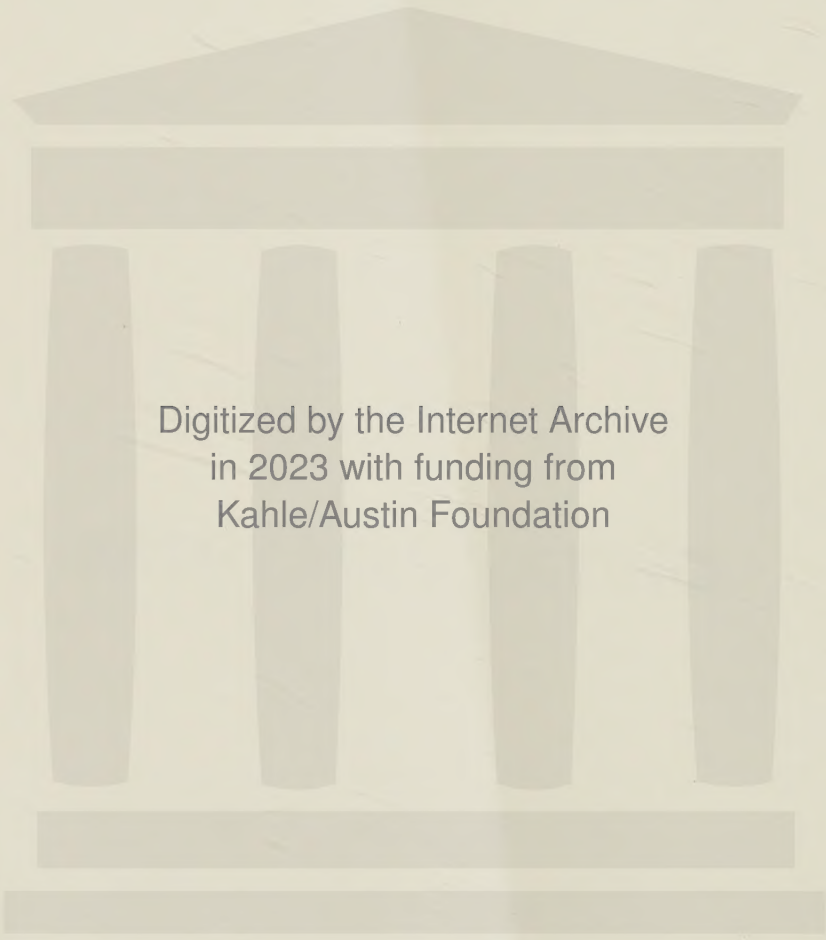
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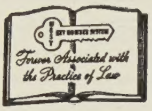
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CALIFORNIA REPORTER

154 PACIFIC REPORTER

(171 Cal. 617)

WILSON v. HOTCHKISS. (S. F. 6786.)

(Supreme Court of California. Dec. 24, 1915. Rehearing Denied Jan. 20, 1916.)

1. FRAUDS, STATUTE OF ⟸89 — SALE OF GOODS—ACCEPTANCE—WORDS.

Under the statute of frauds providing that sales of personal property for a price of $200 or more shall be invalid unless there be some written memorandum, except where the buyer, accepts part of the goods, the mere words of the buyer, who was already the pledgee in possession, or proof of his acts of dominion over the property inconsistent with his former rights as pledgee, might establish a transfer of possession from that of a pledgee to that of complete ownership.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 165–173; Dec. Dig. ⟸ 89.]

2. FRAUDS, STATUTE OF ⟸89 — SALE OF GOODS—POSSESSION.

Where sale of personal property is made to a buyer in possession, the statute of frauds does not require him to quit it and to retake possession as the new owner.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 165–173; Dec. Dig. ⟸ 89.]

3. FRAUDS, STATUTE OF ⟸159 — SALE OF GOODS — TRANSFER OF POSSESSION — SUFFICIENCY OF EVIDENCE.

In an action for the price agreed on a parol sale of stock for a price more than $200, to a buyer already in possession as pledgee, evidence *held* to make the buyer's acceptance of possession as complete owner a question for the jury.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 378; Dec. Dig. ⟸ 159.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Virginia E. Wilson against W. J. Hotchkiss. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

Titus, Creed & Dall, of San Francisco, for appellant. Franklin P. Bull, of San Francisco, for respondent.

HENSHAW, J. The first trial of this cause resulted in a verdict and judgment in favor of the plaintiff. Defendant's appeal was considered by the District Court of Appeal of the Third District, where every legal consideration pressed upon the attention of that court is clearly, fully, and satisfactorily disposed of. Wilson v. Hotchkiss, 21 Cal. App. 392, 132 Pac. 88. That court very properly ordered a reversal of the judgment and a new trial for the failure of the trial court to give any instructions touching the statute of frauds and its applicability to the contract under consideration. Upon the new trial such instructions were given. Again the verdict of the jury was for plaintiff, and once more defendant appeals. It may not be questioned but that the court quite fully and quite accurately instructed the jury as to the nature of the acts by a vendee under a parol contract within the statute of frauds which would be sufficient to satisfy the requirements of that statute.

[1, 2] But complaint is made over the court's refusal to give the following:

"Mere words are not sufficient to prove a receipt or acceptance of the personal property to take an oral contract of sale of personal property, for a price exceeding $200, out of the statute of frauds."

It is said that this refused instruction embodies an unquestioned principle of law, first declared in New York in Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316, and approved in this state in the very early cases of Gardet v. Belknap, 1 Cal. 399, and Malone v. Plato, 22 Cal. 103. These cases and the principle of law for which appellant contends therefore demand examination. Shindler v. Houston was a sale by oral contract of lumber in the possession of the vendor, and piled on a dock. Standing in front of the lumber, the vendor and the vendee agreed upon the price and the plaintiff then said "the lumber is yours." There was absolutely no other delivery, no change of possession, and the true meaning of the decision is that where delivery and change of possession are necessary to comply with the statute of frauds, an oral declaration does not alone constitute such delivery. To precisely the same effect is Gardet v. Belknap, where there was not the slightest pretense that the brandy which the defendant orally purchased had ever been removed from the plaintiff's store, or that the defendant had exercised or attempted to exercise any dominion over it, the plaintiff resting his case solely upon the oral declara-

tion of the vendee at the time of the purchase and as a part of the contract of purchase. In Malone v. Plato defendant was charged with having purchased horses of the plaintiff. The transaction rested wholly in parol, defendant saying: "I will take them. I will be back in half an hour and pay for them." The horses remained in plaintiff's stable. Defendant refused to complete this oral contract, and pleaded the statute of frauds. This court again said that it appears to be entirely settled that to comply with the requirements of the statute of frauds "the transfer of possession must be evidenced by acts and cannot be effected by mere words." With the soundness of these declarations as bearing upon the facts to which they were applied, no criticism can be made. But what were the essential facts? They were that for their validity each contract required a delivery of the article sold, and the holding is merely that the language of the vendor that "the property is yours," or the language of the vendee, "I will take the property," does not measure up to the requirement of the statute.

This principle and these decisions have no bearing on or relationship to cases such as the one at bar—cases where the actual possession is in the vendee and the real question is whether that possession has been transformed from that of bailment or pledge to that of complete ownership. Where a sale is made to a vendee in possession, whatever may have been the nature of his prior possession, the law does not require a quitting of it and a retaking of possession as the new owner. Snider v. Thrall, 56 Wis. 674, 14 N. W. 814. All that is required is evidence showing that the possession is retained by the vendee in his new capacity of owner. And what evidence will establish this? Manifestly it may be established by proof of acts of dominion over the property inconsistent with his former holding as bailee or pledgee, but equally may it be established by his declarations that he so holds the property as owner. On principle this must be so, for it would indeed be strange if a pledgee, formally reciting the oral contract by which he had purchased the property and declaring that he held possession of it no longer as pledgee but as absolute owner, could have the evidence of these declarations excluded from the consideration of the jury upon the ground that they were mere declarations and not a part of his acts or conduct in dealing with the property. They are essentially a part of his acts and conduct, and so we find it declared as "well settled that any acts of the parties indicative of ownership by the vendee may be given in evidence to show the receipt and acceptance of the goods to take the case out of the statute of frauds. Conduct, acts, and declarations of the purchaser may be given in evidence for that purpose." Garfield v. Paris, 96 U. S. 557, 24 L. Ed. 821. And without multiplying citations, reference may be made to Browne Statute of Frauds, § 321e, where he states:

"The conduct of the buyer showing an acceptance * * * may be drawn * * * from what he says."

And again quoting from the same author, page 433, footnote:

"An examination of the cases will show that evidence has uniformly been received even in New York of the conduct of the parties; i. e., what they did and said, without in any way discriminating between acts of doing and acts of saying."

See, also, Mecham Sales, § 382; Williston Sales, § 87. It follows that the court ruled correctly in refusing to give the proffered instruction.

[3] Plaintiff's evidence went to establish that her assignor in selling his stock ceased to have any connection with the corporation and so forfeited his position as manager; that he was temporarily retained by the defendant purchaser in his managerial position at an increased compensation, the increase being paid by the defendant himself; that defendant was the pledgee of the stock at the time of the sale; that the vendor was jointly liable with the vendee upon certain promissory notes; that as a part of the consideration the vendor was to be released from liability on those notes; that in fact the vendee did pay those notes and never made demand upon the vendor for recoupment; that the vendee publicly declared that he had bought the vendor's stock; and that the vendor no longer had any interest in the company. Here certainly is enough and more than enough evidence to justify the submission of the cause to the jury, whose verdict will not here be disturbed. Shumway v. Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

171 Cal. 600

TURNER v. WILSON. (Sac. 2417.)

(Supreme Court of California. Dec. 21, 1915.)

1. ELECTIONS ⇐194 — BALLOTS — DISTINGUISHING MARKS.

Under Pol. Code, § 1211, subd. 4, declaring that no mark upon a ballot which is unauthorized, shall be held to invalidate it unless placed thereon to identify the ballot, ballots will not be refused because a voter, after making pencil crosses, had stamped a cross over such crosses, or because he stamped a cross in the voting squares opposite a blank space under the name of a candidate for Governor, nor because he stamped crosses in the voting squares opposite a proposition submitted; for the purpose of the section which was added in 1903 was to prevent the rejection of ballots containing unauthorized marks, not the result of an intent on the part of the voter to identify his ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⇐194.]

2. ELECTIONS ⟸186—BALLOTS—MARKS.
As under Pol. Code, § 1211, subd. 1, a cross is not essential in the case of a name written on a ballot, the fact that a voter, after writing in a name, placed a cross opposite it, will not warrant the rejection of the ballot.
[Ed. Note.—For other cases, see Elections, Cent. Dig. § 159; Dec. Dig. ⟸186.]

3. ELECTIONS ⟸186 — BALLOTS — DISTINGUISHING MARKS.
Because a voter wrote in the words "Yes" or "No" in the voting squares opposite a bond proposition, instead of stamping such squares with the appropriate cross, will not warrant the rejection of the entire ballot, whatever the effect may be on the vote as to the bonds.
[Ed. Note.—For other cases, see Elections, Cent. Dig. § 159; Dec. Dig. ⟸186.]

4. ELECTIONS ⟸305 — ELECTION CONTEST — DETERMINATION.
Where the finding that the contestee received the highest number of votes was correct, it will not be disturbed because the finding as to the number of votes received by each candidate was incorrect.
[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317–332; Dec. Dig. ⟸305.]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Election contest by J. L. Turner, Jr., against W. C. Wilson. There was a judgment for contestee, and contestant appealed. The judgment of affirmance by the District Court of Appeal was vacated, and the cause transferred to the Supreme Court. Affirmed.

Ostrander, Tuttle & Ostrander, of Merced, for appellant. F. W. Henderson, of Merced, for respondent. Thomas P. Boyd, of San Rafael, and W. H. Early, of Petaluma, amici curiæ.

ANGELLOTTI, C. J. This is an action to determine whether the contestant or contestee was elected constable of township No. 4, Merced county, at the election on November 3, 1914. At the canvass of the votes by the board of supervisors the return made was that each candidate had received 168 votes, and that neither of them was elected. At the hearing in the superior court it was found that contestee (Wilson) had received 165 votes and the contestant (Turner) 160 votes, and it was there adjudged that the contestee was elected. The contestant appeals from the judgment on a bill of exceptions. At the election contestant's name was the only name printed on the ballot for the office of constable; the supporters of contestee being able to express their preference only by writing his name upon the ballot.

[1] 1. This cause was originally decided by the District Court of Appeal of the Third District, which, in view of the provisions of our Constitution, has appellate jurisdiction in the matter of election contests. Upon petition for a hearing in this court after decision by the District Court of Appeal, the decision of the latter court was vacated, and the cause transferred to this court, the members of this court not being satisfied that the views of the District Court of Appeal as to the rejection by the trial court of certain ballots on the ground that the same contained distinguishing marks were correct.

The ballot marked "Contestee's Objection No. 1," containing a vote for Turner, was rejected by the trial court because of the fact that the voter had stamped a cross in the voting square opposite the blank space under the name "Hiram W. Johnson," candidate for Governor.

The ballot marked "Contestee's Objection No. 9," containing a vote for Turner, was rejected because of a cross stamped by the voter in the voting square opposite the blank space under the name of "Lucien Shaw," candidate for Justice of the Supreme Court.

The ballot marked "Contestee's Objection No. 12," containing a vote for Turner, was rejected because of such a cross in the voting square opposite the blank space under the name of "U. S. Webb," candidate for Attorney General.

The ballot marked "Contestee's Objection No. 26," containing a vote for Turner, was rejected because of a similar cross placed in the voting square opposite the blank space under the name of "William M. Conley," candidate for Chief Justice of the Supreme Court.

The ballot marked "Contestee's Objection No. 8," containing a vote for Turner, was rejected because the voter, having written in the name of "L. S. Cardwell" as a candidate for justice of the peace in the blank space left for that purpose on the ballot, had first placed a pencil cross in the blank space provided for that purpose, and had then stamped over said pencil cross a cross with the stamp.

The ballot marked "Contestee's Objection No. 19," containing a vote for Turner, was rejected because the voter had marked his cross with a pencil in the proper place in the case of the first four offices on the ballot, and then, apparently perceiving his mistake, had used the voting stamp for the whole of his ballot, placing the stamped crosses in the case of the candidates already marked with pencil over the pencil crosses.

The ballot marked "Contestee's Objection No. 25," containing a vote for Turner, was rejected because the voter had apparently stamped a cross in each of the voting squares of the twenty-second proposition, there being a cross opposite "Yes," and also a cross opposite "No."

The District Court of Appeal concluded that the action of the trial court in rejecting these ballots was correct, except in the case of the ballot marked "Contestee's Objection No. 8."

We are satisfied that none of these ballots should have been rejected, and that all of them should have been counted for Turner.

In the year 1903 our election law relating to the canvass of votes and marked or spoil-

ed ballots was amended by the addition of subdivision 4 to section 1211, Political Code, reading as follows:

"No mark upon a ballot which is unauthorized by this act shall be held to invalidate such ballot, unless it shall appear that such mark was placed thereon by the voter for the purpose of identifying such ballot."

This provision has ever since been in force. The only purpose thereof was to prevent the rejection of ballots containing some unauthorized mark which was not the result of an intent on the part of the voter to identify his ballot. Theretofore the very stringent provisions regarding the marking and rejecting of ballots had been so construed by the courts as to result in the exclusion of numerous such ballots, although it was perfectly clear from an inspection of the ballots themselves that the mark was made without evil intent of any kind. The effect of the amendment is that, where there is no evidence whatever before the trial court, other than the ballot itself, unless such ballot is so marked as to warrant an inference by the trial court that the marking was designedly made by the voter for the purpose of identifying his ballot, the ballot must not be rejected on the ground that it bears a distinguishing mark. We so intimated in withholding our approval of a portion of the opinion of the District Court of Appeal in Gray v. O'Banion, 23 Cal. App. 468, 479, 138 Pac. 977, 981, citing this very provision of our law. Decisions relative to distinguishing marks rendered prior to the amendment we have referred to must be read in the light of the law as it then was. We find on none of the seven ballots to which we have referred anything warranting the inference that the unauthorized mark was placed thereon by the voter for the purpose of identifying the ballot, and there was no other evidence as to the intent of those marking the ballots. Counting these 7 ballots for Turner would give Wilson 165, and Turner 167.

2. Certain ballots counted by the trial court for Wilson, marked "Contestant's Objections A, E, I, J, M, P, U, X, A4, A5, A8, A9, and A10," were properly so counted. As to all of these except the ballot marked "Contestant's Objection P" we are satisfied with the views expressed by the District Court of Appeal in its opinion in this case. The District Court of Appeal held that the trial court should have rejected said ballot "P" on the ground that the same was really a vote for "W. E. Walson" instead of "Wilson," but an inspection of the ballot satisfies us that the trial court was warranted in concluding that the second letter was an "I" instead of an "A," making the name "Wilson." The same may be said as to certain ballots claimed to read "Welson" instead of "Wilson."

3. We have examined the other ballots referred to in the bill of exceptions as to which objections were made, and from our examination we have concluded as follows: The ballot marked "Contestant's Objection D," containing a vote for Wilson, which was rejected by the trial court, should have been counted for Wilson. The same is true of ballots marked "K, L, N, Q, S, A2, and A3." It is obvious from the inspection of the ballot that the alleged identification mark on ballot "D" was not placed thereon with any intent to identify the ballot.

[2] The same is true of the pencil cross on ballot "L," opposite the name of "W. C. Wilson," written in by the voter. A cross is not essential in the case of a name written on the ballot (see subdivision 1, § 1211, Pol. Code), and the pencil cross cannot invalidate unless it appears that it was placed there for the purpose of identifying the ballot. The same is true of ballot "N." The name written on ballot "K" for constable was clearly that of "Wilson." Ballot "Q" is exactly like ballot "D." Ballot "S" furnishes no support for the conclusion that the pencil mark was placed there for the purpose of identifying the ballot. Ballots "A2 and A3" contain nothing making it appear that the alleged distinguishing marks thereon were placed thereon by the voter for the purpose of identifying the ballots. This makes 8 additional votes for Wilson, bringing his vote to 173.

[3] 4. Ballots marked "Contestee's Objections 16 and 17," each of which contained a vote for Turner, were rejected by the trial court. They should have been counted for Turner. In one case the voter had written in one of the voting squares provided for the vote on certain bond questions the word "Yes"; there being four such propositions so voted on by him. In the other case the voter had attempted to vote on such propositions by writing the word "No" in said voting squares. Whatever may be held to be the effect of this manner of voting on these particular propositions, it is perfectly clear that the word "Yes" in the one case and the word "No" in the other case were not placed on the ballot by the voter for the purpose of identifying his ballot. The addition of these two votes makes Turner's vote 169. It is to be noted that, in so far as alleged distinguishing marks are concerned, there was no evidence whatever before the court as to the intention of the voter saving and excepting the ballot itself. As to all of the ballots referred to in the bill of exceptions that we have not particularly discussed or mentioned we find that the trial court committed no error.

[4] There is no necessity for a new trial of this case. The bill of exceptions purports to contain an appropriate reference to all the ballots to which objection was made and the rulings of the court thereon, and it is clear that, counting such ballots as should be counted for Wilson and such ballots as should be counted for Turner, and excluding all bal-

lots that should not be counted for either party, Wilson has 173 votes, and Turner 169 votes. The findings that contestee did receive the highest number of votes cast in such judicial township for said office of constable, and that it is not true that contestant received a majority of said votes, are fully supported by the evidence, and the mere fact that the findings are incorrect as to the exact number of votes received by each of the parties does not require a reversal.

The judgment appealed from is affirmed.

We concur: SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

SHAW, J. I concur in the opinion of the CHIEF JUSTICE. I think, however, that something additional should be said in regard to the seeming conflict between subdivisions 4 of section 1211 of the Political Code and the preceding portions of the chapter bearing on the subject of improper marks on the ballot.

With respect to all these inconsistencies the case calls for the application of the rule expressed in section 4484 of the Political Code that, where there are conflicting provisions in different sections of the same chapter or article, "the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article." The rule is founded in reason, and it exists independently of the Code. It therefore for like reasons applies to conflicting provisions of different subdivisions of a section. 1 Suth. Stat. Const. § 268.

There is also the rule that specific provisions relating to a particular branch of a subject must govern that branch, "as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate." Harrigan v. Home Ins. Co., 128 Cal. 537, 58 Pac. 180, 61 Pac. 99; Franzden v. San Diego, 101 Cal. 321, 35 Pac. 897; Earl v. Bowen, 146 Cal. 762, 81 Pac. 133; Healy v. Superior Court, 127 Cal. 662, 60 Pac. 428.

Since subdivision 4 is later in numerical order than any of the provisions conflicting therewith, it must, under the rule first stated, prevail over them, and, since it specifically provides that the intention of the voter to identify his ballot must appear before it could be declared invalid because of an unauthorized mark thereon, and there is no other specific provision on that precise subject, it must govern that subject, under the rule last stated.

Applying these rules, we will see that the provision of subdivision 1 of section 1211 declaring that "in canvassing the votes any ballot which is not made as provided in this act shall be void" must yield to the later and specific provision of subdivision 4 which requires that the intention on the part of the voter to identify the ballot must appear. Similar reasons may be given regarding all of the other provisions supposed to conflict with subdivision 4 aforesaid.

It may be further said, with respect to the provision of subdivision 8 of section 1197, as amended in 1911 (St. 1911, p. 404), and of subdivision 10 of the amendments of 1913 (St. 1913, p. 1157) and 1915 (St. 1915, p. 272), providing that there shall be printed on the ballot certain instructions to voters, one of which is that distinguishing marks and erasures make the ballot void is not an enactment of substantive law at all, but a mere provision that certain cautions shall be given to the voter himself. These instructions to voters have been carried down in the same form from the time when the statute provided that every distinguishing mark should invalidate the ballot, and it apparently has not been perceived that subdivision 4 aforesaid changes the rule in that respect.

171 Cal. 553

In re VANDERHURST'S ESTATE. JACOBS et al. v. VANDERHURST et al.

(S. F. 7258.)

(Supreme Court of California. Dec. 16, 1915. Modification of Opinion Jan. 12, 1916.)

1. APPEAL AND ERROR ⇐1178—REVIEW—DECREE OF DISTRIBUTION.

While Code Civ. Proc. § 1714, abolished new trials in probate proceedings except in will contests, an appellate court may, on appeal from a decree of distribution, order the doing of anything which the probate court should have done in the exercise of its jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604–4620; Dec. Dig. ⇐1178.]

2. WILLS ⇐761 — CONSTRUCTION — ADMISSIBILITY OF ACCOUNTS.

A will declared that the testator had made advances to his deceased son, and to the son's children as shown by his books of account, that he had made advances to other children, as evidenced by their notes, and that it was the testator's will that such advances should be deducted from the shares of such children. The books of account showed payment by the testator of monthly allowances to his two daughters, and also contained credits in favor of the daughters, practically balancing their accounts. The daughters admitted that they had not made any payments to the testator. *Held*, that where there were no notes of the daughters showing advancements, the books of account were not admissible to charge them with the amounts paid as monthly allowances, the credits being disallowed, for the description of the notes were sufficiently definite to be binding.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1968, 1969; Dec. Dig. ⇐761.]

3. WILLS ⇐759—LEGACIES—ADEMPTION.

Under Civ. Code, §§ 1351, 1397, declaring that advancements shall not be taken as ademption of general legacies unless such intention is expressed, and that all gifts are made as advancements if expressed in the gift to be so made, payments by testator of monthly allowances to his daughters, which were not evidenced by promissory notes, cannot be treated as advancements, where the testator declared that the

advancements to his children were evidenced by notes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1961–1966; Dec. Dig. ⊂⊃759.]

4. WILLS ⊂⊃759 — ADVANCEMENTS — ADEMPTION.

Advancements made before a will was executed cannot be considered in distributing the estate, unless specified in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1961–1966; Dec. Dig. ⊂⊃759.]

5. WILLS ⊂⊃487 — CONSTRUCTION — FORMAL WILLS.

In construing a will, a former will which was revoked cannot be considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026–1032; Dec. Dig. ⊂⊃487.]

6. WILLS ⊂⊃719—"CONTESTS"—WHAT ARE.

That legatees opposed the petition of other legatees for distribution, claiming that they were not entitled to share under the will, does not show a contest of the will, but a proceeding for its construction; therefore the opponents will not be denied right to take under a provision, if any legatee or devisee should contest the will, his share should be $1.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1722–1725; Dec. Dig. ⊂⊃719.

For other definitions, see Words and Phrases, First and Second Series, Contest.]

Department 2. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

In the matter of the Estate of William Vanderhurst, deceased. Petition by Mary A. Jacobs and another for distribution, opposed by William M. Vanderhurst and another. From the decree of distribution, petitioners appeal. Reversed.

Joseph J. Webb, of San Francisco (John K. Alexander, of Salinas, of counsel), for appellants. Vincent Surr, of San Francisco, and J. A. Bardin, of Salinas, for respondents. Alexander & Alexander, of Salinas, for executors.

MELVIN, J. Mary A. Jacobs and Lillian M. Vanderhurst, daughters of William Vanderhurst, deceased, appeal from a decree of distribution in the estate of said deceased person.

The principal matter involved in this appeal is the action of the probate court in charging the two appellants with certain advancements. Miss Vanderhurst was thus debited with a sum in excess of $9,000 and Mrs. Jacobs with something over $2,000.

[1] Respondents make a preliminary objection to the consideration of the appeal. They say that appellants may only receive the aid which they seek by a new trial; that motions for new trial have been abolished in probate proceedings except in will contests (section 1714, Code Civ. Proc.), and that on an appeal from a decree of distribution the court may not order a retrial of the issues, but is limited to discovery of discrepancies (if any exist) between the findings and the decree and a modification of the decree to conform to the findings. The cited section as amended merely fixes the procedure in a case of this sort by doing away with the cumbersome process of a motion for a new trial. It does not deprive this court of the right to examine the record and to direct the lower court to do anything which may be proper in the exercise of its probate jurisdiction. The amendment to section 1714, Code of Civil Procedure, merely conformed to the declarations of this court that usually in probate litigation motions for new trials and appeals therefrom needlessly raised difficult questions. Estate of Geary, 146 Cal. 107, 79 Pac. 855; Estate of Franklin, 133 Cal. 587, 65 Pac. 1081.

[2] William Vanderhurst originally had a family of seven children. When his will was made in 1912, two of his sons had died, leaving children. The will was an elaborate one. After providing for certain specific legacies and gifts it bequeathed and devised to each living child one-seventh of the residue, and provided for two trusts, each of one-seventh of the said residue, for the benefit of the children of the two deceased sons. The tenth paragraph was the one about which the disagreement arose. It was as follows:

"Inasmuch as I have from time to time, made advances to my deceased son Robert Lee Vanderhurst, and to his three children, named herein, amounting to the full sum of $4,954.50, as is shown by my books of account, and to others of my children, which advances to them, is represented by their promissory notes now in my possession: It is my will, intention and desire that in the settlement and distribution of my estate, that the amounts so advanced by me as herein set forth, to my said children and grandchildren, shall be deducted from any money or other property that would come to them, or either of them, and that represented by the trust estate mentioned and described in the 'eighth' and 'ninth' sub-divisions of this my last will, and that the surplus thus arising, be given and distributed to my children, and said trustees for my grandchildren, in the same shares and proportions as I have indicated in and by this my will, to the end that none of my children or grandchildren shall have or receive more than an equal share of my estate."

The court interpreted this provision as meaning that the books of account might be examined for all purposes, and that all charges made therein against the two daughters might be regarded as advancements to them. The books, despite the objections of counsel for appellants, were admitted in evidence, not only to show the charges against Robert Lee Vanderhurst and his children and against those heirs who had given promissory notes, but for all purposes. The accounts showed that to each of the daughters William Vanderhurst had given a monthly allowance, and had credited each with a like amount, so that according to the books their accounts were practically closed; the balances being merely nominal. The court, however, permitted evidence, which was drawn by respondents from the appellants themselves, that they had paid no money to their father,

and thereupon the court disregarded the credits, but charged the two daughters with all sums received from their father. Commenting upon this ruling, counsel for respondents says in his brief:

"Indeed, were the will silent as to the father's full intent to treat his children with exact justice, a stranger might blunder into the error of supposing that the artificial credits shown in the ledger were placed there to absolve these fair debtors from their obligations."

We fail to see how any other conclusion could be reached, after reading the will and examining the accounts, than that the testator intended to do that very thing—"to absolve" his daughters from all charges. But under the interpretation of the tenth clause of the will which we feel bound to give, the book of account was not admissible for the purpose of showing advancements to the appellants. The language of the will very aptly limits and specifies funds to be charged with payments made in the testator's lifetime as advancements. These are the trust estate created for the benefit of Robert Lee Vanderhurst's children, and the shares of those who had given notes to the testator. By no method of construction which we are able to discover may the language be given any other meaning. Advancements are to be charged against the shares of Robert Lee Vanderhurst and his children in accordance with the book accounts, and all notes are to be regarded as evidences of advancements. Respondents contend that the closing words of the paragraph compel a different interpretation. By the first part of the tenth paragraph the testator had provided a method of determining the amounts to be subtracted before division of the property and the words "to the end that none of my children or grandchildren shall have or receive more than an equal share of my estate" merely declare his purpose in charging these advancements. The mere fact that the court believed the method chosen might not achieve the purposed end would not justify charges against certain heirs which were not directed in the will. Such impositions may not be made by the court in an effort to achieve equal distribution. To permit such a course would be equivalent to allowing the court to make a will for the decedent. If the closing words of the tenth clause would justify the court in going to such lengths to achieve equal distribution, then might the specific legacies to the daughters with like reason be disregarded, because such legacies, in a sense, were opposed to an evenly divided bestowal of decedent's estate.

[3] Respondents contend that the descriptions of the notes contained in the will are too vague to be of binding force, and in this behalf they cite certain cases. One of these is Estate of Plumel, 151 Cal. 82, 90 Pac. 192, 121 Am. St. Rep. 100, which correctly states the rule that reference in a will may be of such character as to exclude parol testimony; as, where it is to papers not yet existent, or where the reference is so vague as to be inapplicable to any particular instrument. But this court adopts the language of the Court of Appeals of New York in Brown v. Clark, 77 N. Y. 369, to the effect that any testamentary document may be incorporated into a will by reference, provided the language of the will clearly identifies the paper or renders it capable of identification. And the court in the Plumel matter was discussing not a mere evidence of debt, but a solemn instrument of testamentary nature, which was held to be incorporated into another such writing by reference. The will specified "notes now in my possession." Surely such allusion to notes was capable of being made certain. It was quite as definite as the reference to "books of account." We find no language in the will, therefore, which justifies the action of the court in charging the shares of Mrs. Jacobs and Miss Vanderhurst in their father's estate with debits shown on the books of account, or in striking out credits formally entered by Mr. William Vanderhurst in favor of his daughters. Advancements are not to be taken as ademptions of general legacies unless such intention is expressed by the testator in writing. Section 1351, Civ. Code. Section 1397 of the Civil Code is as follows:

"All gifts and grants are made as advancements, if expressed in the gift or grant to be so made; or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir."

There were no promissory notes produced at the hearing in the probate court which the appellants, or either of them, had executed in favor of the testator. The will itself, as we have seen, did not charge them with any sums paid to them as advancements, and no writing was produced whereby they were chargeable under section 1397 of the Civil Code. Surely there was nothing in the books of account which would justify their admission under section 1397, Civil Code, or by which the testator evinced any intent to charge the items against his daughters as advancements rather than gifts or loans. Estate of Hayne, 165 Cal. 573, 133 Pac. 277, Ann. Cas. 1915A, 926. On the contrary, the credits indicated that Mr. Vanderhurst intended the payments as gifts, except, perhaps, the trifling balances against the daughters, and those may be regarded as loans rather than advancements.

[4] Moreover, it is a general rule that advancements made before the will was executed cannot be considered in distributing the estate unless specified in the will, because it is presumed that the testator had in view all previous advancements when he made his will and acted accordingly, so as to make the final division conform to his actual wishes. Estate of Hayne, supra; 1 A. & E. Enc. of Law (2d Ed.) p. 760, § 2; Bowron v. Kent, 190

N. Y. 432, 83 N. E. 472; Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85.

The judgment must be reversed because of the errors in charging appellants with any sums as advancements. This conclusion makes it unnecessary for us to discuss all of the matters appearing in the briefs. Some of them, however, require attention.

[5] The court erred in admitting in evidence a former will executed by Mr. Vanderhurst in 1906 and revoked by the later will. The will before us must be interpreted by the language used therein, and cannot be varied or explained by an instrument executed several years earlier. Estate of Tompkins, 132 Cal. 175, 64 Pac. 268.

[6] There was a provision in the will that in case any legatee or devisee contested it his or her share of the estate should be $1. Appellants argue that the respondents William M. and George B. Vanderhurst contested the will. The mere statement of this contention refutes it. They opposed the petition for distribution, but they did not seek, in any way, to contest the will. They merely sought interpretation of it.

No other alleged errors merit discussion.

The decree of distribution is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

Modification of Opinion.

PER CURIAM. Good cause appearing therefor, it is hereby ordered that the judgment of this court in the matter of the above-entitled appeal be and hereby is amended to read as follows:

"It follows herefrom that the court erred in charging the appellants with these advancements. Wherefore, and to this extent, the decree of distribution is reversed, with directions to the court in probate to modify its decree in accordance with this opinion and judgment."

171 Cal. 588

ROBSON v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 7001.)

(Supreme Court of California. Dec. 17, 1915.)

1. NEW TRIAL ⇐163—EFFECT OF AWARD OF NEW TRIAL TO CODEFENDANT.

Where, in a suit to foreclose a mortgage, in which successive purchasers of the mortgaged property, who had severally assumed payment of the mortgage, were made defendants, and a deficiency judgment was rendered against all of the defendants, one of the defendants who had filed no cross-complaint, and in whose favor no affirmative relief had been given, could not be affected by the award of a new trial to one of the defendants in so far as his liability on the deficiency decree as formerly rendered was concerned.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 330–332; Dec. Dig. ⇐163.]

2. PROHIBITION ⇐15—PERSONS BENEFICIALLY INTERESTED.

In such case a defendant other than the one to whom a new trial was awarded was not beneficially interested, and was not entitled to maintain prohibition to prevent a trial of the issues between the plaintiff and the defendant to whom a new trial was awarded.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 57–60; Dec. Dig. ⇐15.]

3. PROHIBITION ⇐9 — WRIT—WHEN ISSUABLE.

In such case, where the application for writ of prohibition to prevent trying the case anew as to the other defendants contained the undenied allegation that the court was about to retry the case as to all defendants, the defendants other than the one who moved for a new trial were entitled to a writ of prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 35; Dec. Dig. ⇐9.]

In Bank. Proceeding in prohibition by Kernan Robson against the Superior Court of the State of California in and for the City and County of San Francisco and others. Writ issued.

Jas. P. Sweeney, of San Francisco, for petitioner. J. J. Lermen, of San Francisco (Chas. L. Tilden, of San Francisco, of counsel), for respondents.

MELVIN, J. This is a proceeding in prohibition. The petition was addressed to this court originally, and an alternative writ was issued. The facts are as follows:

In September, 1908, the Hibernia Savings & Loan Society sued to foreclose a mortgage on real property. The original mortgagor was Theresa Lewin. Jacob Lewin was joined as her husband, and the other defendants, sued as successors to the interest of Mrs. Lewin in the order in which they were named and as persons who had assumed the payment of the note secured by the mortgage, were Kernan Robson (petitioner herein), Michael O'Toole, Curtis Hillyer (sued as C. H. Lieutemps), John G. Hoyt, the corporation known as Tilden, Swayne & Co., and Louis James. Other defendants were designated by fictitious names. The cause was tried, and judgment was given in favor of plaintiff. The court found that there had been successive conveyances, as pleaded, with corresponding assumptions of the indebtedness, and drew the conclusions of law that plaintiff was entitled to foreclosure and to a judgment declaring Theresa Lewin, Robson, O'Toole, Hillyer (sued as Lieutemps), and Hoyt personally liable for the amount of the mortgage debt. The judgment was entered October 5, 1911.

On December 7, 1911, the motion of Hoyt for a new trial was served and filed. On December 8, 1911, the foreclosure sale took place, the plaintiff becoming the purchaser, and a deficiency judgment, which, on April 2, 1912, amounted to more than $14,000, was on that date docketed against Theresa Lewin, Robson, O'Toole, Hillyer, and Hoyt. The deed of the commissioner to plaintiff was executed December 18, 1912. Hoyt's motion for a new trial was denied on February 21, 1913. When said motion was called on the court's

calendar on that date, Hoyt did not answer, because he had agreed with a member of the firm of lawyers representing plaintiff that there should be a continuance. This agreement was not known to the representative of that firm who appeared in court on February 21, 1913, and he asked that the matter be submitted. Thereupon the court denied the motion. On February 27, 1913, on the ex parte application of the plaintiff, the court set aside the order of February 21, 1913. On April 4, 1913, the court made and entered an order granting a new trial. This was based "upon stipulation filed," which stipulation was in the following language:

"It is hereby stipulated that the judgment heretofore made, rendered and entered in the above-entitled action in favor of plaintiff may be vacated and set aside, and that a new trial may be granted in the above-entitled action. Dated April 4, 1913. Tobin & Tobin, Attorneys for Plaintiff."

It is conceded that the petitioner, Robson, had no notice of the application which resulted in the order of February 27, 1913, setting aside the order denying Hoyt's motion for a new trial, nor had he notice of the stipulation upon which was based the order of April 4, 1913.

Respondents contend that the order setting aside the previous order by which Hoyt's motion for a new trial had been denied was fully within the jurisdiction of the court and was made in pursuance of a well-recognized power. The case of Whitney v. Superior Court, 147 Cal. 536, 82 Pac. 37, fully supports this view. In that case, as here, the court was dealing with an order made upon ex parte application of counsel, setting aside its former order denying the defendant's motion for a new trial. In that case, as here, the motion for a new trial had been called up by plaintiff's counsel in the absence of counsel for the moving party and in violation of the stipulation that it should not be brought to the attention of the court in that manner. Upon the theory that the court had lost jurisdiction to set aside the order denying the motion for a new trial, the successful litigant in the lower court (or his assignee) asked for a writ of execution, in spite of the fact that after restoration of the defendant's motion to the calendar and formal argument thereof the prayer of defendant had been granted, and a new trial had been ordered. This court declined to give a writ of mandamus to compel the clerk of the superior court to issue execution. Speaking of the litigation in the superior court, Mr. Justice Van Dyke, delivering the opinion of this court, said:

"The motion for new trial in that case was by the defendant. He was the moving party. It was brought up, as appears, in the absence of the defendant's attorney, without any argument, or opportunity upon the part of the defendant to be heard, and under the circumstances it was right and proper for the court to do as it did—set aside the order denying the motion for a new trial, and thereupon give the moving party an opportunity to present the motion. In Morris v. De Celis, 41 Cal. 331, it is said: 'If a motion for a new trial is decided by the court before it has been submitted, the order denying or granting the new trial should be set aside as improvidently made, if application is made therefor.' In Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605, it is said: 'There is no doubt that the court in which an irregular order is made and entered may, where the irregularity is apparent, on suggestion, motion, or ex mero motu, set it aside at any time before an appeal is taken from it.' In Hayne on New Trial, vol. 2, § 199, the author says: 'Where an appealable order was improvidently or inadvertently made, the aggrieved party may move the court below to set it aside, and may appeal from the order denying his motion. Thus, where a motion for a new trial was granted without any submission of the motion, and before the record upon the motion was completed, it was held to be proper practice for the aggrieved party to move upon affidavits to have the order granting the new trial set aside, and the order denying such motion was reversed [referring in note to case of Morris v. De Celis, 41 Cal. 331]. The fact that the order was made irregularly takes it out of the general rule.' See, also, 2 Spelling on New Trial and Appellate Practice, § 379. The late case of Holtum v. Greif, 144 Cal. 521, 78 Pac. 11, one of the cases relied upon by the petitioner, after stating the general rule that an order granting or refusing a new trial regularly made and entered cannot be set aside by the trial court, states that, if the orders 'have been entered prematurely or by inadvertence, they may be set aside on a proper showing. Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 170, 4 Pac. 1173, and cases cited.' "

It is suggested that Whitney v. Superior Court, supra, may be distinguished from the case at bar because, after the motion had been restored to the calendar, the counsel of the respective parties to the litigation appeared and took part in the proceedings in the hearing of the motion for a new trial, and the plaintiff appealed from the order granting a new trial. But the court in that case was dealing with a question of jurisdiction which may not be conferred by acquiescence. It was clearly held that the court had the power to correct its action with reference to defendant's motion. The fact that after his objection to the jurisdiction of a court the litigant proceeds in the usual manner to try the cause or the proceeding does not preclude him from questioning the power of the court to proceed further. Arroyo Ditch & Water Co. v. Superior Court, 92 Cal. 52, 28 Pac. 54, 27 Am. St. Rep. 91. It was not the theory of the Whitney Case that the plaintiff in the litigation in the superior court was estopped to deny the jurisdiction of the court to set aside its own order inadvertently made. We see no reason to forsake the doctrine of the Whitney Case, which has been the settled law for more than a decade. That case was carefully considered and the opinion of Mr. Justice Van Dyke received the concurrence of four of the justices who are still on this bench.

It is suggested, however, that the inadvertence which resulted in the entering of the order denying the motion for a new trial was an inadvertence of a party relief from which might have been obtained under section 473, Code of Civil Procedure, upon due applica-

tion after proper notice. But the inadvertence was not that of Hoyt. He had done nothing he should not have done. He had omitted nothing which he should have done. It was not his fault that some one unauthorized to submit his motion had done so. Petitioner insists that there was nothing within the knowledge of the court which should have given notice to the judge of that tribunal that an improper order was being made. Undoubtedly the court may dismiss a motion for a new trial when the moving party fails to prosecute, and it is also true that such a motion may be brought on for hearing by either party. Section 600, Code Civ. Proc. The court knew that Hoyt's counsel and Robson's counsel were not present when the order of February 21, 1913, was made. It was the duty of the court to permit Hoyt to present his motion unless he waived his right by failing to appear. When, therefore, the court learned that the motion had been called for hearing under circumstances which deprived Hoyt of his right to a hearing, it became manifest that the court, and not counsel for the injured party, had acted inadvertently, and therefore that of its own volition the court could restore the motion for new trial to the calendar without any application having been made under section 473, Code of Civil Procedure. The Whitney Case has settled that matter.

[1, 2] The next question presented is whether or not the court erred in making the order of April 4, 1913, granting the new trial on stipulation of plaintiff and defendant Hoyt, without giving notice to the petitioner, Robson. The position of respondents is this: Robson and Hoyt were not adversary parties to the action of foreclosure; therefore the judgment in favor of the plaintiff is not res judicata as to any issue between Robson and Hoyt, and the bank could, accordingly, stipulate with Hoyt as it pleased. This contention is correct. The bank sued the defendants and alleged against each of them separately that each in purchasing the land has assumed the payment of the mortgage. Robson and Hoyt filed separate answers. Robson filed a pleading called a "cross-complaint," but in it he asked no affirmative relief against Hoyt. The findings contain the statement, among others, that the case came to trial upon the cross-complaint of Robsón against O'Toole and Hillyer. No reference is made to Hoyt. Clearly the superior court did not look upon the pleading as a cross-complaint against Hoyt. Counsel for petitioner virtually concedes that there was no cross-complaint against Hoyt; for he uses the following language in one of the briefs:

"The cross-complaint was filed as a precautionary measure, for in advance it was not known how plaintiff would act, and whom plaintiff would seek to hold or release, but, in view of the findings of the court, all necessity of the cross-complaint ceased, its existence is of no importance, it affects no right of the parties, and discussion of it is closed."

It should be noted also that no judgment was rendered in favor of Robson. The true position of these two defendants is therefore to be found by eliminating all thought of the so-called "cross-complaint." The true rule is well illustrated by the following quotation from Hibernia Bank v. Dickinson, 167 Cal. 619, 140 Pac. 265:

"Where a complaint is directed against two persons, and the liability of one involves some facts which are not material to the liability of the other upon the cause of action declared upon, and they answer separately, neither is required to answer those allegations which relate solely to the liability of the other. The present case illustrates this proposition. The action was upon the note and mortgage executed by Dickinson alone. His liability was shown by the allegations of the execution and nonpayment of the note and mortgage. Montgomery did not execute them. He was a proper party because he was a subsequent purchaser of the land. But his personal liability for the debt and to a deficiency judgment was founded on the extraneous fact that he had assumed payment of the mortgage debt. This fact had no relation whatever to the original liability of Dickinson. It was not a fact material to the cause of action stated against Dickinson, either to obtain a foreclosure or to obtain a deficiency judgment."

The effect of granting a new trial of the issues between the bank and Hoyt will not disturb the judgment against Robson. Section 578, Code Civ. Proc.; Fowden v. Pacific Coast Steamship Co., 149 Cal. 155, 86 Pac. 178; Nichols v. Dunphy, 58 Cal. 607. Hoyt was asking for a new trial as to the issues between him and plaintiff, and as to such issues only. Petitioner is not an aggrieved party because in the event of Hoyt's escaping a judgment all of the liability might fall upon him. The conclusion of the court in the suit for foreclosure of the bank's mortgage will not be binding in any action which Robson may bring against Hoyt. The decree in favor of the bank fixed none of the rights or obligations of the defendants among themselves. Robson is not an interested party in the proceedings for a new trial of the issues between plaintiff and Hoyt. In Estate of Heydenfeldt, 127 Cal. 459, 59 Pac. 839, it was held that persons who were on the same side in a former proceeding may not invoke the principle of estoppel as between each other based upon findings in that said former proceeding. We need not analyze the many authorities from other states cited by respondents, because the rule is well understood. It is well stated, however, in Wiltrout v. Showers, 82 Neb. 779, 118 N. W. 1080. The action was for breach of contract whereby defendant agreed to pay a note and mortgage executed by plaintiff in favor of a third person. The holder of the note sued both Wiltrout and Showers. The former defaulted, and Showers was successful as against the holder of the obligations. Wiltrout paid the judgment, and then sued Showers, who pleaded the former judgment as res judicata. The court said:

"As between the two defendants in that action no issue was joined. Wiltrout and Show-

ers were not adverse parties. The question of liability of Showers on the oral contract to assume and pay the notes was not litigated and determined as between Wiltrout and Showers. The rule of law is well settled that parties to a judgment are not bound by it in a subsequent action unless they were adverse parties in the original action. 1 Freeman, Judgments (4th Ed.) § 158; 2 Black, Judgments (2d Ed.) § 599; Pioneer Savings & Loan Co. v. Bartsch, 51 Minn. 474 [53 N. W. 764, 38 Am. St. Rep. 511]. The bar of former adjudication can only be raised between those who were adverse parties in the former suit, and the judgment in the former suit settles nothing as to the relative rights or liability of the codefendants as between themselves unless their conflicting claims were put in issue by cross-petition or adverse answers, and were actually litigated and adjudicated. 23 Cyc. 1279; Whitesell v. Strickler, 167 Ind. 602 [78 N. E. 845, 119 Am. St. Rep. 524]."

It follows that Robson's rights are not dependent upon the determination of the issues between the plaintiff and Hoyt in the foreclosure suit. Of course, the court below will confine itself in the new trial to the single issue of the alleged assumption by Hoyt of the payment of the mortgage.

[3] But it is alleged in the petition that the respondent court and the judge thereof are about to "try said action as to all defendants," and there is no denial of this allegation in the answer. The petitioner is entitled to a writ prohibiting respondent from trying any issues except those arising on the pleadings between the plaintiff bank and defendant Hoyt.

Let such a writ issue.

We concur: HENSHAW, J.; LORIGAN, J.

SLOSS, J. I concur in the judgment. It is clearly shown by the opinion of Mr. Justice MELVIN that the petitioner, Robson, would not be affected by a new trial of the issues raised between the plaintiff in the foreclosure suit and Hoyt. This being so, the petitioner is not a party "beneficially interested," and is not, therefore, in a position to seek a writ of prohibition against the trial of such issues. Code Civ. Proc. § 1103. He is, however, directly interested in preventing another trial of the action against himself as defendant. By the judgment he is made liable for a deficiency in the proceeds of the sale. The property has been sold on foreclosure, and the amount of the deficiency ascertained. In the event of a new trial, a new judgment, and a new sale, the deficiency for which Robson is liable may be greatly increased.

It follows that, as is held in the foregoing opinion, any new trial should be confined to the issues between the bank and Hoyt, leaving the judgment of the bank against Robson standing as a final adjudication. This was precisely the effect of the writ of prohibition directed on the former submission of the present proceeding. The correctness of the conclusion is conceded by the respondents in their brief filed since their petition for rehearing was granted. If, as they claim, and as we hold, Robson was not an adverse party to Hoyt, and could not be affected by a new trial granted to Hoyt, there is no occasion to consider whether the court properly set aside, as to Hoyt, the order denying a new trial. But, as this question is discussed in Mr. Justice MELVIN'S opinion, I deem it proper to say that I do not assent to the views expressed by him with respect to the right of a court to vacate, on an ex parte application, an order granting or denying a new trial. On this point I adhere to what I said in the former opinion, from which I quote:

"The petitioner takes the position that, when an application for a new trial has been made in due form and the court has passed upon it, the order made is conclusive so far as the court making it is concerned, and that court cannot afterwards vacate the order and again decide the motion. As a general proposition, this contention is unquestionably sound. Coombs v. Hibberd, 43 Cal. 452; Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 168, 4 Pac. 1173; Dorland v. Cunningham, 66 Cal. 484, 6 Pac. 135; Lang v. Superior Court, 71 Cal. 491, 12 Pac. 306, 416; Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174; Holtum v. Greif, 144 Cal. 521, 78 Pac. 11. The 'statute,' says the court in Dorland v. Cunningham, supra, 'authorizes but one motion for a new trial, and makes the ruling thereon final, so far as the superior court is concerned.' If error has been committed in granting or denying the motion, the proper mode of seeking redress is by appeal, as in the case of any final order or judgment of the superior court. The objection that the lower court has improperly vacated its final order is one that goes to the jurisdiction of the court. Lang v. Superior Court, supra; Carpenter v. Superior Court, supra; Holtum v. Greif, supra. * * *

"An order granting or denying a motion for a new trial is, of course, like other orders, subject to be set aside under section 473 of the Code of Civil Procedure. But the granting of such relief implies an application to the court by the party against whom the proceeding was taken, upon notice to the adverse party and upon a proper showing, and it is not claimed that in this case there was any attempt to invoke or to exercise the power conferred on the court by section 473.

"There is one further limitation upon the rule prohibiting the court from vacating its order once made, and upon this the respondents place their reliance. Where an order has been made 'irregularly and through inadvertence,' the court has power, of its own motion or on application of a party to set the order aside. Morris v. De Celis, 41 Cal. 331; De Gaze v. Lynch, 42 Cal. 362; Hall v. Polack, 42 Cal. 223; O. F. Sav. Bank v. Deuprey, supra, and cases cited; Holtum v. Greif, supra; Whitney v. Superior Court, 147 Cal. 536, 82 Pac. 37. This rule has been applied in cases where the order was prematurely made, as, for example, where a statement to be used on the motion has not been settled, or there had been no submission of the motion. In such cases the court has acted irregularly and inadvertently in undertaking to pass upon a motion which had not been brought before it, and its improvident action may be set aside. This does not mean that an order may be vacated because the court concludes, after making it, that it erred in matter of law or fact, or because one of the parties was guilty of some inadvertence which resulted to his disadvantage. The inadvertence which will justify the setting aside of an order (except under section 473) is the inadvertence of the court, not of a party.

"We think there was here no basis for the court's action in setting aside its order denying

a new trial. The notice of intention had been served and filed, the bill of exceptions had been duly settled and was on file, and the motion appeared regularly on the calendar of the court for argument on February 21, 1913. On that day, there being no appearance for the moving party, Hoyt, the motion was called and answered 'ready' by counsel for plaintiff, who submitted the motion, which was thereupon denied. All of this was perfectly regular, and the court did not act improvidently or inadvertently. It appears, however, that there had been an oral understanding between counsel for Hoyt and a member of plaintiff's firm of counsel that the hearing of the motion should be continued. This was not known to the attorney who appeared for plaintiff on February 21st. The misunderstanding in this regard would unquestionably have supported a claim of inadvertence or surprise on the part of Hoyt, but we cannot see that it tended to show any inadvertence or irregularity on the part of the court. If the disregard of oral stipulations or misunderstandings between counsel could authorize the court of its own motion, or on an ex parte application, to set aside judgments or orders as improvident, the finality of judicial determinations would be seriously impaired. Reasons like these are typical illustrations of the grounds upon which relief should be sought under section 473."

I do not stop to discuss the question whether Whitney v. Superior Court, 147 Cal. 536, 82 Pac. 37, can be successfully distinguished from the case at bar. If there be no valid ground of distinction, I think the decision in the Whitney Case is in conflict with the rules established by a long line of prior decisions, and with fundamental principles governing the finality of judicial determinations.

I concur: SHAW, J.

ANGELLOTTI, C. J. I concur in the judgment on the ground that the petitioner would not be affected by a new trial of the issues raised between the plaintiff in the foreclosure suit and Hoyt, and that, this being so, he is not in a position to seek a writ of prohibition against the trial of such issues. He is beneficially interested in prohibiting the trial of other issues, and therefore it is properly ordered that a writ issue to prohibit any such trial.

171 Cal. 570

HIHN-HAMMOND LUMBER CO. v. ELSOM et al. (S. F. 6707.)

(Supreme Court of California. Dec. 17, 1915.)

1. MECHANICS' LIENS ⟸196—STATUTE—CONSTITUTIONALITY.

Code Civ. Proc. § 1194, declaring that laborers and materialmen shall have preference over subcontractors in participation in the amount applicable to mechanics' liens, is not violative of Const. art. 20, § 15, providing that mechanics, materialmen, artisans, and laborers of every class shall have a lien for labor or material furnished, since such provision serves merely to place on an equal footing mechanics, materialmen, artisans, and laborers who personally perform work.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 337–341; Dec. Dig. ⟸ 196.]

2. MECHANICS' LIENS ⟸196—PERSONS ENTITLED — CLASSIFICATION — STATUTE — "LABORER" — "SUBCONTRACTOR" — "ORIGINAL CONTRACTOR"—"MATERIALMAN."

Under the Mechanics' Lien Law (Code Civ. Proc., § 1194) prior to the amendment of 1911, declaring that laborers and materialmen should have preference over subcontractors in participation in the amount applicable to mechanics' liens, a firm which lathed and plastered a house, furnishing the material; a firm which constructed most of the floors and walls, furnishing the material; a company which erected part of the walls of bathrooms, furnishing the necessary tile; a company which put on a mission tile roof, furnishing the material; a firm which laid the flooring in certain rooms, furnishing the material; and a person who erected the tin work and galvanized iron and copper work, a substantial part of the structure, furnishing the materials—were all "subcontractors" under the statute, which divides the liens assertable against the property into four classes, laborers', materialmen's, subcontractors', and original contractor's, the "original contractor" being the person who agrees with the owner to construct a building on his property, "laborers" being those who perform labor in the construction of the building, "materialmen" being persons who merely furnish material to the contractors to be used in the construction of the building, and "subcontractors" being all persons who agree with the original contractor to furnish the material and construct for him on the premises some part of the structure which the original contractor has agreed to erect for the owner, although literally a "subcontractor" is one who agrees with another to perform a part or all of the obligation which the second owes by contract to a third person.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 337–341; Dec. Dig. ⟸ 196.

For other definitions, see Words and Phrases, First and Second Series, Laborer; Materialman; Original Contractor; Subcontractor.]

3. APPEAL AND ERROR ⟸934—PRESUMPTIONS FAVORING COURT BELOW.

All intendments favor the judgment of the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777–3782; Dec. Dig. ⟸ 934.]

4. MECHANICS' LIENS ⟸290—FORECLOSURE—FINDING—SUPPORT BY LIEN CLAIM.

In a consolidated action to foreclose mechanics' liens, where the lien claims of certain firms stated that they had respectively performed labor on the building, the claim of one stating that its members had performed certain labor in the construction of the house, and also had furnished certain materials used therein, a finding ranking such parties as materialmen or laborers was sufficiently sustained by the respective claims of lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 591–597; Dec. Dig. ⟸ 290.]

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action to foreclose liens by the Hihn-Hammond Lumber Company against R. W. Elsom and others. From a judgment assigning their respective ranks as lienors, and from an order denying their motion for new trial, Thomas J. Guilfoy and certain others appeal. Judgment and order affirmed.

W. P. Netherton, of Santa Cruz, for appellants. Wyckoff & Gardner, of Watsonville, for respondent Hihn-Hammond Lumber Co. H. A. Van C. Torchiana, of San Francisco, and W. P. Netherton, of Santa Cruz, for defendant Williamson & Garrett. Charles B. Younger, of Santa Cruz, for defendants W. R. Van Wagner and F. P. Van Wagner, and for respondents A. D. Houghton, and George H. Cardiff. I. F. Chapman, of San Francisco, for defendant White Bros. W. P. Netherton, of Santa Cruz, for defendants E. B. & A. L. Stone Co., California Artistic Metal & Wire Company, Simpson & Fisher, F. A. Angell, H. V. Angell, and H. W. Truman. Charles M. Cassin, of San Jose, for defendants Henry Willey Co., George G. Byrne, Walter C. Byrne, and Daniels Santa Cruz Transfer Co. C. R. Taylor, of Los Angeles, for defendant Granite Rock Co. Rittenhouse & Johnston, of Santa Cruz, for defendants L. W. Rickey, George H. Leroy, Louis H. Wessendorf, George C. Staffler, H. F. Faneuf, C. H. Heath, Fred A. Bright, and W. F. Bright. Greg S. McEvers, of San Francisco, for defendants William Ross and D. MacLeod. A. E. Bolton, of San Francisco, for defendants William T. Sesnon, B. F. Porter Estate, J. Harry Blohme, and Clarence B. Ward. W. M. Gardner, of Santa Cruz, for defendant R. W. Elsom.

SHAW, J. A number of persons, each claiming a mechanic's lien on the same property, began separate actions to foreclose the liens. These actions were consolidated for trial and resulted in a joint judgment of foreclosure. The building, on account of which the liens accrued, was erected prior to the enactment of the amendment of 1911 to the mechanic's lien law, in pursuance of a contract which was valid under the prior law. The liens amounted to more than the balance found due from the owner to the contractor. This made it necessary to apportion the balance to the respective claimants, and to declare the rank of each lien and the order of its payment out of the fund. Six of the lien claimants, namely, Thomas J. Guilfoy, Waterhouse-Price Company, Floodberg & McCaffery, W. W. Montague & Co., N. Clark & Sons, and Ford & Malott, being dissatisfied with the rank assigned to them by the judgment, have appealed from the judgment and from an order denying their motion for a new trial. The court found that each of these appellants was a subcontractor and, for that reason, assigned them a rank subordinate to that of laborers and materialmen. The provisions of section 1194 of the Code of Civil Procedure, as it then existed, declared that laborers and materialmen should have preference over subcontractors in participation in the amount applicable to liens under that law.

[1] The first point urged by the appellants is that section 1194, in so far as it gives such preference to laborers and materialmen, is unconstitutional. This question was considered by this court in Miltimore v. Nofziger, etc., Co., 150 Cal. 790, 90 Pac. 114. It was there declared that the section did not violate the Constitution by reason of this preference, but only so far as it gave laborers a preference over materialmen. Some members of the court dissented on the ground that the priorities given to laborers over materialmen was valid. But there was no difference of opinion regarding the power of the Legislature to prefer these two classes to subcontractors. We are not disposed to go over the ground again to demonstrate the soundness of this decision. Upon the authority thereof we hold that the point is not well taken.

[2, 3] Another proposition advanced in support of the appeal is that the findings of the court, with respect to each of the appellants, that it was a subcontractor and not a materialman, are contrary to the evidence.

The facts relating to each of them are as follows: The building erected was a large two-story dwelling house. The contract price was $27,635.20. R. W. Elsom & Co. were the contractors for the erection of the building. Guilfoy agreed to furnish and set in place in the building "all tin, galvanized iron, and copper work, including copper sash bars, galvanized iron caps, copper flashings at back of wall, two rows of cross bars and a half bar at wall line, the full length," all according to the plans and specifications of the building prepared by the architect. The cost of the material for this work amounted to $943.50. The cost of the labor was $247.50. The Waterhouse-Price Company agreed to furnish the tile for the walls of four bathrooms and a toilet and set the same in the building, the setting to be done by experienced workmen from San Francisco, all as required by the plans and specifications. The material therefor amounted to $227.50 and the labor, $37.50. Floodberg & McCaffery agreed to furnish the material and labor necessary to complete the lathing and plastering upon the building according to specifications attached to the contract. The material amounted to $1,600 and the labor to $1,363.20. Montague & Co agreed to furnish and place in the building 360 square feet of tile for the front porch, 250 square feet of tile, and the cove around the walls with plinth blocks at doors, for four bathrooms and floors of toilets on the second floor; also, to furnish the materials and place in the building four fireplaces made of brick or tile in different rooms in the building, and to place 75 square feet of tile and wire spaces in the pantry. For all this the material amounted to $500 and the labor to $423. Clark & Sons agreed to deliver and lay in place the tile roof with scalloped iron at the eaves, in accordance with the plans and specifications. The material amounted to $1,350 and the labor $335. Much of the tile had to be cut and fitted on the premises. Ford & Malott agreed to lay the fiber stone flooring and furnish the material

therefor in the breakfast room and on the south and west lower porches. The material amounted to $340 and the labor to $300.

The question whether one who claims a lien upon a building is a contractor or materialman has been several times considered by the court. A brief statement of the cases in which the decisions have been rendered will assist in elucidating the principles to be applied. In Hinckley v. Field, etc., Co., 91 Cal. 139, 27 Pac. 594, it was held that one who constructs, before delivery, "a steam plant consisting of boilers, engine, heater, feed pipe," etc., for a cracker factory, delivers them and puts them in place in the factory building, is a materialman, and not a contractor. It was said that the work of putting these materials in place "was only the completion of their contract to deliver such finished machinery." In Roebling Co. v. Humboldt Co., 112 Cal. 290, 44 Pac. 568, the same rule was made concerning a contract to make and set up ready for use in a building an electrical plant "consisting of dynamos, converters, switchboard, lamps, etc., with the necessary wiring and connections," although in order to set them up it was necessary to put in the building a foundation for the dynamos and to install the wires and lamps. In Bennett v. Davis, 113 Cal. 337, 45 Pac. 684, 54 Am. St. Rep. 354, the same rule was followed with respect to a contract to furnish mantels, tiles, and grates and set them in a building under construction. Each tile pertaining to the mantels had to be set in separately and some bricklaying around the mantels was necessary as a part of the setting thereof. In Bryson v. McCone, 121 Cal. 153, 53 Pac. 637, the court held that a person contracting to build ice tanks, including steel molds, pipes, pumps, and connections, and to set them up in an ice factory, was a materialman, and not an original contractor. In Smith v. Bradbury, 148 Cal. 41, 82 Pac. 367, 113 Am. St. Rep. 189, it was held that one who contracted to do the plastering in a building at a stated price yer yard was a subcontractor and not a materialman. So in La Grill v. Mallard, 90 Cal. 373, 27 Pac. 294, one who contracted to paper and decorate a number of rooms in a dwelling house, where the actual work was done by employés, was held to be an original contractor. The only rule of general application announced in any of the above-mentioned decisions was stated in Bennett v. Davis, supra, 113 Cal. 339, 45 Pac. 685, 54 Am. St. Rep. 354, as follows:

"The main consideration after all is whether the labor bestowed upon the article (in setting) was simple and trifling in comparison to the price."

Literally, a "subcontractor" is one who agrees with another to perform a part or all of the obligation which the second party owes by contract to a third party. With respect to the mechanic's lien law in question, however, the word has a much narrower meaning. Section 1194 divides the liens which can be asserted against property under the mechanics' lien law into four classes, to wit, laborers, materialmen, subcontractors, and original contractors. The meaning of the term "subcontractors," as there used, must be determined by reference to this classification and to the subject to which it relates. The "original contractor" is the person who agrees with the owner to construct a building on his property. Those who perform labor in the construction of the building come within the first class, as "laborers." Persons who merely furnish material to the contractors to be used and which are used in the construction of the building come within the second class, as "materialmen." The term "subcontractor" embraces all persons who agree with the original contractor to furnish the material and construct for him on the premises some part of the structure which the original contractor has agreed to erect for the owner. We think something more than a mere comparison of the cost of the labor of attaching material to the building with the total price of the work and materials is necessary in many cases to a determination of the question whether a claimant is a subcontractor or a materialman. Generally speaking, it would be held that one who, under an agreement with the contractor, enters upon the premises and there, with material furnished by himself, erects a definite part of the structure composing the building, is a subcontractor within the meaning of this section, regardless of the comparative cost of labor and material. The cases above cited which hold the claimant to be a materialman go upon the theory that the claimant agreed with the owner or the contractor to construct, outside of the building, or away from the premises, some completed article, machinery, or apparatus to be thereafter placed in or attached to the building by the person who furnished it. The contention was that the work of attaching it to the building constituted a part of the construction of the building itself, and therefore made the claimant either an original contractor with the owner or a subcontractor with the contractor. The substance of the decisions is that the work of attaching and placing the thing in the building was merely a part of the delivery, and that the essence of the agreement was to furnish a finished article as material to be placed in the building. But in the other cases it was clear that the work of the claimant was that of constructing a part of the building itself with his own materials, under an agreement with the original contractor, and he was held to be a subcontractor.

Under the decision in Smith v. Bradbury, supra, there can be no doubt that the status of Floodberg & McCaffery, who did the lathing and plastering and furnished the material therefor, was that of a subcontractor. The work of Montague & Co. consisted of furnishing the material and constructing in the

building a considerable part of the floors and walls thereof. The Waterhouse-Price Company was to furnish the necessary tile and erect a part of the walls of the bathrooms. Clark & Sons, a corporation, was to furnish the material and put on the building a mission tile roof. Ford & Malott were to furnish and lay the flooring in certain rooms. All these constituted substantial and important parts of the building and of the work of constructing it. These parties were, in our opinion, subcontractors, under the principles we have just stated. It is somewhat difficult to determine, from the meager record on the subject, what part of the building was constructed by the claimant Guilfoy. Enough appears to show that he was to furnish the materials and erect in the building the tin work, galvanized iron, and copper work required by the plans and specifications. The plans and specifications are not set forth in the record. It is at least not improbable that the metal work of this character constituted a substantial part of the structure. If so, Guilfoy would be a subcontractor within the rules above stated. As all intendments are in favor of the decision of the court below, and no evidence of a different condition is presented by the record, we must sustain the finding that Guilfoy was a subcontractor.

In Bennett v. Davis, supra, the claimant, who contracted to furnish mantels for the building with the tiles and grates connected therewith and to set them all in the building, was held to be a materialman. A part of the work of Montague & Co. consisted of the building of four fireplaces in the house, using brick and tile. This work is in some respects similar to that which was held to be the furnishing of materials in Bennett v. Davis. But here we have no plans or specifications or other description of the work, and we cannot say that the fireplaces did not constitute a very substantial part of the structure of the building in question. In Bennett v. Davis the mantels, which are usually finished outside as a complete structure and thereafter taken to and set in the building by the person who makes them, were the principal subject of the agreement and the setting was a mere incident and of very slight cost compared with the price of the mantels. It was in this case that the court said that the comparison of the labor of setting with the price was the main consideration. The work done by Montague & Co. constituted nearly half of the sum they were to receive for furnishing the material and erecting these porch floors, fireplaces and other things in the building. The cost of the different parts of their job is not stated. There is therefore no means of making comparison of the cost of the labor with the total cost of the fireplaces, and we cannot interfere with the finding that they were subcontractors.

[4] The appellants further contend that certain other claimants, namely, Faneuf & Heath, Wessendorf & Staffler, Bright Bros., and the Daniels Santa Cruz Transfer Company, were erroneously ranked as materialmen or laborers when they should have been classed as subcontractors. Their claims were small, amounting in all to $181.79. Each of these parties filed a claim of lien stating that they, respectively, had performed labor on the building. The claim of Faneuf & Heath states that they performed certain labor in the construction of the house and also that they furnished certain materials which were used therein. There is nothing in the record to show the character of the work done by either of these claimants, or of the materials they furnished. The finding is sufficiently sustained by the respective claims of lien, and, as there is no evidence to the contrary in the record, the findings must be upheld.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

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ROYSTONE CO. v. DARLING et al.

(L. A. 4072.)

(Supreme Court of California. Dec. 15, 1915. Rehearing Denied Jan. 13, 1916.)

1. CONSTITUTIONAL LAW ⊂⊃89—MECHANICS' LIENS ⊂⊃3—CONTRACTOR'S BOND—STATUTE—CONSTITUTIONALITY.

Act May 1, 1911 (St. 1911, p. 1313), amending Code Civ. Proc. § 1183, provides that persons working upon a building or furnishing materials shall have a lien for the value of the labor and materials, and that in case the original contract shall be filed in the office of the county recorder, together with the bond of the contractor in an amount not less than 50 per cent. of the contract price, which bond shall be conditioned for the payment of the claims of all persons performing labor or furnishing materials on the work, and shall also be made to inure to the benefit of all laborers or materialmen on the work described in the contract, to give them a right of action to recover upon the bond in any suit to foreclose the mechanics' liens or in a separate suit brought on the bond, then the court, where it would be equitable to do so, may restrict the recovery under such liens to an aggregate amount equal to that found to be due from the owner to the contractor, and render judgment against the contractor and sureties on the bond for any deficiency. Const. art. 1, § 1, guaranties the right of contract. Article 20, § 15, provides that mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished materials, and that the Legislature shall provide for the speedy enforcement of such liens. *Held*, that the provision of the mechanic's lien act requiring the contractor's bond is not unconstitutional as invading the right of contract, since it allows the owner of property to contract freely for its improvement and upon such terms as he may deem for his best interest, merely exacting from him as a condition of exemption from liability to subcontractors and materialmen in excess of the contract price for the work, that he should provide a reasonable security for the constitutional lien given for labor and materials furnished by his contractor, a requirement with-

in the scope of the constitutional provision conferring such liens, and of the police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. ⊂⊃89; Mechanics' Liens, Cent. Dig. § 4; Dec. Dig. ⊂⊃3.]

2. Bonds ⊂⊃35 — Validity — Statutory Bonds.

A bond given solely to comply with a statute which is itself void, or which does not require the bond as supposed, is without binding force.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 40, 40½; Dec. Dig. ⊂⊃35.]

3. Statutes ⊂⊃85 — Class Legislation — Contractor's Bond.

Act May 1, 1911 (St. 1911, p. 1313), amending Code Civ. Proc. § 1183, to require a contractor's bond securing materialmen and laborers as a condition to the owner's exemption from liability thereto in an amount in excess of the contract price, is not unconstitutional as class legislation, since a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction which has some reasonable relation to the legislation respecting the class, which is the case, as to persons furnishing labor or materials for the construction of buildings, under the constitution conferring their liens thereon.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 94, 95; Dec. Dig. ⊂⊃85.]

4. Mechanics' Liens ⊂⊃227—Contractor's Bond — Construction — Recovery in Excess of Penalty—Statute.

Act May 1, 1911 (St. 1911, p. 1313), amends Code Civ. Proc. § 1183, to require that a contractor shall file a bond securing materialmen and laborers as a condition to the owner's exemption from liability thereto in an amount in excess of the contract price, and fixes the penalty of the bond at not less than one-half the amount of the contract price, subsequently providing that after applying to the payment of liens the sum due from the owner to the contractor, lien claimants may, in suit on the bond recover the unpaid balance of their claims. *Held*, that such a bond could not be construed, because of the last provision of the statute, as authorizing a recovery in excess of its penalty.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 410; Dec. Dig. ⊂⊃227.]

5. Appeal and Error ⊂⊃907—Presumptions Favoring Court Below.

In a suit to foreclose mechanics' liens, where the propriety of an allowance for extras to a materialman depended upon the specifications, which were not incorporated in the bill of exceptions or elsewhere in the record, the finding of the court below must be sustained on presumption.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911–2916, 3673, 3674, 3676, 3678; Dec. Dig. ⊂⊃907.]

6. Appeal and Error ⊂⊃181—Reservation of Grounds of Review—Necessity of Objection Below.

An objection made in appellant's brief, but not made on trial or in the court below, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1141–1151, 1157, 1158, 1160; Dec. Dig. ⊂⊃181.]

In Bank. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by the Roystone Company against Thomas Darling and the American Surety Company of New York and others. From a judgment against it, the defendant American Surety Company appeals. Affirmed.

Bicksler & Smith, of Los Angeles, for appellant. Irwin, White & Rosecrans and Randall & Bartlett, all of Los Angeles, for respondents Darling. Ernest E. Nichols, of Los Angeles, for respondent Joseph Musto Sons-Keenan Co. R. L. Horton, of Los Angeles, for respondent Hammond Lumber Co. Gray, Barker & Bowen, of Los Angeles, for respondent Schultz Lumber Co. Shaw & Stewart, of Los Angeles, for respondent Stead. Willis O. Tyler, of Los Angeles, for respondent James. Schweitzer & Hutton, of Los Angeles, for respondent Western Commercial Co. Alfred Wright, of Los Angeles, for respondent Eager Hardware & Paint Co. C. W. Pendleton, Jr., of Los Angeles, for respondents H. W. Johns-Manville Co. and J. C. Crawford. Jones & Weller, of Los Angeles, for respondent Patten & Davies Lumber Co. Arthur Wright, of Los Angeles, for respondent Hughes Mfg. & Lumber Co. Waterman & Green, of Los Angeles, for respondent Neely.

SHAW, J. This is an appeal taken from the judgment within 60 days after its entry, the American Surety Company being the sole appellant. The judgment was rendered in a consolidated action to foreclose mechanics' liens. Nineteen separate complaints embracing 22 claims of lien were included in the order of consolidation.

On June 19, 1912, the defendant Thomas Darling, being the owner of a lot in Santa Monica, Los Angeles county, entered into a contract with the defendant J. M. Thomas for the erection of an apartment house on said lot. The contract price was $13,279, payable in installments. Five of these installments of $1,659 each were payable at intervals during the construction of the building, the sixth, of the same amount, was to be paid at completion thereof, and the seventh, $3,320, was made payable 35 days after the filing of the notice of completion in the recorder's office. The remaining $5 are not accounted for. On the 20th day of June, the contractor, Thomas, and the appellant, American Surety Company, executed and delivered to Darling a bond in the sum of $6,640, being 50 cents in excess of one-half of said contract price. This bond conformed in every particular to the requirements of section 1183 of the Code of Civil Procedure, as amended in 1911. The contract and the bond aforesaid were duly filed and recorded in the office of the recorder of said county on June 21, 1912, the day after the execution of the bond. In pursuance of the contract, Thomas immediately began the erection of the building and completed it on December 14, 1912. Extra work of the value of $183.50 was ordered by Darling and performed by Thomas. On December 14, 1912, Darling filed in the record-

er's office a notice of completion as provided in section 1187 of the Code of Civil Procedure. Prior to November 1, 1912, Darling paid Thomas five installments, as provided in the contract, amounting to $8,295. The remainder of the contract price, $4,984, together with the value of the extra work $183.50, a total of $5,167.50 remains unpaid. The several claims of lien found to be valid by the court amounted to something over $10,000, being more than $6,000 in excess of the balance due from the owner to the contractor as aforesaid.

The court below was of the opinion that said sum of $5,167.50 due from Darling to Thomas on the contract was applicable to these liens, and that liens should be declared and enforced on defendant's property in favor of each claimant for his pro rata share of this sum and for no greater amount. Seven of these claimants were declared to have no right to further relief except against the contractor. The court held that the other 15 claimants were each entitled to a judgment against the American Surety Company upon the bond aforesaid for the excess of their respective claims over their respective shares of the fund due to the contractor aforesaid. Judgment was given in accordance with these conclusions.

As will be seen from the foregoing statement the contract between Darling and Thomas was made in 1912. The case is therefore governed by the provisions of the mechanic's lien law, as revised by the act of May 1, 1911 (Stats. 1911, p. 1313). This revision made some radical changes in the law, and it presents new questions for decision. It will aid in the understanding of the purpose and meaning of this act if we call to mind, as briefly as may be, the history of the mechanic's lien laws in this state and the state of the law on the subject at the time the amendments in question were enacted.

Prior to the adoption of the Constitution of 1879 the lien of mechanics and materialmen for work done and materials furnished in the erection of buildings was entirely a creature of the Legislature. The former Constitution contained no declaration on the subject. Numerous decisions of the Supreme Court had declared that all such liens were limited by the contract between the owner and the contractor, and could not, in the aggregate, exceed the contract price. The doctrine that the right of contract could not be invaded by legislative acts purporting to give liens beyond the price fixed in the contract between the owner and the contractor, or regardless of the fact that the price had been wholly or partially paid, was so thoroughly established that litigation involving it had virtually ended. Section 1183 of the Code, as amended in 1873, declared that every person performing labor or furnishing materials to be used in the construction of any building should have a lien upon the same for such work or material. It did not limit the liens to the contract price. In this condition of the law the Constitution of 1879 was adopted. It provides as follows:

"Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens." Art. 20, § 15.

In 1880 section 1183 was again amended by inserting a direct declaration that "the lien shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party." This amendment of 1880 first came before the Supreme Court for consideration in Latson v. Nelson, 11 Pacific Coast Law Journal, 589, a case not officially reported. The court in that case considered the power of the Legislature to disregard the contract of the owner with the contractor and give the laborer or materialman a lien for an amount in excess of the money due thereon from the owner to the contractor. In effect, it declared that section 15, article 20, of the Constitution was not intended to impair the right to contract respecting property guaranteed by section 1, article 1, thereof, and that the provisions of the Code purporting to give a lien upon property in favor of third persons, in disregard of and exceeding the obligations of the owner concerning that property, was an invalid restriction of the liberty of contract. Although it is not very clearly stated, the theory of that decision is, and it has always been understood to be, that section 1 of article 1, declaring that all men possess "certain inalienable rights," among them the right of "acquiring, possessing, and protecting property," is a guarantee which includes the right to contract concerning the use, enjoyment, and disposition of property, and which cannot be taken away or restricted by the Legislature except by reasonable regulations made in the exercise of the police power. See on this point Kellogg v. Howes, 81 Cal. 177, 22 Pac. 509, 6 L. R. A. 588; Stimson Mill Co. v. Braun, 136 Cal. 125, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116. Latson v. Nelson was approved and followed in McCants v. Bush, 70 Cal. 126, 11 Pac. 601; Wiggins v. Bridge, 70 Cal. 438, 11 Pac. 754, both decided in 1886, and in Walsh v. McMenomy, 74 Cal. 359, 16 Pac. 17, in 1887. In the meantime the Legislature of 1885 (St. 1885, p. 143), apparently recognizing and conceding the force of the decision in Latson v. Nelson, undertook to secure and enforce the constitutional lien by other means, that is, by regulating the mode of making and executing contracts, rather than by disregarding the right of contract. It amended sections 1183 and 1184 of the Code by providing that in all building contracts the contract price should be payable in installments at specified times after the beginning of the work, that at least one-

fourth thereof should be made payable not less than 35 days after the completion of the work contracted for, that all such contracts exceeding $1,000 should be in writing, subscribed by the parties thereto, and should be filed in the office of the county recorder before the work was begun thereunder, that if these regulations were followed, liens upon the property for the erection of the structure should be confined to the unpaid portion of the contract price, but that all contracts which did not conform thereto, or which were not filed as provided, should be void, that in such case the contractor should be deemed the agent of the owner, and the property should be subject to a lien in favor of any person performing labor or furnishing material to the contractor upon the building for the value of such labor or material. This law, with some amendments not material to our discussion, remained in force until the enactment of the revision of 1911, aforesaid.

In the meantime the Supreme Court has followed the rule established by the cases last cited and has uniformly declared, with respect to such liens, that if there is a valid contract, the contract price measures the limit of the amount of liens which can be acquired against the property by laborers and materialmen. The following cases declare the doctrine directly: Stimson Mill Co. v. Braun, supra; McDonald v. Hayes, 132 Cal. 495, 64 Pac. 850; Snell v. Bradbury, 139 Cal. 382, 73 Pac. 150; Kellogg v. Howes, supra; Greig v. Riordan, 99 Cal. 319, 33 Pac. 913; Hampton v. Christensen, 148 Cal. 736, 84 Pac. 200; Hoffman-Marks Co. v. Spires, 154 Cal. 116, 97 Pac. 152; Butler v. Ng Chung, 160 Cal. 438, 117 Pac. 512, Ann. Cas. 1913A, 940; Marshall v. Vallejo Bank, 163 Cal. 474, 126 Pac. 146; Ganahl Co. v. Weinsveig, 168 Cal. 669, 143 Pac. 1025; Clark v. Beyrle, 160 Cal. 314, 116 Pac. 739. In addition to these express declarations there are many cases in which the rights of the parties were adjudicated upon the assumption that this proposition constituted the law of the state. Each one of the large number of decisions regarding the priorities of liens in the unpaid portion of the contract price, each decision respecting the right to reach payments made before maturity under such contract, each decision as to the formal requisites of contracts under the amendment of 1885, and each decision as to the apportionment under section 1200, Code of Civil Procedure, upon the failure of the contractor to complete the work, constitutes an affirmance of the doctrine that the contract, legally made, limits the liability of the owner to lien claimants. There has been scarcely a session of this court since the enactment of that amendment at which one or more cases have not been presented and decided which, in effect, amounted to a repetition of this doctrine. The Legislature has also recognized the doctrine by subsequent amendments following out the theory of the amendment of 1885.

The scheme of regulation embodied in the amendments of 1885 and continued until 1911, did not work well in practical operation. Disputes frequently arose concerning the terms of contracts, the time of maturity of installments, the making of payments, the time of beginning the work, with respect to the filing of the contract for record, and many other details which, under the somewhat elaborate plan of the statute, would affect the validity of the contract, or the right to a lien to the unpaid part of the price when the contract was valid. Our reports show many decisions on these questions. Amendments to the statute were made from time to time, but, upon the whole, conditions were not improved. The act of 1911 was obviously designed for the purpose of removing, as far as possible, the objections to the former law.

The plan differs in important particulars from the previous statute. It amends the entire chapter with the exception of sections 1186, 1188, 1189, 1191, 1191a, 1196, 1198, 1199, and 1201. The provisions of these sections harmonize with either scheme. Sections 1183a, 1200, and 1203a are repealed. The amended sections do not prescribe the form of building contracts, nor do they fix the time or the manner of payment of the contract price or require its payment in installments. All these things are left to the will of the owner and the contractor as they may agree. They do not require that one-fourth of the contract price, or any part thereof, shall be made payable after completion. The parties are at liberty to contract for payment in advance, or in specific property. Such contracts are not declared void by the present law. Section 1183 allows the contract to be filed before the work is begun under it, and provides that there may be filed with it a bond executed by the contractor with good sureties in an amount at least one-half of the contract price, conditioned for the payment in full of all claims on account of labor performed for, or materials furnished to, the contractor in the work, and giving to such persons a right of action on said bond for such claims. Other changes are made, but as they are not material to the decision as to the extent of the lien and the validity of the provision for a contractor's bond, we leave them to be noticed on the discussion of the questions to which they may relate.

[1, 2] The first point urged by the appellant in support of its appeal is that the portion of the statute providing for the execution and filing of the bond by the contractor is unconstitutional and void. It is necessary here to state more fully the statutory provisions regarding the same. Section 1183, after declaring that persons who work upon a building or furnish materials, shall have a

lien upon the property for the value of the labor done and materials furnished, proceeds as follows:

"The liens in this chapter provided for shall be direct liens, and shall not in the case of any claimants, other than the contractor be limited, as to amount, by any contract price agreed upon between the contractor and the owner except as hereinafter provided."

It then provides that such liens shall not extend to any labor or materials not embraced within the original contract, or modification thereof, if the claimant has had actual notice thereof before the performance of labor or furnishing of material. It further provides, with respect to such notice, that the filing of the contract, or modification thereof, in the office of the county recorder before the commencement of the work, shall be equivalent to actual notice thereof to lien claimants. Then follows the important provision of the section in these words:

"In case said original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty (50) per cent of the contract price named in said contract, which bond shall in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work, and shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract so as to give such persons a right of action to recover upon said bond in any suit * * * to foreclose the liens provided for in this chapter or in a separate suit brought on said bond, then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor, and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both. No change or alteration of the work or modification of any such contract between the owner and his contractor shall release or exonerate any surety or sureties upon any bond given under this section. It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties in the amount and upon the conditions as herein provided. It shall be lawful for the owner to protect himself against any failure of the contractor to perform his contract and make full payment for all work done and materials furnished thereunder by exacting such bond or other security as he may deem satisfactory."

Section 14 of the revising act is as follows:

"The provisions of this act shall be liberally construed with a view to effect its purpose. They are not intended as a re-enactment of the provisions of former statutes, with the policy heretofore impressed upon the same by the courts of this state, but are intended to reverse that policy to the extent of making the liens provided for, direct and independent of any account of indebtedness between the owner and contractor, thereby making the policy of this state conform to that of Nevada and the other Pacific coast states."

The court below found that the bond was given in pursuance of section 1183 aforesaid. It is not claimed by the respondents that it is good as a common law bond, or that there was any consideration for its execution other than the belief that it was required by said section. The contention of the appellant is that the entire scheme of the provision is invalid because it invades the right of contract preserved by section 1, article 1, of the Constitution, and that, even if its provisions are otherwise valid, the requirement of a bond is beyond the legislative power and void, and that, for these reasons, the bond is without any consideration, and is unenforceable. If the premises are correct the conclusion that the bond creates no obligation would follow. The principle that a bond given solely to comply with a statute, which is itself void, or which does not require the bond as supposed, is without binding force is settled by the cases of Powers v. Chabot, 93 Cal. 270, 28 Pac. 1070, Coburn v. Townsend, 103 Cal. 235, 37 Pac. 202, Reay v. Butler, 118 Cal. 115, 50 Pac. 375, and similar cases, and, on the other hand, if the statute is valid in this respect it would necessarily follow that there was a sufficient consideration for the bond, and that it was binding upon the surety. The validity of the act as a whole and the provision requiring such bond in particular are, therefore, questions necessary to the determination of the case.

We have shown that when this act was passed it was the established doctrine of this state that the Legislature cannot create mechanic's liens against real property in excess of the contract price, where there is a valid contract, but that it is within the legislative power, in order to protect and enforce the liens provided for in the Constitution, and so far as for that purpose may be necessary, to make reasonable regulations of the mode of contracting, and even of the terms of such contracts, and to declare that contracts shall be void if they do not conform to such regulations. This court has never in any case departed from this doctrine. The case of Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391, and similar cases holding that, although a contract not in conformity with the statutory regulations is void, and therefore does not limit the lien claimant to the contract price, that it is binding in controversies between the contractor and owner to fix the amount of the contractor's recovery in assumpsit for the value of the work he has done, are not in conflict with this doctrine, but in recognition of it. Merced L. Co. v. Bruschi, 152 Cal. 372, 92 Pac. 844, and Burnett v. Glas, 154 Cal. 249, 97 Pac. 423, had to do with invalid contracts. They do not impugn the doctrine stated; they assert and enforce it. Nor is there any suggestion contrary thereto in the recent case of Martin v. Becker, 169 Cal. 301, 146 Pac. 665.

The portions of the act of 1911 above quoted clearly show that the Legislature did not intend thereby to depart from this doctrine,

but that, on the contrary, the design was to follow it and to protect lienholders by means of regulations concerning the mode of contracting and dealing with property for the purposes of erecting improvements thereon. The first declaration on the subject is that the liens provided in the chapter shall be "direct liens" (whatever that may mean), and that persons, other than the contractor, shall not be limited by the contract price "except as hereinafter provided." The proviso referred to is found in the following declaration in the same section:

"It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties, in the amount and upon the conditions as herein provided."

A plainer declaration of the intent to make the contract price the limit of the owner's liability, where the bond and contract have been filed as required by this section, could scarcely be made. The rather vague statement in section 14 of the revising act of 1911 that said act is intended to make the liens therein provided for "direct and independent of any account of indebtedness between the owner and contractor," should not be interpreted as in contravention of section 1183, unless no other reasonable construction is apparent. It is not difficult to find a better application of the expression. Section 1183 describes two classes of liens. One class consists of liens in cases where the bond has not been filed, in which case, the state of accounts between the owner and contractor, and even the contract price, are immaterial to the lien, except as to the contractor. The other classes consist of all cases in which the proper bond and contract are duly filed. In these cases, by the express language of the section, the contract price is made to control, and the account of the indebtedness thereon from the owner to the contractor is decisive of the amount of the liens which can be adjudged against the property. The above-quoted clause of section 14 is therefore obviously applicable only to the first-mentioned class of liens, those where the bond and contract are not filed. To apply it to the other class of liens would work a practical repeal of very many of the elaborate provisions of the chapter as revised, since, for the most part, they would be wholly unnecessary and useless. The intent of the statute is to restrict liens to the contract price in all cases where the provisions of the statute regarding the bond are observed, and to impose upon the owner the penalty of paying all liens to the extent of the value of the work done and materials furnished where he shall neglect to comply with the statute.

The effect is that persons contracting for the erection of buildings or structures on their property must require the contractor to furnish such bond and must file the same with the contract in the recorder's office, or as an alternative, he must see to it that the value of the work and materials used in the building by the contractor is paid to the persons who furnish the same. A contract not accompanied by such bond is not declared to be invalid, but it furnishes no protection to the owner against liens for labor and material on the building. Do these regulations come within the doctrine of Latson v. Nelson, supra, and the other cases above cited?

The amendment of 1880 to section 1183 purported to confer liens for work and material on buildings without any regard whatever to the contract between the owner and the contractor. It gave the owner no method of exercising his right to contract with the builder for improvements on his property, without practically assuming total responsibility for all failure of such builder to pay for the labor and material thereon. It provided no means whereby he could avoid liens placed upon the property for the value of such work and materials. The right of persons to contract in that manner respecting their property was, to that extent, taken away. This was held to be a violation of the inalienable right to acquire and possess property guaranteed by section 1, article 1, of the Constitution. The revision of 1885 also interfered with the right of contract. Under its provisions the owner of property, in all proceedings to have improvements placed thereon by a builder, was not allowed to make payment in advance of the work. He was required to make his contract provide that three-fourths of the contract price should be paid in installments as the work progressed, or at completion, and one-fourth 35 days or more after completion. Failing in this he was declared to have made no contract at all, and the property was made subject to all claims for work and material used in the structure erected. This, although clearly a destruction, pro tanto, of the right of the owner freely to contract for the improvement of his property, was held to be a reasonable and permissible regulation of the right of enjoying property and of making contracts in relation thereto. The difference in the decisions upon these two differing laws points to the solution of the first part of the question. In view of the fact that our Constitution itself gives to workmen and materialmen a lien upon property for the value of the work and materials they bestow upon it and directs the Legislature to provide for the efficient enforcement of such liens, it is obvious that any legislative provision to that end which offers to the property owner a reasonable and practical mode of improving his property through a contractor at a fixed price and without further liability, should be considered as a legitimate exercise of the constitutional mandate. The plan of the amendment of 1880 was deemed unreasonable because it deprived the owner of all right to contract for improvements on his property for a sum fixed by his contract with the builder,

while the amendment of 1885 was considered reasonable because it provided a practical method for the making of improvements under such contracts, although it did to some extent infringe upon liberty of contract. This theory has not been put in this way nor fully expressed in the several decisions on the subject. But the discussion therein plainly points to this as the true reason for the differentiation of the two enactments. The case of Latson v. Nelson, and others following it, construing the amendment of 1880, and the case of Stimson Mill Co. v. Braun, supra, holding that the Legislature may not require such contracts to be made payable only in money, go far toward the limit of reason on the point that section 15, article 20, of the Constitution, is subordinate to the Declaration of Rights in section 1, article 1. The law of 1911 here involved does not deprive the owner of the right to contract for the improvement of his property. It allows him to contract freely for such improvement and upon such terms as he may deem for his best interests. All it exacts from him, as a condition of such exemption from liability, and in order to make his contract effective, is that he shall provide a reasonable security for the constitutional lien given for labor and materials furnished to his contractor. It is not an unreasonable burden. It is one which we think the people have the power to impose and which we believe to be within the scope of the constitutional mandate in the section conferring such liens, and of the police power.

Upon the point that any provision requiring a bond to secure such liens, whether given by the contractor or the owner, is unconstitutional, the appellant cites a line of cases beginning with Gibbs v. Tally, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815. The other cases are Shaughnessy v. American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701; San Francisco, etc., Co. v. Bibb, 139 Cal. 192, 72 Pac. 964; Snell v. Bradbury, 139 Cal. 380, 73 Pac. 150; Montague v. Furness, 145 Cal. 206, 78 Pac. 640; and Hampton v. Christensen, 148 Cal. 729, 84 Pac. 200.

In 1893 the Legislature amended section 1203 by requiring a bond to be filed to secure claims of workmen and materialmen on a building. The foregoing cases construe this section. It provided that every contract required to be filed by the mechanic's lien law should be accompanied by a bond in the sum of at least 25 per cent. of the contract price, which should be made to inure to the benefit of persons performing labor and furnishing materials for the building. To this was added a provision that a failure to file such bond should render the owner and contractor liable in damages to any person entitled, under the mechanic's lien law, to a lien upon the property affected by the contract. Gibbs v. Tally involved the consideration of the latter clause of the section. The other cases involved the validity of the bond thus required, and held that this provision for a bond is in violation of the inalienable right to acquire and possess property and contract in relation thereto. The section did not specify who should file the bond, nor to whom it should be made payable, nor who should execute the same. In Gibbs v. Tally the contract for the building was valid under the lien law as it then existed, and the persons who filed claims of lien had foreclosed the same, and had caused all of the contract price remaining unpaid from the owner to the contractor to be applied upon their liens, but it was not sufficient to pay them in full. Gibbs, one of the lien claimants, then began the action against Tally, the owner, to recover the damages which the statute purported to allow in case of the failure to file the required bond. The gist of the decision is that to allow such recovery, where there was a valid contract between the owner and the contractor, would make the owner liable for a debt which he did not owe, for an amount in excess of the contract price and which he had not agreed to pay. This, it was declared, was an unlawful infringement of section 1, article 1, of the Constitution. The facts involved in the case have no necessary bearing upon the question whether or not the Legislature could in any case require the contractor to file a bond for the benefit of persons having claims against him regarding the same before entering upon the work.

In Shaughnessy v. American Surety Co., supra, the question of the power of the Legislature to require the bond specified in section 1203 was directly involved. It was said that the requirement of such a bond was entirely outside of any protection of the constitutional lien given to mechanics and materialmen, and that it was in violation of the constitutional right of contract respecting property. The other cases above cited merely follow the decision in Shaughnessy v. American Surety Co. without further discussion of the subject. There is a marked difference between the law denounced as void in these cases and the act of 1911. The provisions of section 1203 do not appear to have had any direct relation to the validity or invalidity of the contract for the building. It was an additional requirement, an additional burden upon the parties. It had no connection with or relation to the constitutional mechanic's lien. The bond required to be given by the act of 1911, on the contrary, is provided for the express purpose of enabling the owner to escape liability for his building in any sum in excess of the contract price. It has a direct relation to the constitutional lien and to the effect of the contract for the improvement. The efficacy of the contract as a protection against such liens is made to depend directly upon the act of securing and filing the bond with the building contract. We think these differences are sufficient to distinguish

this case from the line of cases above cited. We are unable to perceive any constitutional objection to the expedient of providing that by the execution and filing of such bond the owner may be protected against the delinquencies of his contractor while, at the same time, lien claimants are afforded a security for the payment of their claims. We therefore hold that the foregoing decisions are not applicable, and that the provision for requiring this bond is not unconstitutional or invalid.

[3] Some minor points remain to be noticed. It is urged that the provisions of the act requiring persons who make building contracts to file a bond, while no such requirement is made of any other person who may wish to make other kinds of contracts, creates a lack of uniformity and is class legislation. There is an intimation to this effect in Shaughnessy v. American Surety Co., supra, but the point was not directly involved, and the case does not hold to that doctrine. It is not sustained by authority. The rules regarding legislation respecting classes have been thoroughly settled in this state. The case most often cited is Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604. The decision in that case has been followed in very many cases since it was rendered. The principle announced is that a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. To this it has been added, in some cases, that the distinction must have some reasonable relation to the legislation enacted respecting the class. The fact that the Constitution confers upon persons performing labor or furnishing materials for the construction of a building the right to a lien thereon, at once establishes these persons as a class and makes a constitutional distinction between them and all other persons making contracts. This justifies legislation for the benefit of such claimants and governing the conduct and contracts of the owner of the property and the person contracting to construct buildings thereon. There is no improper classification.

[4] The claim that the terms of the bond, as prescribed in section 1183, would authorize a recovery on the bond for the full amount found due to lien claimants and in excess of the sum named therein as the penalty thereof, is untenable. The penalty of the bond is to be not less than one-half the amount of the contract price. This measures the obligation and the liability of the surety. The subsequent statement that after applying to the payment of liens the sum due from the owner to the contractor, such claimants may, in a suit on the bond, recover the unpaid balance of their claims, cannot be construed to authorize a recovery on the bond of more than the penal sum thereof. The provision must be construed as an entirety. So construed it seems that the recovery, being had in a suit on the bond, is necessarily limited to the penalty thereof. The fact that such suit may be joined with a suit to foreclose the liens does not make it any the less a suit on the bond. The statement that the bond must be "conditioned for the payment in full of the claims" of lienholders, is the usual phraseology of the obligation of a bond at common law. This is not understood to create an obligation in excess of the penal sum named, but only an obligation to pay such claims in full, provided they do not exceed the penal sum. The statute, being descriptive of the terms of a bond, should be given the same meaning.

[5, 6] The objection to the allowance of $144 to the respondent Hughes Manufacturing and Lumber Company, for extras on its subcontract for wall beds in the building cannot be sustained on the record before us. That company agreed with Thomas, the contractor, to furnish the wall beds, of a kind described as No. 40, for $600. While they were being installed, the architect interfered, stating that the specifications of the contract called for wall beds known as No. 29, and directed that No. 29 wall beds be placed in the building, which was done, with the consent of Thomas. The $144 was the additional charge on account of this change. The plans and specifications were attached to and filed with the general contract, as a part thereof, but they are not set forth in the bill of exceptions, nor elsewhere in the record. Therefore the finding of the court must be sustained on the presumption that the court below, upon examining the specifications, ascertained that they call for No. 29 wall beds, and that there was no change in the original contract nor any departure therefrom. The objection that the allowance of $144 includes some small amount, not inquired into at the trial or shown by the record, charged for the labor of making the changes, which would not be chargeable to the owner, or to the surety on the bond, is made in appellant's brief, but it was not made at the trial, or in the court below, and for that reason we refuse to consider it on appeal.

Our conclusion that the revision of 1911, as a whole, and the part thereof requiring the bond are valid enactments, disposes of all other points urged by the appellant.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

HENSHAW, J. I concur in the foregoing judgment, but solely for the following reasons: It would seems when the Constitution of this state declares, as it does, that "mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property * * * for the value of such labor done and material furnished" that it was

wholly beyond the power of the Legislature to destroy or even to impair this lien. The Legislature, controlling all procedures in courts of justice, could prescribe reasonable regulations with which the lien claimant must comply in the matter of the enforcement of his lien and declare in effect that for a noncompliance with these reasonable regulations the lien claimant shall be deemed to have waived his lien. Again, as a part of its powers in this matter, it may interpose between the lien claimant and the property owner some other fund and exact of the lien claimant that he first exhaust this fund before enforcing his lien upon the property. But it would also seem that there is a well-defined limitation upon the Legislature's power in the matter of this lien so solemnly guaranteed by the Constitution itself, and that limitation is that if the interposed fund (or bond) shall prove inadequate, the Legislature cannot say to the lien claimant that he must be satisfied with this fund, though he do not receive from it all that the Constitution has guaranteed him. But by a long course of judicial decisions, beginning with what I believe to be a mistaken view, first announced in the unreported case of Latson v. Nelson, this court has held that the legislative powers are greater than those I have indicated, and that those powers go to the extent of permitting the Legislature to impair or even to destroy the lien. It is too late, perhaps, for this court to recede from what I believe to have been the mistaken view thus forced upon it. The fact still remains, however, that under our decisions the Legislature can and does control the whole matter. Thus, if the Legislature desires to do so, it may give the lien claimant all the rights touching his lien, which the Constitution guarantees him.

It would appear that by the new act here under review the Legislature undertook to do this thing. The act to begin with declares as to the right to a lien in the very language of the Constitution. It does away with much of the pre-existing technical law of filing contracts, etc., and in its last section declares:

"Sec. 14. The provisions of this act shall be liberally construed with a view to effect its purpose. They are not intended as a re-enactment of the provisions of former statutes, with the policy heretofore impressed upon the same by the courts of this state, but are intended to reverse that policy to the extent of making the liens provided for, direct and independent of any account of indebtedness between the owner and contractor, thereby making the policy of this state conform to that of Nevada and the other Pacific Coast states."

By this language it would appear that the Legislature had at last decided to give to these lien claimants everything that the Constitution declares they should have. But by a most singular interpolation by way of an amendment to this act as originally proposed the question is again thrown into confusion. By the language of this interpolated amendment it is declared:

"If the original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties, in an amount not less than fifty per cent of the contract price named in said contract * * * then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found due from the owner to the contractor."

The owner may have paid the contractor (and he is not prohibited from so doing) everything that is due, and in such case this language would limit the right of the recovery of the lien claimant to what he could obtain under the bond. In short, he would have no lien upon the property at all. Here is as radical a denial of the constitutional lien as is found in any of the earlier statutes. The inconsistency between this language and other parts of the act is too apparent to require comment. Yet, as this seems to have been the deliberate design of the Legislature, it is perhaps incumbent upon this court under its former decisions to give that design legal effect. If the Legislature in fact means to give claimants the rights which the Constitution guarantees them, as it declares its desire to do in section 14 above quoted, it alone has the power to do so by language which will make it apparent that a lien claimant may still have recourse to the property upon which he has bestowed his labor if the interposed intermediate undertaking or fund shall not be sufficient to pay him in full. This court is, however, justified I think in waiting for a plainer exposition of the Legislature's views and intent in the matter than can be found in this confused and confusing statute.

I concur: MELVIN, J.

171 Cal. 599

Ex parte UDELL. (Cr. 1993.)

(Supreme Court of California. Dec. 20, 1915.)

1. HABEAS CORPUS ⇐54 — APPLICATION — SUFFICIENCY OF.

Under Pen. Code, § 1475, an application for a writ of habeas corpus should state whether a previous application has been had and what the proceedings thereon were.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 51; Dec. Dig. ⇐54.]

2. HABEAS CORPUS ⇐120 — ISSUANCE OF WRIT—POWER OF JUDGE.

While under certain circumstances the court may feel warranted in entertaining a second application for a writ of habeas corpus, no single member of the court after the denial of a writ may entertain a second writ.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 121; Dec. Dig. ⇐120.]

In Bank. Application by Alva Udell for a writ of habeas corpus. Application denied.

Alva Udell, of San Francisco, pro se.

ANGELLOTTI, C. J. This is an application for a writ of habeas corpus by one Alva Udell who is now in the custody of the sher-

iff of the city and county of San Francisco under a judgment of the superior court thereof adjudging him guilty of contempt of court. The application is addressed to the Chief Justice, and not to the court.

[1] The petition is defective in that it does not state whether any prior application has been made to any court for a writ in regard to the same detention or restraint, and, if there was any such application, does not show the proceedings therein. Section 1475, Penal Code. As a matter of fact, a prior application in regard to the same detention or restraint was made by petitioner to this court, as our records show, on December 1, 1915, and such application was denied by the court on December 2, 1915. Not only was such application in regard to the same detention or restraint, but the grounds of the former application were the same as those now urged, with a greater degree of elaboration.

[2] While it may be that under certain circumstances the court itself might feel warranted in entertaining a second application from a party regarding the same detention or restraint, it is manifest that no single member of the court, be he Chief Justice or Associate Justice, is warranted in granting a writ where the same has been denied as to the same detention or restraint by the whole court in bank.

The application to me for a writ of habeas corpus is denied.

171 Cal. 607

In re WENKS' ESTATE.
WENKS v. GEHRING.

(S. F. 7315.)

(Supreme Court of California. Dec. 22, 1915.)

1. EXECUTORS AND ADMINISTRATORS ⊂=314—ORDER OF DISTRIBUTION—SCOPE OF RELIEF.

Where appellant as heir of his father sought to reach property which he claimed was the community property of his father and testatrix, who was the father's second wife, such claim should either be asserted by an action by appellant as heir or by the administrator of the father's estate, and cannot be presented on objections to an order of distribution of the estate of the testatrix.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274–1297; Dec. Dig. ⊂=314.]

2. EXECUTORS AND ADMINISTRATORS ⊂=314—ORDERS OF DISTRIBUTION—CONTESTS—COMMUNITY PROPERTY.

Civ. Code, § 1386, subd. 8, authorizing, in a proceeding for the distribution of the property of a decedent, contests arising out of the community property, applies only in case of intestacy.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274–1297; Dec. Dig. ⊂=314.]

Department 2. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

In the matter of the estate of Elizabeth Wenks, deceased. Contest by Joseph Wenks against an order of final distribution in favor of Edward E. Gehring. From an order refusing to entertain the contest, contestant appeals. Affirmed.

Carl L. Lindsay and H. C. Lucas, of Oakland, for appellant. Burton Jackson Wyman, of Oakland, for respondent. Gutsch & Lempke, of San Francisco, for residuary legatee.

HENSHAW, J. [1] Elizabeth Wenks died testate, disposing of all her property by will. Joseph Wenks, appellant, is her stepson, the son of her predeceased husband. During his lifetime that husband conveyed to her a piece of real property. No administration was had upon the estate of the husband of Elizabeth Wenks. Upon her death his son appeared and filed a contest in the matter of the final distribution of the estate, alleging that his father, the husband of Elizabeth, in his lifetime conveyed to Elizabeth certain real property which was community property; that the character of the property as community property was not changed by this conveyance, and that it remained the community property of the two spouses until the death of the husband; that after the death of the husband Elizabeth sold this property, and that the property of her estate for which distribution is sought is the proceeds of this sale. The court refused to entertain the contest or to hear the proffered evidence in support of these allegations.

In this the court was clearly right. Appellant had abundant opportunity to establish the facts which he here asserts by appropriate action as an heir of his deceased father, and it was his duty to have brought or to have caused the bringing of such an action either by himself as heir or by the administrator of his father's estate. His claim here presented is a claim of title adverse to that of the estate, and "the law does not contemplate or provide for the distribution of property or money in the hands of the executor or administrator to persons who may claim adversely to the estate, but leaves all such questions to be determined by an action on behalf of or against the executor." Estate of Rowland, 74 Cal. 523, 16 Pac. 315, 5 Am. St. Rep. 464.

[2] Moreover, section 1386, subdivision 8 of the Civil Code, upon which appellant apparently bases his right to be heard, is applicable only to cases of intestacy. Estate of Brady, 151 Pac. 275. Here the deceased died leaving a will disposing of all of her property. No support can be found for appellant's position in Estate of McCauley, 138 Cal. 546, 71 Pac. 458. There the court declared that under this section, in case of intestacy, the named relatives of the spouse first deceased are heirs so far as concerns the common property of the spouse last dying intestate. The decision then proceeds to

show that there was a small amount of common property, amounting only to $499, in the estate of Jennie McCauley undisposed of by her will. This appears from the first paragraph of the decision, where it is pointed out that the distributable value of the estate is $67,000, and the total value of the property disposed of by will amounts to $62,000. The conclusion therefore properly followed that Jennie McCauley died intestate as to the small amount of community property, which would therefore descend, under the rules of succession, to the relatives of her husband, she having left no next of kin.

For these reasons the order appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

28 Cal. App. 780

NATIONAL LUMBER CO. v. KENNEDY et al. (Civ. 1771.)

(District Court of Appeal, Second District, California. Nov. 13, 1915.)

1. MECHANICS' LIENS ⟸132 — BUILDINGS — COMPLETION.

That after a building was completed and occupied by the owner, a skylight proved defective and was remedied, does not show that the building was incomplete until the skylight was repaired.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190, 192–207; Dec. Dig. ⟸132.]

2. APPEAL AND ERROR ⟸1011 — REVIEW — FINDINGS.

A finding of the court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. ⟸1011.]

3. MECHANICS' LIENS ⟸132—TIME OF FILING—NOTICE OF COMPLETION.

Code Civ. Proc. § 1187, declares that the owner of any building must, within 10 days after its completion, or 40 days after cessation from labor upon any unfinished contract, file with the county recorder a notice thereof, that a failure to file such notice shall estop the owner and persons deraigning title from him from asserting, in foreclosure of a mechanics' lien, the defense that the lien was not filed within time, and that all claims for liens "must be filed within 90 days after completion." *Held*, the failure of the owner to file the notice of completion will not excuse a materialman's failure to file his lien claim within 90 days after completion, such provision fixing the ultimate time within which liens may be filed.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190, 192–207; Dec. Dig. ⟸132.]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by the National Lumber Company against James Kennedy and another. There was a judgment for the named defendant, and from an order denying new trial, plaintiff appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant. E. H. Jolliffe, of Ontario, Cal., for respondent.

SHAW, J. Action to foreclose an alleged lien for materials sold by plaintiff to defendant Miller for use in the construction by him, as contractor, of a building for defendant Kennedy. Miller made default. Kennedy answered, and upon trial judgment was entered for said defendant. The appeal is by plaintiff from an order overruling its motion for a new trial. No record was made of the contract, which was for a sum exceeding $1,000.

Two questions are presented: First, was the lien filed within the time required after the completion of the building, as provided in section 1187, Code of Civil Procedure? If not, did the acts and conduct of Kennedy as owner of the building estop him from urging such ground as a defense to the action?

The court found that the building was fully completed on October 15, 1909, but that no notice of its completion was ever at any time filed with the county recorder; that plaintiff's claim and notice of lien was not filed until March 15, 1910, which was 151 days after the completion of the building; that Kennedy did not, between November 3d and November 15, 1909, as alleged in the complaint, or at any time, state to plaintiff that said building was not complete according to the plans and specifications; nor is it true that plaintiff delayed filing its claim of lien because of any statements or representations made by Kennedy.

As we understand appellant's brief, it attacks all of these findings, except that as to defendant's failure to file a notice of the completion of the building.

[1] That the building was fully complete and occupied on October 15, 1909, is conclusively shown by the evidence. The only reason suggested for claiming otherwise is the fact that a skylight put in by the contractor proved defective, and later, some time in January, 1910, the defendant's tenant, being authorized so to do, employed another workman who installed a skylight in place of the one originally put in under the terms of the contract by Miller, the cost of which substituted skylight was, some time in March, paid for by Kennedy.

[2] Appellant, basing its contention upon the case of Hubbard v. Lee, 6 Cal. App. 602, 92 Pac. 744, insists that the acts and conduct of Kennedy estop him from basing any defense to the validity of the lien on account of its not being filed within time. In support of this theory plaintiff offered testimony to the effect that in response to a letter requesting him so to do, Kennedy, some time between November 3d and November 15th, called at its office, and in a conversation with its agents concerning the bill for materials furnished to Miller, and wherein the filing of a lien being mentioned, he asked them not to file any lien on the property, that the building was not yet completed, and that Miller

would pay the bill. With reference to this conversation, one of plaintiff's witnesses, who at the time represented it, testified as follows:

"Q. And you didn't file your lien because you expected I. S. Miller to take care of the amount coming to you? A. Yes, sir. Q. That is the reason you did not file your lien? A. Yes, sir. Q. Didn't Mr. Kennedy tell you that I. S. Miller had the money to settle these claims and would settle them, and for you not to file any lien? A. Yes, sir. Q. And on that account you didn't file any lien? Now, isn't that the exact reason? A. Yes."

In addition to the general effect of plaintiff's evidence being weakened by this testimony, the defendant Kennedy denies that he ever said the building was not completed, but, on the contrary, stated to plaintiff that the building was completed, and that I. S. Miller had the money to pay their bill and told them to go and see him. Conceding that plaintiff's testimony, if believed by the court, might have constituted an estoppel against defendant, nevertheless there was a sharp conflict between the evidence on behalf of plaintiff and that given by defendant, as to which the determination of the court thereon must be deemed final. In the Hubbard Case, as here, the owner neglected not only to record the contract, but also to file for record the notice of actual completion of the work as required by the statute, and it was sought to prove that not only the owner, but the architect, repeatedly stated and represented to the materialman and lienor that the buildings were not completed, and that he had not accepted them and would not until certain other work was done, and that plaintiff, relying thereon, had delayed filing his notice of lien, to all of which the court sustained objections, and it was held to be error. The facts in the case at bar easily distinguish it from the Hubbard Case.

[3] Appellant next insists that, notwithstanding the expiration of more than 90 days, to wit, 151 days, following the completion of the building, it nevertheless was entitled to file its notice of lien by reason of the provisions of section 1187, Code of Civil Procedure, to the effect that the owner may, within 10 days after completion of any contract, or within 40 days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred. The section further provides that "in case such notice be not so filed, then the said owner and all persons deraigning title from or claiming any interest through him, shall be estopped in any proceedings for the foreclosure of any lien provided in this chapter from maintaining any defense therein, based on the ground that said lien was not filed within the time provided in this chapter"—followed by this proviso: "That all claims of lien must be filed within ninety days after the completion of any building, improvement, or structure." In support of its contention, appellant cites the case of Robinson v. Mitchel, 159 Cal. 581, 114 Pac. 984. But there the court, with reference to this latter clause, say:

"This would seem to fix a time limit within which all liens must be filed regardless of whether the owner has filed his notice of completion or not. * * * But this question it is not necessary here to resolve."

Clearly the purpose of the provision was to give to persons interested therein notice of the completion of the work, in order that they might in due time file their claims of lien. Filing the notice of completion is not mandatory, but failure to file it extends the time for filing claims of lien for a period of 90 days after the actual completion of the work. The Legislature deemed such period ample time for otherwise obtaining information as to the time of completion. The provision that "all claims of lien must be filed within ninety days after the completion of any building," could serve no purpose other than to terminate the time within which the claim of lien might be filed. Such is the plain import of the language used. As found by the court, the building was completed about October 15, 1909. In the absence of the filing of notice of its completion, plaintiff had until about the middle of January within which to file its lien, which, as stated, was not filed until March 15th thereafter. It appears from the record that plaintiff's agents passed the building daily, and from October 15th knew that it was occupied and had every appearance of being completed. In our opinion, the findings of the court attacked are fully sustained by the evidence.

Since the plaintiff was not entitled in any event to enforce its claim of lien, the alleged errors due to rulings upon the admission and rejection of testimony could in no event have been prejudicial to the rights of plaintiff.

The order appealed from is affirmed.

We concur: CONREY, P. J.; JAMES, J.

28 Cal. App. 789

HILBORN v. BONNEY et ux. (Civ. 1777.)

(District Court of Appeal, Second District, California. Nov. 13, 1915.)

ELECTION OF REMEDIES ⇐14—FRAUD—MONEY JUDGMENT.

Defendant fraudulently procured the conveyance of plaintiff's property to him in exchange for worthless stock. Plaintiff instituted an action at law to recover damages against defendant for fraud, in which she obtained a judgment. Meanwhile, defendant had sold plaintiff's land and invested the proceeds in land upon which defendant's wife filed a declaration of homestead. Plaintiff then instituted the present action to have the declaration canceled as a cloud on the property purchased with and representing the property fraudulently obtained from her which obstructed an execution under her money judgment. *Held*, that plaintiff, hav-

ing elected to pursue her remedy at law for damages for the fraud, was estopped from again proceeding on the same facts for equitable relief.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 16; Dec. Dig. ⟸14.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Grace A. Hilborn against Frank R. Bonney and Ella Bonney, his wife, to annul a declaration of homestead by the wife. Judgment for plaintiff, and defendants appeal. Reversed.

E. J. Fleming and S. L. Carpenter, both of Los Angeles, for appellants. Frank L. Muhleman, Jones & Evans, and Earl T. Miller, all of Los Angeles, for respondent.

SHAW, J. It appears from the complaint filed August 20, 1912, that plaintiff had theretofore, on August 9, 1912, in an action instituted against defendant Frank R. Bonney to recover damages for alleged fraud, obtained a judgment against him in the sum of $4,000, upon which she caused to be issued an execution and a levy thereof made upon certain real estate described as lot 22 of the Huston tract, in Los Angeles county, title to which real estate was at the time in the name of defendant Ella Bonney and upon which she, prior to the entry of the judgment against her husband, had filed a declaration of homestead. The complaint then alleges the fraudulent acts of Frank R. Bonney by means of which he induced plaintiff to convey to him certain real estate then owned by her in exchange for certain valueless corporate stock, which acts were made the basis of the action wherein judgment was rendered against him and in favor of plaintiff; that after thus obtaining such real estate from plaintiff he sold the same and invested the proceeds thereof in said lot 22 of the Huston tract, which, prior to the rendition of the judgment against him, he caused to be conveyed to his wife, Ella, who, as stated, filed a declaration of homestead thereon. The prayer of the complaint is to have this declaration canceled and annulled; the reason assigned therefor being that it constitutes a cloud upon the property, thereby obstructing plaintiff in enforcing collection of her judgment against Frank R. Bonney by sale of the property under execution so levied thereon. A general demurrer interposed to this complaint was overruled. Judgment went for plaintiff, from which defendants appeal.

The only question involved is the ruling of the court upon the sufficiency of the complaint. The theory of respondent (plaintiff here) is that since, as adjudged in the action wherein she had a judgment for damages against him, the conveyance of her property was obtained by the fraudulent acts of Frank R. Bonney, neither it nor lot 22, bought with the proceeds of the sale thereof, could, as to her judgment, be the subject of a declaration of homestead by the wife; in other words, that by reason of the manner in which the property was obtained, it was impressed with a trust in favor of plaintiff. Conceding, upon the facts stated, plaintiff might have brought an equitable action to impress a trust upon the property or to have a lien declared thereon, and thus have obtained relief, she chose instead to sue at law for a money judgment. Having elected to pursue this course, we are unable to perceive that she has any greater or different rights with reference to the property than any other general judgment creditor of Bonney. The case presented is almost identical with that of Hanly v. Kelly, 62 Cal. 155, wherein it was said:

"Under such circumstances, plaintiff must be held to have elected his remedy at law, and to be estopped from pursuing in equity the fund into the homestead."

To the same effect is Barker v. Barker, 14 Wis. 142; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198; and Harding v. Atlantic Trust Co., 26 Wash. 536, 67 Pac. 222. Section 1240, Civil Code, provides that "the homestead is exempt from execution or forced sale, except as in this title provided," and section 1241 designates the circumstances which must exist in order to render a homestead subject to execution or forced sale in satisfaction of judgments obtained. The sale sought of the property is under an execution issued upon a general judgment, and, as stated, plaintiff's rights with reference to the homestead in no wise differ from the rights of any other general judgment creditor. Under the doctrine of election, she chose to assert her rights in an action for damages against defendant Bonney, thus electing to enforce her claim generally against his property, and is now estopped from again, upon the same facts, asking for equitable relief. In Fitzell v. Leaky, supra, the Supreme Court says:

"It (the homestead) is not invalid because made during the progress of litigation, which subsequently results in an ordinary money judgment against the homesteader, or because made at any time before the entry and docketing of such a judgment. The law authorizes a debtor to erect a barrier around the home, over which the sheriff, although armed with final process under such a judgment, cannot pass. With the policy of the law, or the abstract morality of a particular transaction, we have nothing to do. The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead."

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

28 Cal. App. 777

TINGEY v. CALLAHAN CONST. CO.

(Civ. 1761.)

(District Court of Appeal, Second District, California. Nov. 13, 1915.)

1. APPEAL AND ERROR ⊂=874—RESERVATION OF GROUNDS OF REVIEW—NECESSITY FOR APPEAL.

Where no appeal was taken from the judgment, orders overruling a demurrer to an amended complaint and denying a motion to strike out portions thereof, will not be considered on appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3478, 3480, 3481, 3484, 3530–3540; Dec. Dig. ⊂=874.]

2. APPEAL AND ERROR ⊂=548 — RESERVATION OF GROUNDS OF REVIEW — OBJECTION TO EVIDENCE—SPECIFICATION.

Where various exceptions were taken to the introduction of testimony, which were again urged in the briefs on appeal, the general point being made that the evidence heard was insufficient to sustain the findings, the bill of exceptions containing no particular specification pointing out the weakness of the testimony as to any of the facts in issue, the question of the propriety of the evidence was not presented where there was sufficient evidence, unchallenged, to support the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433–2440; Dec. Dig. ⊂=548.]

3. APPEAL AND ERROR ⊂=1050—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.

Errors in receiving testimony cannot be deemed to have been prejudicial to defendant when, disregarding the incompetent matter, enough remains in the record to sustain the cause of action as alleged in the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⊂=1050.]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by C. H. Tingey against the Callahan Construction Company. Judgment for plaintiff, and from an order denying its motion for new trial defendant appeals, presenting the appeal upon a bill of exceptions. Order denying motion for new trial affirmed.

A. J. Morganstern, of San Diego, for appellant. Crouch & Harris, of San Diego, for respondent.

JAMES, J. Judgment was awarded plaintiff in this action. The defendant appealed from an order made denying its motion for a new trial and presents the appeal upon a bill of exceptions.

[1] The action was based upon a contract whereby plaintiff's assignor agreed with the defendant to do certain excavating and grading work for a specified sum per cubic yard. The cause of action was stated in brief form, it not appearing from the allegations thereof whether the contract sued upon was written or oral. The defendant by its answer, after denying that plaintiff's assignor had performed the work described in the complaint, alleged that the contractual relation between the parties depended upon a writing which was set up as an exhibit attached to the answer. In the course of the trial plaintiff was allowed leave to amend his complaint by incorporating therein the written contract as alleged by the defendant, and alleging other facts showing that the oral agreement under which the work was commenced was incorporated in the writing which was signed at a later date, but before the alleged completion of the work; that at the time the preliminary negotiations were closed it was agreed that the contract should be reduced to writing; and that the delay occasioned in that regard was because of the failure of the defendant to prepare the writing. There was a demurrer to this amended complaint and a motion to strike out portions thereof. However, these points cannot be considered, as no appeal was taken from the judgment. Under our practice the taking of such an appeal is necessary before questions of the kind suggested would be presented for review. See Stewart v. Stewart, 156 Cal. 651, 105 Pac. 955, and cases therein cited.

[2, 3] At the trial various exceptions were taken to the introduction of testimony, which objections are again urged in the briefs of counsel on this appeal. The general point is made that the evidence heard was insufficient to sustain the findings of the court. In the bill of exceptions there is no particular specification, as is required, which points out the weakness of the testimony as to any of the facts in issue. The objection that a sufficient specification is lacking is not answered by saying that it is the claim of appellant that there is no evidence upon which to sustain the decision of the trial court, for there is evidence as to the making of the contract and the entering upon the work, which stands undisputed and unchallenged. We may say that there is some evidence shown in the record to sustain all of the findings of the trial judge. The defendant offered no testimony whatsoever in opposition to the case presented by the plaintiff. An examination of the evidence, as the bill of exceptions presents it, shows, we think, sufficiently that the claim of the plaintiff was just and that he was entitled to enforce his demand. Any errors committed by the court in receiving testimony cannot be deemed to have been prejudicial to defendant's right to a fair trial, when, disregarding the incompetent matter, enough remains in the record, as we conclude there does, to sustain the cause of action as alleged in the amended complaint. In other words, it is not shown in this case that there has been a miscarriage of justice within the meaning of the constitutional amendment.

The order denying the motion for a new trial is affirmed.

We concur: CONREY, P. J.; SHAW, J.

28 Cal. App. 774

PEOPLE v. RIVERA. (Cr. 390.)

(District Court of Appeal, Second District, California. Nov. 12, 1915.)

1. LARCENY ⊂⊃55—EVIDENCE—SUFFICIENCY. In a prosecution for cattle theft, evidence *held* insufficient to warrant conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167–169; Dec. Dig. ⊂⊃55.]

2. CRIMINAL LAW ⊂⊃1036—APPEAL—OBJECTIONS BELOW—NECESSITY. Error cannot be predicated on the admission of evidence not objected to below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631–1640, 2639–2641; Dec. Dig. ⊂⊃1036.]

3. CRIMINAL LAW ⊂⊃829 — EVIDENCE — INSTRUCTION. The refusal of requests covered by the charges given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂⊃829.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Joe Rivera was convicted of grand larceny, and, from the judgment of conviction and an order denying new trial, he appeals. Affirmed.

H. A. Pierce, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant, together with Bert Rivera and John Cassou, was charged with having committed the crime of grand larceny by stealing a heifer belonging to Elias Munz. The theft of the animal was claimed to have been committed in the cattle-raising district of Los Angeles county, near Elizabeth Lake. Appellant was convicted of the charge and sentenced to serve a term of imprisonment in the state prison. He appealed from an order denying a motion for a new trial and from the judgment.

[1] As a principal contention involved in a consideration of the appeal is that the evidence was insufficient to warrant the jury in finding a verdict of guilty, it will be proper to review briefly the testimony introduced by the prosecution as the typewritten record shows it: At the time of the alleged theft appellant resided at a ranch which appears to have been owned or controlled by his brother and codefendant. Several miles away was the ranch of complainant Munz. Shortly before the 20th of April, 1914, Munz drove two cows, or rather a black cow and the heifer which was alleged to have been stolen, onto a nearby range, where they were left in charge of one Babcock. They were then upon an open range, and at about the 20th of April they had come down near to Babcock's house, and he drove them back into the hills where there was a small canyon and a spring of water. This point where he left them was approximately between 6½ and 8 miles from the Rivera ranch. Immediately after the 20th of April Babcock missed the two animals hereinbefore referred to which belonged to Munz. Munz, being informed of their absence, began a search in an endeavor to locate the animals. He went down upon the Rivera ranch and was proceeding, with the aid of a neighbor, to search in a thicket of willows that grew there. While so engaged, Joe Rivera, the appellant here, came hastily down to where the men were, appearing in an excited state. He cursed Munz and told him to "get off the place" and not to search there without a search warrant. Munz deemed it best to follow the advice of Rivera and proceeded at once to Lancaster, which was 20 miles away, where he procured a search warrant and came back and resumed the search. It was observed that a pathway which led into the thicket of willows had been covered with leaves (apparently for the purpose of giving it the appearance of not having been disturbed). Following this pathway into the thicket, Munz and his companion found evidences that something had been buried there, and they soon unearthed what appeared to them to be the entrails of two cows, the remains of an unborn calf, together with a cow's head. This cow's head bore a resemblance to the head of the larger cow which had been taken from Babcock's range. Shortly thereafter another neighbor, who was about to embark with his boat on the body of water known as Elizabeth Lake, noticed a gunny sack close to the shore and he took possession of it. In this sack was a hide, evidently that of a cow. Later another hide was found in a similar sack at the bottom of the lake near the shore. These hides were exhibited to Munz, who identified them, not only on account of the color of the hair which appeared clinging thereto, but because also of the fact that a brand appeared on the hides which he identified as being his own and one which his family used in marking their cattle. Munz testified that the brand on the younger animal had only been placed there about two months prior to the time of its disappearance. Witness Chandler was the keeper of a hotel at the town of Elizabeth Lake, which was about 2½ miles northeast from the ranch of appellant. Chandler testified that on the night of the 20th of April, 1914, John Cassou came into his place, asking if there were any cows in the yard. It was about 8 or 8:30 o'clock in the evening and very dark and cloudy; a rain was threatening. Chandler testified that he took two lanterns and went out into the yard, and that he there saw a young cow or heifer of a fawn color, and also a big dark-colored cow. (The heifer which Munz claimed to have been stolen from him by appellant was a light-colored Jersey heifer.) Witness Lindstrum was a next-door neighbor of Chandler's and as Chandler went out that night into his

yard he first called to Lindstrum. Lindstrum heard the call, but did not go farther than his front gate. Cassou drove the animals out of Chandler's yard and left the place. Lindstrum testified that, when he came to his front gate in answer to Chandler's call, Joe Rivera, the appellant, was there seated upon a horse; that they exchanged greetings; that Rivera continued on his way; and that there was the noise of something proceeding ahead of him. Witness Andrade, who lived about one mile from the Riveras, on the same night and at a time not far from that mentioned by Chandler in his testimony, hearing the barking of a dog, went out into his front yard and there saw this appellant and Cassou driving two cows. The animals had stopped at a watering trough that stood by the roadside. At a later date a man named Burns shipped a carcass of beef to Lapham, a butcher at Lancaster. The witness Andrade testified that some time after the alleged theft of the heifer he was present when Harry Burns reported to appellant that "they" had found the hides in the lake, and that Rivera had replied to him, "They won't know who put them there, anyhow." In the face of this testimony, the claim that there was a lack of sufficient evidence to warrant the jury in convicting impresses us with but little force. We think that, upon the state of facts as the testimony for the prosecution presented them, there was ample evidence to show the commission of the crime alleged and the participation of this appellant in it. It is said by counsel in the briefs that it is altogether improbable that Joe Rivera and John Cassou could have driven the cattle from the place where Babcock left them, a distance of seven or eight miles, within the period of time from sunset or thereabouts until they were seen at Chandler's and Andrade's places. The witnesses in this case, as is usual in courtroom experience, did not attempt to state the time exactly, and, even though they had, the question as to the probability of the cattle having been driven the distance mentioned was one peculiarly for the jury to pass upon. No such state of improbability is presented by the evidence as to warrant this court in interfering with the verdict on that ground.

[2] We find it urged also in the brief of appellant that the court improperly allowed testimony of the selling of the carcass of an animal or animals by Burns to Lapham. We find that objection was made to but little of this testimony, and that the main facts of the occurrence adverted to were given without any protest being heard from the appellant.

[3] Some complaint is made on account of the refusal of the court to give certain instructions offered by the appellant. Those instructions, in so far as they may be said to have correctly stated the law, were pointed to the purpose only of emphasizing and laying stress upon matters which were, by other instructions given by the court, very fully stated to the jury.

We have given no attention to claims for error which are not supported by argument in the briefs. It seems clear enough that on the merits the case against appellant was fairly presented, and that no error was committed which may be said to have produced a miscarriage of justice.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(28 Cal. A. 786)

POLLOK v. EVENING HERALD PUB. CO.

(Civ. 1774.)

(District Court of Appeal, Second District, California. Nov. 13, 1915.)

1. LIBEL AND SLANDER ⟸86—WORDS NOT ACTIONABLE PER SE—INNUENDO.

Where defendant published an article saying that plaintiff's theater manager was guilty of immoral conduct, the charge specifically mentioning the name of the theater, but not specifically referring to the plaintiff, nor susceptible of a meaning injurious to him; the words were not actionable, since the innuendo could not supply to them a meaning which they of themselves did not contain.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205–208; Dec. Dig. ⟸86.]

2. LIBEL AND SLANDER ⟸32 — GENERAL DAMAGE—WORDS NOT LIBELOUS PER SE.

Where the words used were not libelous per se, merely alleging that the manager of the plaintiff's theater was guilty of immoral conduct, no general damage could be shown, since the injury suffered, if at all, was due to the extrinsic circumstances set forth by way of innuendo.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 112; Dec. Dig. ⟸32.]

3. LIBEL AND SLANDER ⟸89 — WORDS ACTIONABLE—WORDS NOT LIBELOUS PER SE.

Where an alleged libelous article merely alleged that the manager of plaintiff's theater was guilty of immoral conduct, but made no specific reference to the plaintiff, and the complaint failed to charge any special damage, such as loss of patronage at the theater, no recovery could be had, since special damage must be shown to warrant recovery for words not actionable per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 213, 214; Dec. Dig. ⟸89.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Fred A. Pollok against the Evening Herald Publishing Company, a corporation. From a judgment for defendant upon an order sustaining his demurrer to the third amended complaint, plaintiff appeals. Affirmed.

Jesse A. Gyger and Wesley H. Beach, both of Los Angeles, for appellant. Denis & Loewenthal, of Los Angeles, for respondent.

SHAW, J. Action for libel. Plaintiff prosecutes this appeal from a judgment rendered in favor of defendant upon an order of court sustaining the latter's demurrer, both general and special, interposed to the third amended complaint.

It appears from the complaint that on October 21, 1912, plaintiff became the lessee and manager of a place of amusement in the city of Los Angeles, known as the Princess Theater; that at that time defendant was a corporation engaged in the publication of a newspaper of general circulation, known as the Los Angeles Evening Herald; that on November 14, 1912, defendant published in the regular issue of said newspaper an article as follows:

"Theater Manager Accused in Court. Girl Says George E. Ryan Forced Her to Accept His Attentions.

"May Thomas, whose stage name is Ladene Earl, who several days ago swore to an affidavit charging Guy Eddie, city prosecuting attorney, with forcing his attentions upon her, appeared in Judge Wilbur's court this morning as prosecuting witness against George E. Ryan, manager of the Princess Theater.

"According to the testimony of Miss Thomas, Ryan contributed to her delinquency. She stated that she was employed by Ryan as a chorus girl at the Princess and that two days after she went to work he told her that she would be discharged unless she accepted his attentions. She also stated that he promised her a raise in salary provided she would look with favor upon his advances.

"According to Deputy District Attorney H. S. G. McCartney, Ryan has made a business of forcing his attentions upon girls working in the chorus. He avers that when Ryan's trial is called he will produce at least six girls who have complained to him of Ryan's treatment."

By way of innuendo, it is then alleged that by the publication of said article defendant intended to and did charge, and by the readers of said paper was understood as charging, that Ryan was the manager of said theater at the time of the publication of the article, to wit, November 14, 1912, and that Ryan was and had been for some time, as such manager, in the employ of plaintiff, who had allowed him as his agent to employ chorus girls in said theater, and that plaintiff had allowed said Ryan to act in an indecent, outrageous, and criminal manner in the course of the performance of his duties as plaintiff's manager, and that plaintiff was a person of low character, and allowed his business to be operated in a low and criminal manner. It is further alleged that plaintiff had never employed Ryan in any capacity, and that at no time subsequent to said October 21, 1912, when plaintiff acquired the Princess Theater, had Ryan been manager thereof; that said publication, as understood by the general public and by defendant intended to be understood, exposed plaintiff to hatred, contempt, and ridicule by imputing to him a low and base character similar to that of an owner of a brothel; "that by reason of the publication aforesaid plaintiff was thereby injured in his theatrical business to his damage in the sum of $15,000."

[1] It must be conceded that as to plaintiff, to whom the article made no reference, the language thereof is not actionable per se. Recognizing this fact, plaintiff seeks, by way of innuendo, to show that by the article defendant intended, and was understood to intend and mean, to charge him in effect with being an accomplice of Ryan in the commission of the misdeeds imputed to the latter. From no angle, in our opinion, is the language used susceptible of such meaning or application. As said by Lord Kenyon in a very early case:

"The injury is much too remote to be the foundation of an action." Ashley v. Harrison, 1 Esp. 48.

"If the words before the innuendo do not sound in slander, no meaning produced by the innuendo will make the action maintainable, for it is not the nature of an innuendo to beget an action." Grand v. Dreyfus, 122 Cal. 58, 54 Pac. 389.

While it may serve to point a meaning to precedent matter, it can never be resorted to for the purpose of establishing a new charge. At most, the article erroneously describes Ryan's calling as manager of the Princess Theater. Quoting from Odgers on Libel and Slander (5th Ed.) p. 134, it is said:

"Where the words can bear but one meaning, and that is obviously not defamatory, then no innuendo or other allegation on the pleadings can make the words defamatory. * * * No parol evidence is admissible to explain the meaning of ordinary English words, in the absence of any evidence to show that in the case before the court the words do not bear their usual signification."

[2] Moreover, while it is alleged that the article was published for the purpose of and did damage plaintiff and injure him in his business and calling, the article itself makes it apparent that no general damage could have been sustained. This for the reason that, as stated, the language used was not libelous per se, the alleged injury suffered being due solely to the extrinsic circumstances set forth by way of innuendo.

[3] It appears to be the rule that "in order to maintain an action upon words which are not libelous * * * per se, the plaintiff must have suffered some special damage, and the recovery is limited to compensation therefor." 18 Am. & Eng. Ency. of Law, p. 1085; Harris v. Burley, 8 N. H. 216; Hirshfield v. Bank, 83 Tex. 452, 18 S. W. 743, 15 L. R. A. 639, 29 Am. St. Rep. 660. Such damage might be predicated upon the loss of patronage and attendance upon entertainments given by him at the Princess Theater. There is nothing in the complaint, however, showing any falling off in such attendance, nor any allegations upon which special damages could be predicated. Our conclusion is that, since the article was not libelous in itself, no recovery could be had thereon for the general damages prayed for; and, while plaintiff might have alleged facts upon which to base a claim for special damage, no such averments were made, and therefore the complaint states no cause of action for the re-

covery of such damage. Newbold v. Bradstreet & Son Co., 57 Md. 38, 40 Am. Rep. 426; Woodruff v. Bradstreet Co., 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555; Wilson v. Fitch, 41 Cal. 386; Harris v. Burley, supra; Dun v. Maier, 82 Fed. 169, 27 C. C. A. 100.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

28 Cal. App. 784

NEWELL v. NEWELL. (Civ. 1537.)

(District Court of Appeal, Second District, California. Nov. 13, 1915.)

1. DIVORCE ⟸255—ALIMONY—DECREE.

Where the complaint of plaintiff wife suing for divorce alleged that she and defendant had contracted to settle their property rights, whereby defendant agreed to pay plaintiff, as alimony, the sum of $75 per month during her life, or until she should remarry, praying that defendant be required to pay plaintiff such sum, a decree ordering that defendant pay such sum monthly, until the further order of the court, for the support of the plaintiff, was not open to attack on the ground that the relief granted was without the issues tendered and prayed for.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 722–724; Dec. Dig. ⟸255.]

2. DIVORCE ⟸240—ALIMONY—DECREE.

Where plaintiff wife, suing for divorce, alleged a contract settling the property rights of the parties, whereby the husband agreed to pay $75 a month alimony, praying that he be required to pay her that sum monthly as alimony, the decree ordering that defendant pay $75 per month until the further order of the court, the amount to be for the maintenance and support of plaintiff, even if defendant were bound both by the order and the agreement to pay the amount, so that upon default plaintiff might have concurrent remedies in enforcing payment, the decree was not improper as effectuating a double award.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675–678, 680; Dec. Dig. ⟸240.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action for divorce by Kate Elizabeth Newell against William D. Newell. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Weller, of Los Angeles, for appellant. K. B. Campbell, of Los Angeles, for respondent.

SHAW, J. [1, 2] This was an action for divorce. In addition to the grounds therefor, plaintiff alleged that she and defendant had entered into a contract in writing whereby they had settled and adjusted all their property rights, making a division of all community property belonging to them, and whereby, among other things, defendant agreed to pay plaintiff as alimony the sum of $75 per month during her life, or until she should remarry. The prayer of the complaint was:

"That the bonds of matrimony heretofore and now existing between herself and defendant be dissolved, and that defendant be required to pay to the plaintiff the sum of $75 on the first day of each and every month during her life, or until she shall remarry."

To this complaint defendant made default, and upon the trial of the case the court found:

"That a divorce ought to be granted as prayed for in said complaint, and that the defendant pay $75 per month for the support and maintenance of plaintiff as hereinafter directed."

The appeal is prosecuted from that part of the decree wherein:

It is "ordered and decreed that defendant William D. Newell pay to plaintiff on the first day of each and every month, beginning on the 15th day of November, 1912, the sum of $75 per month, until the further order of this court; the said sum of $75 to be for the maintenance and support of plaintiff, Kate Elizabeth Newell."

As we gather from appellant's argument, his contention is that the court went outside of the complaint and beyond the allegations thereof in ordering that defendant pay alimony to plaintiff; that, since the complaint alleged an agreement for a division of the community property and under which defendant had agreed to pay plaintiff the sum of $75 per month as alimony, the effect of the decree is to require defendant to pay the $75 per month alimony as ordered by the court, leaving him bound under his contract with plaintiff to pay her an additional $75 month, making in all $150 per month. The prayer of the complaint was that defendant be required to pay plaintiff the sum of $75 per month alimony, and the decree and order are in strict accordance with the prayer of the complaint. Defendant therefore had due notice of the specific relief demanded by plaintiff, and hence, since the complaint alleged his agreement to pay the same, cannot say the relief granted was without the issues tendered and prayed for. Nor do we see any merit in the contention of appellant to the effect that he is bound by his contract to pay $75 per month as alimony, and also bound by the decree to pay an additional $75 as alimony. Conceding that he may be bound by both the order and agreement to pay said sum, and upon default plaintiff might have concurrent remedies in enforcing payment, nevertheless the payment of $75 per month would not only satisfy his obligation existing by virtue of the agreement made with plaintiff, but at the same time satisfy the obligation imposed upon him by the order and decree made in accordance with the terms of the agreement and pursuant to the prayer of the complaint.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

28 Cal. App. 792

PEOPLE v. CANFIELD. (Cr. 415.)

(District Court of Appeal, Second District, California. Nov. 15, 1915.)

1. FALSE PRETENSES ⟸31 — INDICTMENT — SUFFICIENCY—STATUTE.

Under Pen. Code, § 952, requiring a statement of the particular circumstances of the offense when they are necessary to constitute an offense, where an indictment for obtaining money by false pretenses described no natural or causal connection between the false representations alleged and the delivery of the property to defendant, such indictment was demurrable, since an indictment for the offense must show that the property was obtained by means of the false pretenses alleged, so that, when no natural connection appears between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 38–41; Dec. Dig. ⟸31.]

2. FALSE PRETENSES ⟸31 — INDICTMENT — SUFICIENCY.

There may be averments in an indictment for obtaining money by false pretenses from which the connection between the pretense and the obtaining of the property can be inferred, so that the indictment is sufficient without direct averment of the connection.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 38–41; Dec. Dig. ⟸31.]

3. INDICTMENT AND INFORMATION ⟸60 — NECESSARY CONTENT.

An indictment or information must set forth all the facts and circumstances necessary to constitute the crime sought to be charged, as such matters cannot rest in presumption.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. ⟸60.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Leonard C. Canfield was indicted for obtaining money by false pretenses, and from a judgment sustaining his demurrer, the people appeal. Affirmed.

U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Tracy C. Becker, Deputy Dist. Atty., of Los Angeles, for the People. Paul W. Schenck, of Los Angeles, for respondent.

SHAW, J. Defendant was indicted for obtaining money by false pretenses. His demurrer, interposed upon both general and special grounds, was sustained, and from the judgment following such ruling, the people appeal.

The indictment is quite lengthy; the substance thereof being that defendant, with intent to defraud Caroline Schertz, Flora B. Schertz, Ernest H. Lockwood, and Title Insurance & Trust Company, a corporation, out of their, and each of their, money, represented that he was Helmer E. Rabild, the owner and legal holder of a certain promissory note of the face value of $10,000, made by one Justin E. Cook to him, said Helmer E. Rabild, payment of which was secured by a mortgage duly executed by said Cook upon certain real estate in Los Angeles county, which real estate it was represented had been conveyed to one Earl M. McLaughlin, and that $7,000 had been paid upon the principal of said note, and $350 paid on account of interest accrued thereon, all of which representations so made to said persons, it is alleged, were at the time made, false, and known by defendant to be false and untrue; "that by reason of the aforesaid false and fraudulent representations and pretenses, so made as aforesaid by the said Leonard C. Canfield to the said Caroline Schertz, Flora B. Schertz, Ernest H. Lockwood, and the Title Insurance & Trust Company, a body corporate, the said Caroline Schertz, Flora B. Schertz, Ernest H. Lockwood, and the Title Insurance & Trust Company, a body corporate, relying upon the said false representations and pretenses, and believing same, were thereby induced to, and on the 3d day of September, 1914, did, at and in the county of Los Angeles aforesaid, pay over and deliver to the said defendant, Leonard C. Canfield, $2,739.20 lawful money of the United States of the moneys and personal property of them, the said Caroline Schertz, Flora B. Schertz, Ernest H. Lockwood, and the Title Insurance & Trust Company, a body corporate, and they were and each of them was thereby then and there defrauded out of said sum of $2,739.20 of the personal property" of said persons.

[1] In addition to the general demurrer, it was also alleged that the indictment did not conform to the requirements of sections 950, 951, and 952 of the Penal Code, and that it was not direct and certain, in that it could not "be determined what, if any, causal connection there is or was between the alleged false representation, and the parting with money by any one, if any was parted with." It appears the trial court deemed the indictment obnoxious to the ground last stated. In thus sustaining the demurrer the court followed the case of People v. Kahler, 26 Cal. App. 449, 147 Pac. 228, wherein this court, in discussing a like objection urged against an information, said:

"It is merely alleged that defendant, knowing the same to be untrue, falsely represented to Richard J. Cogan that he had contracts for furnishing orchestras to certain cafés and theaters; that Cogan, believing the representations to be true, and relying thereon, paid and delivered to defendant the sum of $75. For what purpose is not disclosed. Conceding the representation made by defendant to have been false, there is no causal connection between the payment of the money and the representation. * * * We are unable to perceive any connection between the alleged false representation and the paying or giving to defendant the $75, nor how, in the absence of further allegations, such representations should have been induced, or were calculated to induce, Cogan to pay defendant $75 in money."

We deem the language there used likewise appliable here. For aught that appears to the contrary, defendant retained and still holds the note. Then for what purpose was

the money paid over and delivered to him? It is left entirely to conjecture. In the absence of any allegation to that effect, we cannot assume the prosecuting witnesses were, by reason of the false representations, induced to pay their money to defendant in consideration of a transfer by him to them of this promissory note and mortgage. Conceding the representations were, as believed, all true, why should they induce these persons to give their money to Rabild? That they delivered the money to him relying upon the representation that he was Rabild is as inconceivable as that they should have paid it to him because of a false representation that he was Dr. Cook and had been to the north pole.

"The indictment must show that the property was obtained by means of the false pretense alleged. Accordingly, when there appears to be no natural connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged." 19 Cyc. 429; People v. White, 7 Cal. App. 99, 93 Pac. 683.

In the absence of an allegation showing that the prosecutors were induced to purchase the note and mortgage or lend money thereon, there appears to be no natural connection between the false representations and the delivery of the property to defendant.

[2] While such facts should be directly pleaded, nevertheless there may be averments from which the connection between the pretense and the obtaining of the property can be inferred, as in the case of People v. Donaldson, 70 Cal. 116, 11 Pac. 681; where the defendant was charged with false pretenses in obtaining from one Spence certain hogs by falsely pretending to Spence that he, the defendant, had in bank a certain sum of money for which he delivered to Spence his check. So, in the case of People v. Haas, 151 Pac. 672, recently decided by this court, and wherein the court, through Mr. Justice James, distinguished the facts therein from those in the Kahler Case, an examination of the information upon which Haas was prosecuted exhibits facts from which the court was fairly justified in inferring that the money of the prosecuting witness was, by reason of the false pretenses, paid over to defendant, in consideration of a transfer to her of certain property alleged to be owned by Haas. In the case of People v. Hines, 5 Cal. App. 122, 89 Pac. 858, cited by appellant, the information, by indirect allegations, disclosed the money of the prosecuting witness was paid over to defendant in consideration of a conveyance of property which he represented he owned.

[3] It is a well-settled rule that an indictment or information must set forth all the facts and circumstances necessary to constitute the crime sought to be charged. In the absence of such allegations, or statements from which such facts may be fairly deduced, the court cannot indulge in the presumption that acts were committed which constitute a crime. The prosecuting witnesses herein may by reason of such representations have been induced to pay the money over to defendant as a contribution to some charitable object, in which case we do not mean to say it would not constitute the offense charged. Section 952, Penal Code, requires a statement of the particular circumstances of the offense when they are necessary to constitute a complete offense. Measured by this provision, the indictment is insufficient, since it fails to disclose any natural or causal connection between the false representations alleged and the delivery of the property to defendant.

The judgment and order from which the appeal is prosecuted are affirmed.

We concur: CONREY, P. J.; JAMES, J.

(28 Cal. A. 766)

PEOPLE v. TURNER. (Cr. 592.)

(District Court of Appeal, First District, California. Nov. 12, 1915.)

1. CRIMINAL LAW ⇐1186—APPEAL AND ERROR—HARMLESS ERROR—STATUTE.

Under Const. art. 6, § 4½, providing that no judgment shall be set aside in any criminal case unless the court shall be of opinion that the error complained of resulted in a miscarriage of justice, in a prosecution for libel, where, at the conclusion of the preliminary hearing, the magistrate merely announced and caused to be entered in his docket, without signing it, an order that the defendant should be held to answer in the superior court to a charge of libel, fixing his bail, in contravention of Pen. Code, § 872, providing that, if it appears on examination that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty, the magistrate must make or indorse on the complaint an order signed by him to that effect, it not appearing that defendant was injured by the failure of the magistrate to make the required indorsement upon the complaint before the information was filed, judgment of conviction after fair trial will not be set aside for the omission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. ⇐1186.]

2. LIBEL AND SLANDER ⇐145 — CRIMINAL PROSECUTION—STATUTE—"LIBEL."

Under Pen. Code, § 248, declaring that a libel is a malicious defamation, expressed by printing, tending to impeach the honesty, integrity, virtue, or reputation of one, and thereby expose him to public hatred, contempt, or ridicule, where a newspaper proprietor published an oath alleged to be required of all fourth degree members of a fraternal association, which oath was of such a character as to impeach the members' loyalty as citizens, though not directly impeaching their honesty and integrity, he was guilty of libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 404; Dec. Dig. ⇐145.

For other definitions, see Words and Phrases, First and Second Series, Libel.]

3. LIBEL AND SLANDER ⇐145 — CRIMINAL PROSECUTION — LIBEL UPON MEMBERS OF FRATERNAL ORDER.

Where a newspaper proprietor published a libel in the form of an oath alleged to be

required of fourth degree members of a fraternal organization, although the publication was intended to apply only to persons who were candidates for public office at the time, it was libelous as to all members of the order of the degree named, since a libel may be upon a class of persons if the tendency of the publication is to stir up riot and disorder.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 404; Dec. Dig. ⟸145.]

4. Criminal Law ⟸824 — Trial—Instructions—Requests.

In a prosecution for libel, where no instruction was requested or given on the subject of privileged communication, the omission to specifically instruct the jury as to defendant's contention that, since his publication related to an election, it was privileged under Pen. Code, § 256, was not ground for reversal, since, as the jury are judges of both the law and the facts in criminal libel cases, the defendant should have requested a specific instruction if he desired to have the jury more directly advised as to his contention in regard to privilege than it was by the evidence or argument of counsel.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ⟸824.]

5. Libel and Slander ⟸148 — Criminal Prosecution—Privilege—Libel of Candidate for Office—Statute.

Pen. Code, § 256, providing that a communication made to a person interested in the communication by one who was also interested, or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication, did not render privileged a libelous publication in a newspaper impeaching the loyalty of citizens who were candidates for public office, since a candidate for office is as much entitled to protection from defamation as any other citizen, and a public journal or individual who indulges in defamatory assertions in respect to him is equally responsible for his acts with those committing the same offense against private individuals.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 407–411; Dec. Dig. ⟸148.]

6. Criminal Law ⟸1166½ — Appeal and Error — Harmless Error — Remark of Court.

In a prosecution for libel, where the court, in the presence of the jury, stated that the publication might fairly be interpreted to state that all persons admitted to the fourth degree of a fraternal order had taken the published oath, which was libelous, and then explained to the jury that the remarks were not directed to them, but solely to counsel incidentally to the denial of a motion to dismiss, repeatedly admonishing the jury thereafter that they were not in any way to be influenced in reaching their verdict by the court's observations, that they were the sole judges of the facts, and that the interpretation of the language of the publication was a matter for them, the error in the court's statement was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114–3123; Dec. Dig. ⟸1166½.]

Appeal from Superior Court, Santa Cruz County; W. A. Beasly, Judge.

Henry S. Turner was convicted of libel, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Ralph H. Smith, of Santa Cruz, and Aaron L. Sapiro, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged by information with the crime of libel, and was tried and convicted. This appeal is from the judgment of conviction, and from an order denying defendant's motion for a new trial.

Upon his arraignment the defendant moved the court to set aside the information upon the ground that he had not been legally committed for trial by a magistrate. The motion was denied. Such denial is the first of the grounds urged by the appellant for the reversal of the judgment.

[1] Section 872 of the Penal Code provides that, if it appears upon an examination that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty thereof, the magistrate must make or indorse on the complaint an order, signed by him, to that effect. Under the authorities, in so far as the section requires that the order shall be indorsed upon the complaint, it may be regarded as directory; and it is sufficient if the indorsement be reduced to writing and signed by the magistrate and entered upon his official docket, or upon the complaint or deposition. People v. Tarbox, 115 Cal. 57, 46 Pac. 896; People v. Wilson, 93 Cal. 377, 28 Pac. 1061. In this case the order of commitment was neither indorsed upon the complaint or deposition, nor was the entry of such order in the magistrate's docket, made by his stenographer, signed by the magistrate until after the motion to dismiss the information was filed. In other words, the record discloses that prior to the filing of the motion the magistrate did nothing more at the conclusion of the preliminary hearing than to announce and cause to be entered in his docket an order that the defendant should be held to answer in the superior court to a charge of libel, and fixing the bail.

While it is no doubt true that the terms of section 872 of the Penal Code should be complied with before the district attorney is warranted in filing an information against a person, still it does not appear that the defendant was deprived of any substantial right by reason of the omission of the magistrate. If the motion had been granted, another preliminary examination could have been held under the provisions of sections 997–999 of the Penal Code (Ex parte Baker, 88 Cal. 84, 25 Pac. 966; People v. Breen, 130 Cal. 72, 62 Pac. 408), wherein the omission now complained of could have been supplied. Under the provisions of section 4½, art. 6, of the Constitution, it not appearing that the defendant was injured by the failure of the magistrate to make the required indorsement

upon the complaint before the information was filed, we cannot now, after a fair trial, set aside the judgment of conviction because of such omission.

[2] Defendant demurred to the information on the ground that it did not state facts sufficient to constitute a public offense. The demurrer was overruled, and he now challenges the correctness of such ruling.

The question presented is whether or not the publication complained of comes within the definition of the offense found in section 248 of the Penal Code. That section, in so far as it is pertinent to the offense here involved, declares:

"A libel is a malicious defamation, expressed * * * by * * * printing * * * tending * * * to impeach the honesty, integrity, virtue, or reputation * * * of one * * * and thereby expose him to public hatred, contempt or ridicule."

The information charges that the defendant, the proprietor and publisher of a certain newspaper called the "World-Issue," committed the crime of libel, in that on the 22d day of August, 1914, he unlawfully and wrongfully caused to be printed and published in said paper in Santa Cruz county, of and concerning the prosecuting witnesses, who lived in that county, and who were members of the fourth degree of that certain fraternal organization known and called the Knights of Columbus, the following article:

"Can you vote for a man for public office who subscribes to the following?

"Knights of Columbus Oath.

"(Extracts—4th Degree.)

"'I do now denounce and disown any allegiance as due to any heretical king, prince or state, named Protestant or Liberals, or obedience to any of their laws, magistrates or officers.

"'I do further promise and declare that I will have no opinion or will of my own or any mental reservation whatsoever, even as a corpse or cadaver (perinde ac cadaver), but will unhesitatingly obey each and every command that I may receive from my superiors in the militia of the Pope and of Jesus Christ.

"'That I will in voting always vote for a Knight of Columbus in preference to a Protestant—especially a Mason—and that I will leave my party to do so; that if two Catholics are on the ticket I will satisfy myself which is the better supporter of Mother Church and vote accordingly.

"'That I will not deal with or employ a Protestant if in my power to deal with or employ a Catholic. That I will place Catholic girls in Protestant families of the heretics.

"'That I will provide myself with arms and ammunition that I may be in readiness when the word is passed, or I am commanded to defend the church as an individual or with the militia of the Pope.'

"To the quiet, law-abiding, liberty-loving American citizen it is almost unbelievable that any fellow citizen or body of them can seriously undertake or hope to overthrow our present form of government and replace it with an absolute monarchy. It is still more unbelievable that such a proposed monarchy should be dominated by a foreigner, and that such a change be brought about under the guise of religion. Yet if such a citizen will but open his eyes to the condition existing under his very eyes, and open his ears to the open, avowed purpose of the Roman Catholic Church, he will no longer rest easily in his present peaceful slumber."

It would seem that a mere statement of the published oath, coupled with an averment that it was false and malicious, would by sufficient to bring the publication within the terms of section 248 of the Penal Code. It would be a severe reflection upon the condition of the law of libel if it permitted to go uncondemned the publication of articles such as this, if false. It is clear that the published oath, if believed by the community to be taken by the members of the fourth degree of the Knights of Columbus, would have a tendency to expose those persons to hatred, contempt, or ridicule. While the publication may not, as claimed by the defendant, directly impeach their honesty and integrity, it does in a most direct and vital way assail their loyalty as citizens by charging them with the taking of an obligation which is in itself a violation of their oath of allegiance and of the essential duties and bonds of American citizenship, and thus in a general sense impeaches their reputations, and exposes them to those attitudes of public feeling described in the section of the Penal Code.

[3] At the time of the publication of the article in question it appears from the record that there was a political campaign in progress in Santa Cruz county, where the article was published; and perhaps it is fair to infer from the record that some of the candidates for election were members of the fourth degree of Knights of Columbus, but none of the prosecuting witnesses were such candidates. With the record in that condition defendant contends: First that the publication was not of and concerning the prosecuting witnesses; and, secondly, that the alleged libelous matter applies to a class or generally to all of the members of the fourth degree in the fraternal order mentioned, and therefore has no individual application, and that for these reasons the judgment of conviction cannot stand.

While the published matter may have been intended to apply only to persons who were candidates for office at that election, nevertheless, in terms and in effect, it refers to each and every member of the order of the degree named. It is undisputed that the publication was false, that the prosecuting witnesses were members of the society of the degree in question, and the inevitable conclusion to be drawn from the article is that every member of the order of the fourth degree had taken and subscribed to the published oath. The article asperses the character of such members, and ascribes to them base and dishonest motives, and as to them its publication constituted criminal libel, whether at that time a candidate for public office or not. The points presented by defendant might be urged with some force in a civil action in mitigation of damages, but we do

not believe they are good in a criminal prosecution for libel, for, as is said in the case of State v. Brady, 24 Pac. 948, 949:

"The law is elementary that the libel need not be on a particular person, but may be upon a family or a class of persons if the tendency of the publication is to stir up riot and disorder and incite to a breach of the peace. It is obvious that a libelous attack upon a body of men, though no individual may be pointed out, may tend as much or more to create a public disturbance as an attack on one individual, and a doubt has been suggested whether the 'fact of numbers does not add to the enormity of the act.'"

This statement is a correct exposition of the law and of the causes of its existence. People v. Crespi, 115 Cal. 50, 46 Pac. 863.

[4, 5] The defendant next contends that the court erred in denying his motion for a new trial. He argues that the record supports the theory that the publication was made for the purpose of enabling the voters at the approaching election to cast their ballots more intelligently, and that therefore, under the terms of section 256 of the Penal Code, the publication must be deemed a privileged communication. That section provides:

"A communication made to a person interested in the communication, by one who was also interested or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication."

Assuming for the moment that this publication comes within the privilege of that section, still we are satisfied that this case should not be reversed upon the ground stated. No instruction was requested or given upon the subject of privileged communications of the sort defined by that section, but the record shows that the defendant was relying upon this form of privilege in presenting his defense, and, since the jury are the judges of both the law and the facts in criminal libel cases, the defendant should have requested the specific instruction if he desired to have the jury more directly advised as to his contention than it was by the evidence or argument of counsel. We are further satisfied, however, that section 256 of the Penal Code has no application to cases of this character. Whatever the rule may be in other jurisdictions, it has been expressly decided in this state that a candidate for office is as much entitled to protection from defamation as any other citizen, and that a public journal or an individual who indulges in defamatory assertions about candidates for office is equally responsible for his acts with those who commit the same offense against private individuals, and that such libelous matter published against a candidate for a public office is not a privileged communication. Jarman v. Rea, 137 Cal. 341, 350, 70 Pac. 216; Edwards v. San Jose Pr. & Pub. Co., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; Aldrich v. Press Pr. Co., 9 Minn. 133 (Gil. 123), 86 Am. Dec. 84; Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757; King v. Root, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102; McAllister v. Detroit Free Press Co., 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318 and cases noted. In the present case it is not disputed that the publication was false. It was therefore not privileged.

[6] During the trial of the case, in denying a motion made by the defendant to dismiss, the court gave his reasons therefor in the presence of the jury, and, among other things, said that, examining the publication by its four corners as one would a contract, it might fairly be interpreted to state that all persons who were admitted to the fourth degree of the Knights of Columbus had taken the published oath; "in fact, the court thinks the paper is fairly interpreted to mean just that." This remark, defendant insists, constituted error on the part of the learned trial judge, for which the case must be reversed. At the time, upon attention being called to the apparent inadvertence, the court explained to the jury that the remarks were not directed to them, that they were addressed solely to the counsel in the case, and made incidental to the denial of the motion before the court. Subsequently in the instructions the jury were repeatedly admonished that they were not to be in any way influenced in reaching their verdict by the observations of the court, that they were the sole judges of the facts in the case, and that the interpretation of the language of the publication was a matter to be wholly determined by them. It will, of course, be presumed in this behalf that the jury followed the plain admonition of the court, and hence that in the matter suggested the defendant suffered no injury.

Other points made by the appellant relate to the admission or rejection of evidence, and to instructions given to the jury. We have examined them, but without finding therein anything upon which to ground appellant's argument for a reversal of the judgment.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

28 Cal. App. 796

CARTER v. HOLT et al. (Civ. 1766.)

(District Court of Appeal, Second District, California. Nov. 16, 1915. Rehearing Denied by Supreme Court Jan. 13, 1916.)

1. TRUSTS ⇐95—CONSTRUCTIVE TRUST—CONTRACT AS SUBJECT-MATTER.

Where, by fraud, defendant obtained money from plaintiff and therewith paid part of the purchase price of an automobile on a contract of sale to him on the installment plan, plaintiff could impress a constructive trust, arising from defendant's fraud, upon such contract, since in proper case there is no reason why a contract or lease, as well as any other property, may not be subject to a constructive trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145–147; Dec. Dig. ⇐95.]

2. TRUSTS ⟸371 — GENERAL DEMURRER — CONSTRUCTIVE TRUST.

In an action to impress a constructive trust upon a contract of sale of an automobile on the installment plan, the allegation of the complaint that an assignment was made to a defendant by the defendant who fraudulently obtained money from plaintiff without consideration "after knowledge by (the assignee) that said automobile had been purchased with plaintiff's money and funds," was sufficient, in the absence of special demurrer, as alleging that prior to the assignee's acquisition of the automobile and contract of purchase he had knowledge of plaintiff's rights.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 588–599; Dec. Dig. ⟸371.]

3. TRUSTS ⟸356—CONSTRUCTIVE TRUST—NOTICE TO ASSIGNEE OF RES—EFFECT.

Where the assignee of a contract of sale of an automobile on the installment plan took the same with knowledge that it had been paid for with funds fraudulently procured from plaintiff, his position as to money loaned or paid on the contract to the assignor thereof was that of a second lienor, subordinate to the rights of the defrauded party.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529–538; Dec. Dig. ⟸356.]

4. ATTORNEY AND CLIENT ⟸88 — RIGHT OF ATTORNEY TO CONDUCT OWN CASE.

Where an attorney who was sued appeared in court by an attorney of record who conducted the case to a point where defendant proposed to cross-examine plaintiff's witness, it appearing that he would be a witness in his own behalf, the court properly denied him the right to cross-examine.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 161–163; Dec. Dig. ⟸88.]

5. APPEAL AND ERROR ⟸1170 — REVIEW — HARMLESS ERROR.

Under Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted for any error in procedure, unless, after the court shall be of opinion that the error complained of resulted in a miscarriage of justice, where an attorney, defendant in an action, was represented by an attorney of record who conducted the case until defendant desired to cross-examine a witness, which leave was refused him because it appeared that he would testify in his own behalf, the action of the court, if erroneous, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540–4545; Dec. Dig. ⟸1170.]

6. TRUSTS ⟸373 — CONSTRUCTIVE TRUSTS — SUIT TO ENFORCE—EFFECT OF FINDING.

In an action to impress a constructive trust upon a contract of sale of an automobile on the installment plan, the court's finding that when the assignee of the contract presented the assignment to the seller, it recognized and approved the same in writing, whereupon the assignee paid the installment due, and that thereafter the seller with knowledge that the money paid it by the purchaser was plaintiff's money, attempted to rescind the contract, was sufficient to negative the allegation of the answer that the assignee purchased the automobile from the company by an independent contract after it had repudiated the assigned contract.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 604–606; Dec. Dig. ⟸373.]

7. TRUSTS ⟸372 — CONSTRUCTIVE TRUST — SUBTERFUGE IN SALE—SUFFICIENCY OF EVIDENCE.

In an action to impress a constructive trust on a contract of sale of an automobile on the installment plan, evidence *held* sufficient to show that a new deal between the seller, the original contractor for the car, who had paid part of the price with money fraudulently obtained from plaintiff, and his assignee, purporting to cancel the assigned contract and to make a new contract of sale direct with the assignee, was a mere subterfuge.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 600–603; Dec. Dig .⟸372.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Grace M. Carter against Ira W. Holt and others. From a judgment for plaintiff, and an order denying a motion for new trial, defendant Linney appeals. Judgment and order affirmed.

Robt. T. Linney and Kendrick & Ardis, all of Los Angeles, for appellant. Ralph W. Schoonover and Harriman, Ryckman & Tuttle, all of Los Angeles, for respondents.

SHAW, J. The complaint shows that by means of fraud and false representations defendant Holt obtained from plaintiff the sum of $1,151.37; that he entered into a contract with an automobile company for the purchase of an automobile for the sum of $1,375, and of the money so fraudulently obtained from plaintiff he paid thereon $625; that thereafter, and before the filing of the complaint herein, Holt was arrested, charged with the embezzlement of said sum of money so procured from plaintiff; that he employed defendant Linney as attorney to defend him upon said charge of embezzlement, and to whom he assigned said contract for the purchase of the automobile upon which he had paid $625 of plaintiff's money; "that said assignment was made without consideration and after knowledge by said Linney that said automobile had been purchased with plaintiff's money and funds as aforesaid"; that the automobile is in the possession of Holt and Linney. In addition to general relief asked, the prayer of the complaint, so far as appellant is concerned, is that plaintiff be declared the owner of said contract and automobile to the extent of the application of plaintiff's money in the purchase thereof so made by Holt.

The court, among other things, found that plaintiff was entitled to an equitable lien upon the automobile to the extent of $625 so invested therein, and that Linney held the car charged with such lien. Judgment followed, from which, and an order denying his motion for a new trial, Linney appeals.

[1, 2] Appellant's first contention is that the complaint (to which no demurrer was interposed) fails to state facts sufficient to constitute a cause of action against him. This for two reasons: First, it is not alleged that title to the automobile passed to Holt, but that he merely held a contract in the form of a lease for its purchase. No ground is assigned for this contention, and

we perceive no reason why, in a proper case, a trust might not be impressed upon a contract or lease, as well as upon other property. Second, it is claimed the complaint fails to show that prior to Linney's acquiring the automobile and contract of purchase he had knowledge of plaintiff's rights therein. In the absence of a special demurrer, we think the allegation that the assignment was made to him by Holt without consideration and "after knowledge by said Linney that said automobile had been purchased with plaintiff's money and funds as aforesaid," was a sufficient showing of the fact. The words "as aforesaid" refer to the fraudulent acts of Holt by means whereof he obtained the money and invested it in the automobile, all of which, it is alleged, was known to Linney.

[3] It is next claimed that the judgment is not supported by the findings, in that it appeared that after Linney acquired the contract upon which Holt had paid the $625, he paid thereon $260, and the judgment accorded plaintiff a lien thereon for her $625 which was declared prior to any rights of Linney by reason of the $260 so paid by him. Since Linney took the contract with knowledge of plaintiff's rights thereunder, his position as to money loaned or paid thereon must be deemed that of a second lienor, just as if he had a second mortgage on the property.

[4, 5] Defendant Linney appeared in court by an attorney of record, who conducted his case to a point in the proceedings where defendant Linney proposed to cross-examine one of plaintiff's witnesses; whereupon, it appearing that he would be a witness in his own behalf, the court denied him the right to cross-examine the witness. Thereupon his attorney of record continued the conduct of the case, cross-examining the witness. It is claimed this was reversible error. Had appellant had no attorney of record representing him, no doubt exists as to his right to appear in propria persona and conduct his case, and notwithstanding the incidental inconvenience, he could also have appeared as a witness. But where a party appears in court as a litigant represented by an attorney of record, the court may insist that such attorney and not his client, appearing as a party litigant only, conduct the trial. Boca, etc., R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718. Indeed, courts have not infrequently insisted that where more than one attorney appears, one only shall conduct the examination of witnesses. But, however this may be, and conceding the ruling was error, it is impossible to perceive how defendant was prejudiced thereby, and hence it may be disposed of by applying thereto the provisions of section 4½, article 6 of the Constitution.

[6] There is no merit in the contention that the court failed to find upon an issue tendered by the answer, to the effect that appellant purchased the auto from the Studebaker Company by an independent contract after it had repudiated the contract made with Holt and which he had assigned to Linney. As to this the court, in effect, found that upon Linney presenting the assignment to the company it, in writing, recognized and approved the assignment; whereupon Linney paid the installments thereon then due; that thereafter the company, having knowledge that the $625 paid to it by Holt was plaintiff's money, and after the assignment made to Linney with its approval, attempted to rescind the contract after Holt had assigned the same to Linney who had, by reason of said assignment, paid the arrearage. The finding is sufficient to negative the allegation made in the answer.

[7] Appellant attacks as being without support a number of findings based upon and in accordance with facts, which the evidence and fair inferences to be drawn therefrom tended to prove. The evidence tends to establish the fact that appellant, when he acquired the assignment from Holt, knew the manner in which the latter had obtained plaintiff's money, and knew that he had wrongfully and in violation of the trust reposed in him invested $625 thereof in the automobile, upon which there were some installments due and unpaid. Linney, accompanied by Holt, went to the office of the Studebaker Company, the seller of the car, where the assignment of the contract was made, Linney stating that he desired to get the car the possession of which it appears Holt had theretofore delivered to the company. Upon the making of the assignment and Linney paying the installments then due and unpaid, the company indorsed thereon, "We, the Studebaker Company, consent to the assignment, and fully release Mr. Holt hereunder," signed by William J. La Casse, sales manager, and thereupon delivered the automobile to Linney. Several days afterwards, all the parties ignoring this completed transaction, made a new deal which purported to cancel the contract so assigned by Holt to Linney and pursuant to which the company had delivered the car to Linney, and a new contract was made direct with Linney which, so far as it concerned the amount, terms, and conditions, was identical with the terms and conditions contained in the contract made with Holt and by him assigned to Linney. The company recognized the existence of its contract with Holt and his right to assign the contract, pursuant to which it delivered the car to Linney and released Holt from further liability thereon. The court was justified, under all the circumstances, in its conclusion that this was a mere subterfuge.

The judgment, which appears to be a righteous one, and the order denying appellant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; JAMES, J.

29 Cal. App. 8

AMERICAN EXCHANGE NAT. BANK OF DULUTH v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY, et al. (Civ. 1848.)

(District Court of Appeal, Second District, California. Nov. 17, 1915.)

1. GARNISHMENT ⊜123—RIGHTS OF PERSONS GARNISHED.

Where writs of garnishment to reach the property of a payee of a check were served both on the drawer of the check and the bank on which it was drawn, the reasons given by the bank for dishonoring the check are not available to the drawer.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 243, 248; Dec. Dig. ⊜123.]

2. PAYMENT ⊜21 — CHECKS — LIABILITY OF DRAWER.

By agreement a check may be taken in absolute payment, in which case the drawer is liable only as an indorser, and not on the original debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 86; Dec. Dig. ⊜21.]

3. GARNISHMENT ⊜51—DEPOSIT IN BANK—CHECKS—EFFECT OF.

A check is so far a payment that until dishonored the drawer cannot be garnisheed as a debtor of the payee in respect to the debt for which it is given.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 74, 97–101; Dec. Dig. ⊜51.]

4. GARNISHMENT ⊜232—EFFECT OF.

Defendant, after giving a check in payment of a debt, was garnisheed by creditors of a payee. The check had already been indorsed over to plaintiff. Both defendant and the bank on which the check was drawn refused payment on the theory that payment could not be enforced until the disposition of the prior suits. *Held*, that as the garnishee's liability in the case of a debt due from him is limited by his liability to the defendant in the principal action, whereby the latter has, at the time of the garnishment, a cause of action, payment of the check could not be denied until disposition of the garnishment proceedings, for the check, until dishonored, was a payment of defendant's debt, until which time the principal debtor in the garnishment proceeding had no right of action against defendant, and plaintiff could not recover unless it was the legal holder of the obligation.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 445–453; Dec. Dig. ⊜232.]

Petition by the American Exchange National Bank of Duluth, a corporation, for a writ of mandate, against the Superior Court of California, in and for the County of Los Angeles, and John W. Shenk, Judge. Writ issued.

Davis, Kemp & Post, of Los Angeles, for petitioner. C. H. Brock and M. P. Frasier, both of Los Angeles, for respondent.

CONREY, P. J. On petition for writ of mandate. An action numbered B–16352 and entitled American Exchange National Bank of Duluth, Plaintiff, v. Title Insurance & Trust Company, Defendant, was filed in the superior court of Los Angeles county on September 11, 1914, and is now pending. In that action the plaintiff seeks to recover a sum of money due upon a check assigned to it by one J. H. Constantine. This check was issued by the Title Insurance & Trust Company to Constantine on May 12, 1914, and was thereafter indorsed and transferred by Constantine to the plaintiff. The action was brought against the defendant company after presentation of the check by the plaintiff to the bank against which it was drawn and refusal of payment by that bank. The action of plaintiff against the Title Insurance & Trust Company came on regularly for trial on June 3, 1915, counsel for the respective parties being present in court. Thereupon the defendant moved the court for a stay of proceedings in the action until final determination of another action pending in that court, numbered B–25383, and entitled Herbert Freston, Plaintiff, v. J. H. Constantine, Defendant. An order was made, granting said motion, and in accordance therewith the superior court refused to proceed with the trial of the case. The petitioner alleges that by reason of said order and action on the part of the respondent, petitioner is unable to proceed with its said action, and unless

relief be granted in this proceeding, the action cannot be tried until final judgment shall have been rendered in the Freston Case.

[1-4] The motion of the defendant Title Insurance & Trust Company for stay of proceedings in the action against it was made—

"on the grounds that the defendant in this action has been served with notice of garnishment in said case of Herbert Freston, Plaintiff, against J. H. Constantine, Defendant, as aforesaid, as will more fully appear by the affidavit marked 'Exhibit A' attached hereto and made a part hereof."

The affidavit shows that the action of Freston v. Constantine was commenced on June 2, 1915; that a writ of attachment was issued in that action against the property of the defendant Constantine; that the writ, with notice of garnishment of the funds and property of Constantine and of any indebtedness due to Constantine from the Title Insurance & Trust Company, was served on the company on June 2, 1915; and that the Freston action is still pending. The affidavit, which is by the secretary of defendant company, closes by saying:

"That it was sought by said writ of attachment and notice of garnishment to attach all indebtedness, if any, of the defendant Title Insurance & Trust Company to J. H. Constantine, under and by virtue of the identical check sued upon in this action."

The notice of garnishment as served by the sheriff upon the defendant company is attached to the answer of respondent herein, and does not, in any way, pretend to describe or identify said check. It purports only to give notice of attachment of all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to defendant Constantine in the possession or under the control of the Title Insurance & Trust Company. If the obligation sued upon by the plaintiff in action No. B–16352 is not a debt owing by the defendant company to Constantine, the garnishment proceeding can furnish no reason for postponing the plaintiff bank in the enforcement of its demand. The subject-matter of the complaint in the Freston Case has no relation whatever to the check sued on in action No. B–16352. A judgment in favor of plaintiff bank in its action against the Title Insurance & Trust Company cannot possibly be rendered, except upon a finding that the plaintiff bank is the legal owner of the obligation, to wit, the check indorsed to it by Constantine. If it is such legal owner, we can find no reason or rule of law under which it should be compelled to postpone realization upon its demand until the settlement of a controversy between its assignor and some one claiming to be his creditor.

It is claimed by respondent that progress in the action against the Title Insurance & Trust Company should be stayed for the further reason that, as shown by the answer in that action, another attachment in the case of one Lovell against J. H. Constantine (No. B–12286 of said superior court) was issued and garnishment notice therein served on the Title Insurance & Trust Company and also on the Farmers' & Merchants' National Bank, drawee of the check so assigned by Constantine to the petitioner herein, plaintiff in action No. B–16352; that the refusal of the bank to honor and pay the check was solely on account of said notice of garnishment served on it. This matter is probably extraneous to the case presented for our decision, since the motion for stay of proceedings in action No. B–16352 referred only to the attachment proceedings in the Freston Case. But even conceding that the garnishment in the Lovell Case is a proper subject for consideration here, we do not think that the respondent is in any better position on that account. We apprehend that the reason given by the Farmers' & Merchants' National Bank for not honoring the check and the notice of garnishment served upon that bank are not available to the defendant Title Insurance & Trust Company as a ground for abatement of proceedings in the action against it. So far as the notice of garnishment is concerned in the action of Lovell against Constantine, it is of no more importance with respect to the matters involved herein than is the garnishment notice in the Freston Case.

"By agreement a check may be taken as absolute payment, and the drawer will then be liable only as an indorser, and not on the original debt. And a check is always so far payment, until dishonored, that, after its delivery, the drawer cannot be garnisheed as debtor of the payee in respect to the debt for which the check is given." Morse on Banks and Banking (4th Ed.) § 543.

"A check given by a debtor in settlement of an account is so far payment as to discharge the drawer as trustee of the payee, service being made on him after giving the check but before presentment; the check is payment unless dishonored." Id. § 545; Getchell v. Chase, 124 Mass. 366.

A garnishee's liability in the case of a debt due from him is grounded upon and is limited by his liability to the defendant in the principal action whereby the latter has, at the time of the garnishment, a cause of action, present or future, against him. Drake on Attachment (7th Ed.) § 463. But Constantine had no right of action against the Title Insurance & Trust Company, for its check issued in his favor, either in payment or in conditional payment of its obligation to him, was not dishonored while in his hands.

Being of the opinion that the notices of garnishment relied upon by the respondent herein were not sufficient to impose upon the Title Insurance & Trust Company any liability affecting the check issued by it to Constantine, we think that the court erred in granting the motion for stay of proceedings in said action No. B–16352, and that the plaintiff therein is entitled to have the case proceed to trial and judgment the same as if neither of said garnishments had been issued.

Let peremptory writ issue.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 41

KEISER v. LEVERING. (Civ. 1390.)

(District Court of Appeal, Second District, California. Nov. 22, 1915. Rehearing Denied Dec. 21, 1915.)

1. PLEADING ⊂⊃310 — COMPLAINT — SUFFICIENCY.

Recitals in a chattel mortgage incorporated in the complaint in an action to recover possession as to the value of the property will not supply the want of averments as to value in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 345, 944, 946, 947; Dec. Dig. ⊂⊃ 310.]

2. REPLEVIN ⊂⊃107—ACTIONS—JUDGMENT.

Under Code Civ. Proc. § 667, declaring that in an action to recover possession of personal property judgment shall be for possession of the property or the value thereof, a judgment not in the alternative is not necessarily void, and may, under particular circumstances, be upheld.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 424–428; Dec. Dig. ⊂⊃107.]

3. REPLEVIN ⊂⊃107—ACTIONS—JUDGMENT.

In an action to recover possession of personal property claimed under a chattel mortgage, the first count of the complaint averred the giving of a mortgage to secure a note and the amount due thereon, but did not aver the value of the property claimed. The second count averred the execution of another note and mortgage that the value of the property was $1,200, while the sum alleged to be due on the second mortgage was $359. It appeared that some of the property was subject to both mortgages. Code Civ. Proc. § 667, declares that in an action to recover the possession of personal property, judgment may be for the possession or value thereof in case delivery cannot be had. The judgment was for the property or its value, which was stated as $970. *Held*, that as the first count of the complaint did not state the value of the property claimed, and as the value was in excess of the amount of the indebtedness set forth by the second count, the judgment could not stand.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 424–428; Dec. Dig. ⊂⊃107.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by S. W. Keiser against J. H. Levering. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Reversed.

Harry L. Dearing and T. C. Gould, both of Los Angeles, for appellant. A. C. Galloway, Wm. L. Jarrott, and James S. Jarrott, all of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover possession of personal property. From a judgment in favor of the plaintiff, and from an order denying defendant's motion for a new trial, the defendant appeals.

By the first count of the complaint it appears that the defendant made to the plaintiff a chattel mortgage securing a note on which there was due at the time of filing the complaint the sum of $835. The mortgage contained the usual provision entitling plaintiff to possession of the property with right of sale to satisfy his claim whenever default should be made on the defendant's obligation. The facts of such default and of demand for possession and of refusal by the defendant are alleged, which the plaintiff averred are to his damage in the sum of $835. Defendant demurred separately to each count of the complaint on the general ground as to each count that it did not state facts sufficient to constitute a cause of action, and also on special grounds which we need not discuss. The demurrer was overruled, and an answer filed.

[1] In support of the general demurrer, defendant contends that the first count does not contain any allegations showing the value of the demanded property, and claims that an allegation of such value is essential to the cause of action. The plaintiff in this first count alleges the execution of the mortgage, a copy of which is attached to the complaint, "and made a part hereof to all intents and purposes the same as if recited at length herein." The schedule of mortgaged articles as set forth in the mortgage purports to give the value of some of those articles. Allowing this as an allegation of value, it would only specify the values at the date of the mortgage and not as of the time of filing the complaint, unless we could assume that such values continued unchanged. It is settled law that recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading. Thus, where the complaint alleged the making of a note set forth by copy and the note recited that it was "secured by mortgage of even date herewith," it was held that this did not amount to an averment that the note was secured by mortgage. Hibernia Savings & Loan Society v. Thornton, 117 Cal. 481, 49 Pac. 573; Hayt v. Bentel, 164 Cal. 681, 686, 130 Pac. 432.

[2, 3] The contention that a statement of value of personal property in an action to recover possession thereof is essential to the cause of action seems to be based upon the fact that in such action judgment for the plaintiff may be for the possession, or the value thereof in case delivery cannot be had, and damages for the detention. Code Civ. Proc. § 667. In the earlier cases it was held to be imperative that the judgment be in the alternative form, and such judgments for possession only, without providing for a recovery of the value thereof in case delivery could not be had, were reversed even at the instance of the defendant. Berson v. Nunan, 63 Cal. 550; Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605, and other cases. But this rule was seriously questioned in Claudius v. Aguirre, 89 Cal. 506, 26 Pac. 1077, and Erreca v. Meyer, 142 Cal. 308, 310, 75 Pac. 826. The law seems to be that, while the judgment must ordinarily be in the alternative, yet "a judgment that is not in the alternative is not, however, void, and whether or not such a judgment is even erroneous must depend upon the facts of the particular case." These later decisions might be sufficient to support

a complaint and judgment for mere possession of property without regard to the value thereof, if the case as a whole appeared to be within the jurisdiction of the court; but could not possibly support a judgment for the value as specified by the court in its findings where no value was alleged in the complaint. This is important in the present case, as will appear in our further statement of it.

The second count of the complaint in this action alleges the execution of another note and chattel mortgage by the defendant to the plaintiff, upon which at the date of filing the complaint there was alleged to be due the sum of $359.12. This count is similar to the other, except that the second count alleges the value of the property sought to be recovered therein to be the sum of $1,200. The property described in the second mortgage is in part identical with that described in the first mortgage, but some of the original items are omitted and others are added. The defendant in his answer did not deny the allegation of value set forth in the second count, and the court found—as the defendant also admitted—the amount of indebtedness on each mortgage note to be substantially as stated in the complaint. The court found as a fact the total value of the property in the possession of the defendant to be the sum of $970. The judgment is for possession of all of the mortgaged property described in the findings and judgment, or if delivery thereof could not be had, that plaintiff recover from defendant the sum of $970 and specified costs.

Manifestly the judgment is for an excessive amount. For the reasons heretofore stated, no part of the $970 can be charged against the cause of action stated or attempted to be stated in the first count of the complaint; and as to the second count, although it may be that the property involved therein is worth as much as $970, the debt for security of which it was mortgaged by the second mortgage did not amount to half that sum, as stated in the complaint. In Pico v. Martinez, 55 Cal. 148, which was an action of claim and delivery of personal property, it was held that, where the goods had been taken from the defendant and the judgment was that the defendant was entitled to possession of them, and it further appeared that the defendant had only a special and limited interest in the property, the amount of his recovery under the alternative provision in the judgment must be limited to the value of his special and limited property in the goods, and was not to be measured by the entire value thereof. If this is the rule applicable in the instance of a judgment in favor of the defendant, under section 667, Code of Civil Procedure, it is equally applicable in the case of a judgment in favor of the plaintiff. Since in the present case the plaintiff's right to have possession of the described property is only claimed for the purpose of satisfying his claims for an indebtedness unpaid to him, and since no special damages are either alleged or proved, it is clear that the value of the property to him cannot exceed the amount of the indebtedness unpaid; and this amount in the present state of the pleadings is limited to the indebtedness shown in the second count of the complaint.

The judgment and the order denying defendant's motion for a new trial are reversed.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 5

STROUD v. FAIRBANKS. (Civ. 1767.)

(District Court of Appeal, Second District, California. Nov. 17, 1915.)

APPEAL AND ERROR ⊂⊃1011 — FINDINGS — CONCLUSIVENESS.

The trial court's findings of fact made on conflicting evidence cannot be questioned on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. ⊂⊃1011.]

Appeal from Superior Court, Kern County; John C. Covert, Judge.

Action by B. K. Stroud against H. W. Fairbanks. Judgment for defendant, motion for new trial denied, and plaintiff appeals. Judgment and order affirmed.

E. L. Foster, of Bakersfield, and Frank H. Short, of Fresno, for appellant. Kemp, Mitchell & Silberberg, of Los Angeles, and George E. Whitaker, of Bakersfield, for respondent.

JAMES, J. This case is brought into this court on an appeal taken by the plaintiff from an adverse judgment, and also from an order denying his motion for a new trial.

Appellant brought this action to recover profits alleged to have accrued on account of a joint enterprise entered into between himself and the respondent with respect to the purchase and sale of certain oil-producing lands in the county of Kern. We are asked only to consider one point, to wit, as to whether the evidence sustains the findings made by the trial judge. A careful examination of the testimony as it is set out in the bill of exceptions leads us to the conclusion that as to the main issues in controversy there was testimony before the court from which the conclusions of fact as set forth in the findings might naturally and legally follow. From this testimony it appears that in the year 1908 appellant was employed by the Fairbanks Oil Company, which was operating in Kern county, as superintendent of its field plant; that respondent was connected with that corporation; that upon the occasion of a visit made by respondent to the oil fields respondent and appellant made a short trip for the purpose of viewing certain undeveloped land lying in that neigh-

borhood of which a certain section 14 was a part; that as to the north half of this section 14 some conversation took place between the two; that this ground was held by several individuals under placer locations; that appellant and respondent had some talk with one McReynolds, who represented himself and other of the locators on section 14. Following this a contract was made by respondent and McReynolds which provided for the acquiring by respondent of a certain interest in the north half of section 14 upon consideration that Fairbanks should develop the property within a certain period of time in that contract mentioned. The terms of this agreement were not complied with on the part of respondent, and shortly after default had been made of some of the conditions therein set forth, respondent and associates other than appellant entered into a contract with McReynolds and others whereby a large body of land, including several sections, and including the north half of section 14, which was the subject of the first contract, was provided to be taken over by respondent and his associates and developed. Later the contract rights so acquired were negotiated to other interests, and respondent received a considerable sum of money in exchange for his interest. It was the claim of appellant that respondent and he held a partnership interest as to the rights acquired by the first contract affecting the north half of section 14, and that, when the sale was made of the total interests involved in the second contract, some accounting should have been made to him for his interest in the first contract. Respondent denied positively that there was any partnership interest agreed to be given to the appellant under the first agreement. His statement, as shown in his testimony, was that the understanding expressed between himself and appellant was that, if a corporation could be organized to handle the placer rights on the north half of section 14, and if the appellant would assist in the forming thereof, that he (respondent) would see that appellant was given employment as superintendent of the proposed company and receive some shares of stock therein as additional compensation. So it first appears that there was a conflict in the testimony as to what the agreement between the parties really amounted to. The further fact appears without dispute that appellant did nothing at all in the direction of assisting in the organization of a company to promote and develop the north half of section 14. It is also clear that the rights of respondent in the first contract made with McReynolds had become subject to forfeiture at the time the second contract was made, which included many times the acreage of ground described in the first contract. McReynolds testified as to the termination of the first contract as follows:

"After the contract was signed Dr. Fairbanks arranged for some material and, as I recollect it, arranged to have it hauled to the ground, and about the 15th of December advised me that he was unable to go ahead with the contract—unable to fulfill its terms. Nothing was done after that; no other development or work was done under the conditions and terms of that contract. Dr. Fairbanks and I agreed that the contract was at an end. This contract of November 30th was not performed."

Appellant admits that there was testimony in contradiction of his own as to the principal circumstances relied upon as tending to establish his case. He claims, however, that certain letters written by respondent constitute admissions conclusive in their nature against the respondent, and which statements were not refuted. In view of the testimony introduced on behalf of the respondent and denial of the principal occurrences as testified to by appellant, we do not think that the letters constitute admissions conclusive in their nature as to appellant being possessed of any legal claim for the compensation asserted by his complaint. Without reciting in detail the contents of these letters, it is enough to say that such contents may properly be resolved in accordance with the oral testimony of the respondent and against the contention of appellant. In one of the letters respondent refers to arranging to give the appellant something on account of that first contract, but expresses it as being such "an amount which might be held as morally due you for your interest." Resolving the case briefly, the record presents a state of conflicting evidence upon which the findings of fact as made by the trial court cannot be questioned on appeal.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

29 Cal. App. 1

PEOPLE v. ANDRADE. (Cr. 427.)

(District Court of Appeal, Second District, California. Nov. 17, 1915.)

1. CRIMINAL LAW ⟸763, 764—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In the absence of direct testimony or other overwhelmingly convincing evidence connecting defendant with a homicide charged, other than the circumstances of an alleged confession and his failure to testify in his own behalf, an instruction that defendant does not deny the killing, but claims that it was done in self-defense, is erroneous, as usurping the functions of the jury, and is in violation of Const. art. 6, § 19, which provides that judges shall not charge juries on matters of fact, but may state the testimony and declare the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1748, 1752, 1768, 1770; Dec. Dig. ⟸763, 764.]

2. WITNESSES ⟸300 — INSTRUCTIONS — COMPELLING ACCUSED TO BE A WITNESS AGAINST HIMSELF.

Such an instruction is a violation of Const. art. 1, § 13, and Pen. Code, § 1323, which se-

cure a defendant from being a witness against him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1042, 1042½; Dec. Dig. ⟸300.]

3. Criminal Law ⟸778 — Instructions — Burden of Proof.

Such an instruction throws upon defendant, without the verdict of a jury in the matter, the burden of proving circumstances of mitigation or of justification or excuse, contrary to Pen. Code, § 1105, which imposes this burden, except when the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1852, 1854–1857, 1960, 1967; Dec. Dig. ⟸778.]

4. Criminal Law ⟸1169 — Cure of Evidence—Error in Admission.

When evidence of a custom of deceased in carrying considerable sums of money with him is received to prove a motive for his murder, and is subsequently stricken, such striking cures the error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. ⟸1169.]

5. Homicide ⟸166 — Admission of Evidence.

In a trial for murder, testimony as to a specific sum of money which deceased had upon his person two days before his death was received upon the assurance of the district attorney that knowledge of the possession of this sum by the deceased would be brought home to the defendant, and other evidence was received showing the possession of money by the deceased the day previous to his death, and exhibited by him in the presence of defendant. *Held*, that such evidence was properly received, notwithstanding the fact that it was also shown that a certain sum of money was found in the pockets of the deceased after his death, as such a circumstance, while favorable to the defendant on the question of motive, was properly subject to the consideration of the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320–331; Dec. Dig. ⟸166.]

6. Criminal Law ⟸519 — Evidence — Confession—Admissibility.

A confession made by a defendant to a sheriff, which is shown, and properly determined by the court, to have been made voluntarily and without any of those promises, threats, or other means of coercion which would require exclusion of a so-called confession, is admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163–1174; Dec. Dig. ⟸519.]

7. Homicide ⟸142—Information—Proof.

Where the information charges that defendant "did willfully, unlawfully, feloniously, and with malice aforethought kill and murder," etc., the fact that the people attempted to prove that the motive was robbery does not confine the charge to one of murder committed in the perpetration or attempt to perpetrate robbery, and a requested instruction to the contrary is properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250–259; Dec. Dig. ⟸142.]

8. Homicide ⟸142—Information—Proof.

Under an information charging that defendant "did willfully, unlawfully, feloniously, and with malice aforethought kill and murder," etc., any kind of willful killing is sufficient, under Pen. Code, § 189, defining murder and its degrees, to constitute the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250–259; Dec. Dig. ⟸142.]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Jose Andrade was convicted of murder, and he appeals. Reversed.

Edwards & Smith, of Dinuba, and Ralph H. Walker, of Visalia, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted of the crime of murder and sentenced to imprisonment for life. He appeals from the judgment and from an order denying his motion for a new trial.

On the morning of January 10, 1915, the dead body of one Ina P. Cook was found on a public road in the county of Tulare, and from the evidence it clearly appears that his death had been caused by a bullet wound in the head. The evidence further shows that on the previous afternoon and evening he had been traveling along that road in an open buggy and in company with the defendant. When the deceased was last seen alive, so far as the evidence shows, he was in company with the defendant. There are no eyewitnesses to the attack which caused the death of deceased, and in that respect the defendant has been convicted entirely upon circumstantial evidence, with the single exception of an alleged confession by the defendant. The sheriff of Tulare county gave testimony concerning an interview between himself and the defendant after defendant's arrest and that in that interview the defendant admitted that he had shot Mr. Cook. The precise words covering this point, as stated by the sheriff, were that:

Defendant "said that he did not remember whether he shot him as he was getting up or after he got up. After he shot him he ran away. He did not know where he throwed the gun."

[1, 2] The defendant did not testify in his own behalf, but stood silent under his plea of not guilty. On this state of the record the court charged the jury as follows:

"You are instructed that the defendant does not deny that he killed one Ina P. Cook on the 9th day of January, 1915, but claims that such killing was done in self-defense."

The defendant claims that the giving of this instruction constitutes prejudicial error; and with this contention we are constrained to agree.

"No person shall * * * be compelled in any criminal case to be a witness against himself. * * *" Const. Cal. art. 1, § 13.

"A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself. * * * His neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding." Pen. Code, § 1323.

"Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Const. Cal. art. 6, § 19.

[3] In giving the foregoing instruction the court usurped the functions of the jury. It withdrew from the jury the determination of the essential question whether or not the deceased came to his death at the hands of defendant, and, without a verdict of the jury upon this fact, threw upon the defendant the burden of proving circumstances of mitigation or of justification or excuse. Pen. Code, § 1105. Thereby the failure of the defendant to give testimony in his own behalf was used against him at the trial, notwithstanding his plea of not guilty addressed to the entire issues of the case. In the absence of direct testimony or other overwhelmingly convincing evidence connecting the defendant with this homicide, other than the circumstances of the alleged confession, we are unable to say that the giving of such instruction was nonprejudicial error, or that the jury necessarily would have convicted the defendant if such instruction had not been given. The substantial effect of the record is that the judge set up the unsworn statement of the defendant that he did kill the deceased against the unsworn statement implied in his plea of not guilty, and made a finding of fact thereon which could lawfully be made by the jury only. People v. Strong, 30 Cal. 151.

[4, 5] Appellant claims that the court erred in permitting the introduction of certain testimony of the witness Jarrad with respect to the amount of money which deceased had on his person on the 8th day of January, and as to the custom of the deceased as to carrying considerable sums of money with him. The second specific part of this testimony, that relating to the deceased being accustomed to carry money with him, was afterwards stricken out by the court, and we think the error was thereby sufficiently corrected. The testimony as to the specific sum was received upon the district attorney's assurance that knowledge of the fact would be brought home to the defendant. Other evidence was introduced showing the possession of money by the deceased on the 9th day of January and exhibited by him in the presence of the defendant. We think that this evidence was properly received. It is true that the evidence further showed that about $20 was found in the pockets of the deceased after his death, but this circumstance, so far favorable to the defendant on the question of motive, was properly subject to the consideration of the jury.

[6] The objection that the alleged confession as detailed by the sheriff in his testimony should have been rejected because not proved to be a voluntary statement by the defendant cannot be sustained. It was sufficiently shown and the court was authorized to determine that the statement was made freely and voluntarily and without any of those promises, threats, or other means of coercion which would require exclusion of a so-called confession. People v. Miller, 135 Cal. 69, 67 Pac. 12.

The other contentions made in the brief with respect to the reception of evidence are of minor importance, and do not disclose any errors requiring discussion here, if indeed any there were.

[7, 8] It is further claimed that the court erred in refusing to give to the jury the following instruction:

"Before you can convict the defendant of the crime charged, you must be satisfied beyond a reasonable doubt and to a moral certainty that he did commit such a crime with the intent and motive of robbery, and, if you do not so find from the evidence herein, you must acquit him."

The fact that the people introduced testimony for the purpose of showing the intent and motive of robbery did not have the effect to confine the charge to one of murder perpetrated in the perpetration or attempt to perpetrate robbery. The information charged that the defendant committed the crime of murder in that he "did willfully, unlawfully, feloniously, and with malice aforethought kill and murder one Ina P. Cook, a human being," etc. The particular motive above mentioned was not necessary to a successful prosecution in this case. Any kind of willful and premeditated killing would be sufficient to constitute the crime. Pen. Code, § 189.

The judgment and the order denying defendant's motion for a new trial are reversed.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 37

BENSON v. BENSON. (Civ. 1429.)

(District Court of Appeal, Third District, California. Nov. 20, 1915.)

1. DIVORCE ⇐172—JUDGMENT—CONCLUSIVENESS—PLEADING AS DEFENSE—NECESSITY.

In a husband's suit for divorce, where, answering the wife's cross-complaint charging cruelty and desertion, he did not plead a former judgment for himself in an action for divorce by the wife against him, and no proof of such former judgment was offered under the plea of estoppel set up by the wife in her answer to the complaint, the judgment roll in the former action not being introduced in evidence by either party, and defendant wife merely pleading in her answer the cross-complaint, in the former action, of the then defendant husband and the judgment in such action, there was nothing in the record disclosing the grounds upon which defendant wife, as plaintiff in the former action, relied for a divorce, to render the former judgment conclusive in the suit upon her right to maintain her cross-complaint.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 559–561; Dec. Dig. ⇐172.]

2. DIVORCE ⇐171—CONCLUSIVENESS OF ADJUDICATION—SUBSEQUENT MATTERS.

Where a wife sued for divorce, charging cruelty and desertion, and judgment was for the husband, who thereafter committed acts of cruelty and desertion, the judgment was not conclusive upon the wife's right to maintain a cross-

bill, based on such acts, in a subsequent action for divorce by the husband.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 554–558; Dec. Dig. ⟸171.]

3. Divorce ⟸184—Proceedings—Appeal—Harmless Error—Evidence.

In a husband's action for divorce, where both parties had, on sufficient grounds, persistently been engaged in an effort to get rid of each other as husband and wife, and the wife brought a cross-bill charging cruelty and desertion, the ruling sustaining defendant's objection to plaintiff's question to her on cross-examination as to whether she was willing to go back to plaintiff and live with him was harmless, if erroneous, and not ground for reversal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570–573; Dec. Dig. ⟸184.]

4. Divorce ⟸308—Allowance for Support of Children—Propriety.

Where the husband, against whom a divorce was awarded, was a carpenter and building contractor, making good wages and usually employed, an allowance to the wife, solely for the support and maintenance of three minor children, of $15 a month each, was proper as not unreasonable.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802; Dec. Dig. ⟸308.]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action for divorce by Carl Benson against Gerda Benson. From an interlocutory decree adjudging defendant to be entitled to a divorce on her cross-complaint, and awarding her a one-half interest in the community property, the custody of the children, and making an allowance for their support, plaintiff appeals. Affirmed.

Austin Lewis, of San Francisco, and R. M. Royce, of Oakland, for appellant. Willard & Ferrell, of San Francisco, for respondent.

HART, J. The court below rendered and entered its interlocutory decree, adjudging the defendant to be entitled to a divorce upon her cross-complaint, and awarding her a one-half interest in the community property and the custody of three minor children, issue of the marriage of the parties, and making an allowance of $15 per month to each of said children for their support and maintenance. This appeal is by the plaintiff from the judgment so rendered and entered.

The complaint is in two counts, the one in due form charging the defendant with willfully deserting the plaintiff in the month of October, 1908, and the second alleging extreme cruelty on the part of the defendant toward the plaintiff. Certain specific acts of cruelty are set forth in the latter count, and, in substance, they are: That the defendant had been in the habit of bestowing unbecoming attention on men other than her husband, and that in the month of July, 1908, the plaintiff discovered "that she had a man other than her husband in her bedroom"; that defendant on numerous occasions expressed to the plaintiff a preference for other men over him; that the defendant abused their children, being in the habit of addressing them in harsh and abusive language, and had threatened to kill said children on many occasions; that she refused to prepare meals for said children, and refused to "dress them" or give them other necessary attentions due from a mother to her minor children, with the result that the plaintiff was required to prepare their meals for them and otherwise minister to the necessities of said minors; that on the 8th day of December, 1912, the defendant said to the plaintiff that she desired to have nothing more to do with either their minor children or him; and that she "refuses to have anything to do with the said children, and that plaintiff provides for them in every respect," etc.

The defendant answered the complaint by specific denials of the allegations of each of the counts thereof, and, furthermore, pleaded in bar of the plaintiff's action a former judgment in an action for a divorce, wherein the defendant here was plaintiff and cross-defendant and the plaintiff here defendant and cross-complainant. The defendant also filed a cross-complaint herein, in which she charges, separately and in different counts, that the plaintiff had willfully deserted her, had neglected and failed to provide for her the common necessaries of life for and during the year immediately preceding the filing herein of her cross-complaint, and that the plaintiff had been guilty of extreme cruelty towards her in divers ways and on numerous occasions; such acts of cruelty being specifically set out. The plaintiff made answer to the cross-complaint. No evidence was offered in support of the defendant's plea of res adjudicata.

The court made no findings upon the causes of action for desertion and failure to provide set up in the defendant's cross-complaint. It did, however, in substance, find as to the cause of action therein stated, involving the charge of extreme cruelty, that the plaintiff for and during the course of a number of years prior to the date of the institution of this action by the plaintiff and cross-defendant, on numerous occasions, and often in the presence of other persons, had called the defendant and cross-complainant vile and, indeed, unprintable names; that he during that time told other people, in her absence, that she was an immoral woman, and that the persons to whom he so spoke of her had communicated to her the fact of his denunciation of her in the manner indicated; that, without cause or provocation therefor, he attempted to strike her on one occasion, and but for the interference and protection she received at the hands of a Mr. Ellis, who was then present, he would have struck and inflicted upon her serious bodily injury; that on said occasion he, in the presence of strangers, called her a liar, a thief,

and a fool, and said she was not a moral or respectable or virtuous woman, and asseverated "that he would not live with said Gerda Benson again, even if she begged him to allow her to live with him"; that for many years he had kept up a continuous abuse of the defendant and cross-complainant of a character which made it impossible for her to live in peace or happiness with him.

There is no claim here that the evidence does not support the allegations of cruelty of the cross-complaint or the findings upon which the judgment is planted. It is contended, however: (1) That each and all of the matters set up by the defendant in the several counts of her cross-complaint were made issues by the respective pleadings in the former divorce action between the parties and were adjudicated by the judgment therein, whereby the court denied to both of the parties the relief prayed for in their complaint and cross-complaint, respectively, filed in said action, and dismissed the said action and all the proceedings therein; (2) that the court erred to the serious detriment of the rights of the plaintiff by refusing to allow certain testimony to be received; (3) that the allowance for the support of the minor children is too large and not justified.

[1, 2] There are two conclusive answers to the first of the propositions above stated: (1) That the plaintiff, in his answer to the cross-complaint of the defendant, did not plead the former judgment, nor was there proof thereof offered or received under the plea of estoppel based upon said judgment set up by the defendant in her answer to the complaint. The judgment roll in said former action was not introduced in evidence by either party, and, the defendant having merely pleaded in her answer the cross-complaint of the plaintiff here (defendant there) and the judgment in said action, there is nothing in the record disclosing the grounds upon which the defendant here, as plaintiff in the former action, relied for a divorce. (2) It appears that the acts of cruelty charged in the cross-complaint of the defendant in the present action occurred after the judgment in the former action was rendered and entered, and in such case, of course, the plea of res adjudicata cannot be maintained. There is nothing said in Civille v. Civille, 22 Cal. App. 707, 136 Pac. 503, cited by appellant, in conflict with this declaration.

[3] Counsel for the plaintiff asked the defendant on cross-examination the following question, to which objection was made by the defendant and sustained by the court: "Are you willing to go back to Mr. Benson and live with him?" It is here urged that the ruling was error and prejudicial. Of course, if a reply to the question had been allowed, and the defendant had answered in the affirmative, it might have had some tendency to weaken her testimony as to the nature and extent of the acts of cruelty of which she said her husband had been guilty. But, having given testimony in the most emphatic manner of outrageous acts of cruelty habitually inflicted upon her by the plaintiff for many years prior to the filing of her cross-complaint in this action, it is more than probable that the defendant would not have answered the question in the affirmative, as evidently counsel desired might be the answer. But, however that may be, we do not think that the ruling, even if not strictly correct, should be held to afford a sufficient reason for sending the cause back for retrial, particularly since it appears to be true that both parties have persistently been engaged in an effort to get rid of each other as husband and wife upon what appears to be sufficient reason. As to the last of the propositions above stated, it is said that "the allowance to the wife is out of all proportion to the financial status of the parties."

[4] The allowance was not made to the wife, but solely to and for the support and maintenance of the minor children of the parties. The amount allowed for that purpose to each of said children is $15, or a total of $45, per month. The evidence showed that the plaintiff is a carpenter and building contractor, earns good wages, and is usually employed. We cannot say that the allowance is unreasonable as to the plaintiff or beyond what may be reasonably required to support and maintain the children in a manner consistent with the plaintiff's circumstances and earning ability.

No other points are raised.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

29 Cal. App. 24

ANDERSON v. LEWIS, County Auditor.

(Civ. 1730.)

(District Court of Appeal, Second District, California. Nov. 20, 1915.)

1. OFFICERS ⇐104—DE FACTO OFFICER—VALIDITY OF ACTS.

The acts of a person performing assumed duties as an officer de facto are ordinarily regular and valid.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 173; Dec. Dig. ⇐104.]

2. OFFICERS ⇐95—COMPENSATION—DE FACTO OFFICER.

The collection of the salary or compensation of an office is an incident to the title to such office, and not to its occupation and exercise by a de facto officer.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 134, 139; Dec. Dig. ⇐95.]

3. COUNTIES ⇐63 — ASSISTANT PROBATION OFFICER—VALIDITY OF APPOINTMENT—SALARY.

Const. art. 11, § 7½, par. 5, as amended October, 1911, authorizes freeholders' charters for counties to provide that boards of super-

visors shall, by ordinance, regulate the appointment and number of assistants, etc., in the county offices, their compensation and the manner of their appointment and a county board, by ordinance, allowed the probation officer, assistant probation officers, to be appointed by him. Pol. Code, § 4024, provides that every county officer may appoint deputies by appointment in writing filed in the office of the county clerk; section 910 requires deputies, etc., within ten days after notice of their appointment, to take and file an oath; and section 894 provides that the appointment of deputies, etc., not otherwise provided for, shall be in writing, filed in the office of the appointing power. Petitioner, by appointment in writing filed in the office of the county clerk, was appointed an assistant probation officer by the judge of the superior court, and the probation officer thereafter recognized her as one of his assistants. *Held*, that as the board of supervisors had not provided the manner of appointing subordinate officers, the general laws of the state governed, and that petitioner was not legally appointed, and could not collect salary as an assistant probation officer.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 87–90; Dec. Dig. ⟸63.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Mandamus by Mrs. P. T. Anderson against Walter A. Lewis, Auditor of the County of Los Angeles. Writ issued, and defendant appeals. Reversed.

A. J. Hill, County Counsel, and Roy V. Reppy, Asst. County Counsel, both of Los Angeles, for appellant. Ford & Hammon and Tyrrell, Abrahams & Brown, all of Los Angeles, for respondent.

JAMES, J. Respondent herein petitioned the superior court to issue a writ of mandate compelling appellant, as the auditor of the county of Los Angeles, to issue to her a warrant on the county treasurer for the sum of $100 as salary to which she claimed to be entitled. It was alleged that during the month of December, 1914, respondent occupied the position of assistant probation officer of the county of Los Angeles. The writ was issued, and the auditor appealed.

It is urged that the judgment was unwarranted because of the insufficiency of the evidence as to several material matters embraced within the findings of the court. The trial judge, in brief, determined the facts to be that: Petitioner, on the 12th day of December, 1913, was on the civil service list as an eligible for appointment as assistant probation officer, and that on or about said 12th day of December, 1913, she was nominated, and appointed to the position by the chief probation officer and assigned to duty, and that she entered upon her duties as such officer and ever since that time, to and including the month of December, 1914, continued to so act under the direction of the chief probation officer; that the salary attached to the position had been duly fixed by ordinance of the board of supervisors of Los Angeles county at the sum of $100 per month; that petitioner had presented her demand to appellant auditor, which he had refused to comply with, and that there was sufficient funds in the treasury of the county of Los Angeles available to pay the claim. The facts as they were presented to the trial judge are set out in abstract in a bill of exceptions. It appears that Hugh C. Gibson, the probation officer, testified that on the 12th day of December, 1913, there were vacancies in several of the positions designated as assistant probation officer, and that the petitioner was at that time nominated by the probation committee of the juvenile court as a candidate to fill one of such positions, and that thereafter she was "appointed to said vacant position by Fred H. Taft, judge of the juvenile court of said county." Further, that the appointment was made in writing, filed in the office of the county clerk, and that petitioner thereupon took the oath of office. This witness further testified that on the 15th day of December, 1913, he assigned petitioner to duty in her office, and that she had since that time continued to act. Further, the bill of exceptions also contains this clause:

"The witness testified further that on the 12th day of December, 1913, he consented to and was willing that said Mrs. P. T. Anderson be appointed to the said position, and that he did not at any time discharge her."

Gibson testified that he had recognized and considered petitioner as the duly qualified and appointed assistant probation officer of Los Angeles county during all the times material to the controversy. Three letters were introduced in evidence, the first of which was written to Gibson as chief probation officer by the county civil service commission, requesting Gibson to give the names of persons added to his department. This letter bore date of the 19th day of December, 1913. The second letter was one written by Gibson in answer to the letter just referred to, wherein he (Gibson) stated the names of persons added to his department, which included the name of this petitioner as assistant probation officer. The third letter was written later by Gibson to the probation committee of the county wherein again was given a list of all employés in the probation office, which list included the name of petitioner as assistant probation officer. An ordinance of the board of supervisors was introduced in evidence, which provided for officers in the probation department as follows:

"Section 28. Probation officer, one hundred and fifty dollars per month: Provided it shall be and there is hereby allowed to the probation officer the following assistants, clerks, deputies and employés, *who shall be appointed by the probation officer from the eligible civil service list*, and shall be paid as follows: * * * Sixteen assistant probation officers at a salary of one hundred dollars per month."

This ordinance was shown to have been adopted in June, prior to the date of the alleged appointment of petitioner. It will be noted that the evidence showed that the formal appointment of petitioner as assistant

probation officer was attempted to be made by the judge of the superior court. This procedure no doubt was adopted because of the view held by the judge of the juvenile department that under the state juvenile law the power to appoint the probation officers rested with him. In the case of Gibson v. Civil Service Commission of the County of Los Angeles, 150 Pac. 78, this court decided that, under the provisions of the county charter, the board of supervisors was authorized to make provision for the appointment of these officers, and that where such appointment had been so provided for the state law ceased to operate as to that matter.

[1-3] Appellant's claim is that the petitioner herein was not shown to ever have been legally appointed and that because of such fact she was not entitled to collect salary. It is admitted that at all times material to matters in issue she was at least a de facto officer. The acts of a person performing assumed duties as an officer de facto ordinarily are regular and valid. However, it does not follow that such de facto officer may claim the compensation attached to the office for the performance of such duties. It is held that the collection of the salary or compensation is an incident to the title of the office, and not to its occupation and exercise. Burke v. Edgar, 67 Cal. 182, 7 Pac. 488. There is then squarely presented the question as to whether petitioner herein, during the time covered by her claim for compensation, was acting under a valid appointment. The amendment to the state Constitution adopted in October, 1911, authorized for the first time the framing of freeholders' charters for counties. Const. art. 11, § 7½. By the terms of this amendment the several things which it is competent for such charters to provide for are set forth in a number of paragraphs. It is therein stated to be competent for charters to provide, and the phrase is used, "and the same shall provide," among other things:

"5. For the fixing and regulation by boards of supervisors, by ordinance, of the appointment and number of assistants, deputies, clerks, attaches and other persons to be employed, from time to time, in the several offices of the county, and for the prescribing and regulating by such boards of the powers, duties, qualifications, and compensation of such persons, the times at which, and terms for which they shall be appointed, *and the manner of their appointment and removal.* * * *"

The italics have been indicated by us to give emphasis to the clause to be particularly considered in determining the question stated. The ordinance passed by the board of supervisors in June, 1913, which has been referred to and wherein the offices of probation officer and assistant probation officer were provided for, makes no mention of the manner in which said appointments shall be made. It is respondent's argument that, as the question of the "particular manner of the appointment" was left to the board of supervisors, in the absence of any action by ordinance taken to that end, no particular form of appointment was requisite, and that such appointment might be made orally. This argument assumes also that because of the charter provisions and the constitutional permission authorizing the adoption of charters, the effect of all general laws touching the matter of the appointment of deputies or assistants is completely nullified. It is admitted that by section 4024, Political Code, appointments of deputies are required to be in writing and filed with the county clerk. Our opinion is that, where the board of supervisors has failed or declined to exercise a right to legislate as to the manner of appointment of subordinate officers, the general laws of the state touching such matters should govern. The constitutional amendment referred to seems not to restrict the operation of general laws in that regard by any express terms or definite suggestion. There are other sections of the Political Code than the one cited which declare that appointments of deputies must be in writing and that an oath of office must be taken by the persons appointed. We may refer to Political Code, sections 894 and 910. Section 910 particularly refers to the matter of the oath, and provides that deputies, clerks, and subordinate officers must, "within ten days after receiving notice of their appointment, take and file an oath in the manner required of their principals."

The position of respondent that no written appointment was required to be made, would have found some authority in precedent were there an entire absence of statutory law upon the subject. Bonds v. State, Mart. & Y. (8 Tenn.) 143, 17 Am. Dec. 795. Respondent urges, nevertheless, as further ground for sustaining the regularity of petitioner's appointment, that the letters introduced in evidence expressed sufficient to show an appointment in writing made by the probation officer. The case of People v. Fitzsimmons, 68 N. Y. 514, is cited as an authority. In that case the mayor, who legally had the right to appoint certain excise commissioners, but thinking that he only had the right to recommend to a city council for confirmation such appointments, did transmit to the latter body in writing his recommendation containing the names of three persons whom he designated as nominees. It was held that such a writing constituted a sufficient appointment. It is well to note that in the opinion the court there says that the mayor "selected the men; he appointed them, and they were no less his appointments after confirmation by the common council." It was clear enough in that case that the persons who assumed office were persons actually selected and nominated in writing by the mayor. But the same court in a later decision entitled Babcock et al. v. Murray et al., 70 N. Y. 521, declared that the decision in the Fitzsimmons Case, supra, had

been made with "considerable hesitation and not without great doubts." As we understand the attitude of counsel, as impressed in the argument in briefs, it is not contended that if section 4024 of the Political Code is of effect as governing the manner of appointment of assistant probation officers, the letters would be sufficient evidence of compliance with the requisite formalities. That section provides as follows:

"Every county, township, or district officer except a supervisor or judicial officer, may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing, and filed in the office of the county clerk; and until such appointment is so made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy."

While it is not argued, we have taken notice of the fact that the provisions of section 4024 might be construed as applicable only to deputies or assistants appointed in excess of those specifically provided for by law. In that event the section would not apply to the assistant probation officers. For that reason we have called attention to section 894, Political Code, which provides:

"The appointment of deputies, clerks, and subordinate officers, when not otherwise provided for, must be made in writing, filed in the office of the appointing power or the office of its clerk."

If we are to say that the last provision was the one under which the appointment should have been made, then it would have been the duty of the chief probation officer to make a record of the appointment in his office in some substantial form and for the person so appointed to take the oath of office. The question is not raised, but, parenthetically, we may suggest that nowhere in the findings of fact does it appear to have been determined that the petitioner ever took an oath of office at all. That point, however, not having been suggested, no reason for this decision is in any particular to be ascribed to the lack of such finding. The evidence, to our minds, in no wise shows that Gibson, the probation officer, ever selected as his appointee, directly or impliedly, this petitioner. It appears expressly by the evidence that such selection was made by the judge of the juvenile court who, as we have heretofore determined, had no power to appoint. By every reasonable inference to be drawn from the testimony, it seems clear beyond any doubt whatsoever that the chief probation officer assumed that the judge had the right to make the appointment and accepted the appointment of the petitioner because of that fact and that fact alone. We attach no weight as determinative of this matter to the statement contained in the evidence that the probation officer consented to and was willing that the petitioner be appointed to the position. He did not so appoint her, and the letters written by him were apparently merely by way of compliance with the regulations of the civil service commission, under the control of whom, as to the making of the reports of his office, he seemed to be.

Having reached the conclusion that the evidence was insufficient to justify the material finding made by the court that petitioner was regularly appointed to her position, we do not think it necessary to pass upon the question suggested in conclusion by the appellant. In the petitioner's complaint it did not appear that the auditor, before demand for the salary warrant was made upon him, had received a certificate from the civil service commission certifying to the correctness of the demand, as section 38 of the Los Angeles county charter provides. Appellant has contended that the auditor could not be compelled by mandate to act until such certificate had been furnished him. In answer to this proposition, respondent contends that the general duties of the auditor, as set forth in section 4091 of the Political Code, do not admit of this certificate being insisted upon as a prerequisite to the issuance of a warrant for a salary amount which is fixed by law. There is no doubt at all but that in defining the duties of the civil service commission it was competent for the charter to provide that such commission should furnish to the auditor evidence that the officers had performed their duties. As to whether, however, the presence of this certificate was a necessary prerequisite to the issuing of the warrant to an officer whose salary is fixed by law, we do not decide.

Under the conclusions expressed it must follow that the petitioner is not entitled to the relief.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

29 Cal. App. 12

PEOPLE v. SIDWELL. (Cr. 316.)

(District Court of Appeal, Third District, California. Nov. 18, 1915.)

1. HOMICIDE ⊂⊃339, 340 — APPEAL — HARMLESS ERROR—INVOLUNTARY MANSLAUGHTER.

Defendant, a special officer, who shot and killed another while endeavoring to force his way into a room where he suspected gambling was going on, was denied the right to introduce evidence showing his duty to force his way into the room. The court also erroneously charged that defendant's act in forcing his way into the room was unlawful. *Held*, that the error was harmless, for the jury in convicting accused of involuntary manslaughter must have found that he was guilty of culpable negligence, and that is the gravamen of the offense under Pen. Code, § 192, regardless of whether the negligence occurred in the commission of a lawful or unlawful act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 714–717, 720; Dec. Dig. ⊂⊃339, 340.]

2. CRIMINAL LAW ⊂⊃1159—APPEAL—REVIEW.
A conviction cannot be reversed unless the appellate court can, as a matter of law, say that the verdict was not justified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. ⊂⊃ 1159.]

3. HOMICIDE ⊂⊃255—EVIDENCE—SUFFICIENCY.
Evidence *held* to warrant a conviction of involuntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 539–541; Dec. Dig. ⊂⊃255.]

4. CRIMINAL LAW ⊂⊃957 — VERDICT — IMPEACHMENT.
As a verdict cannot be impeached by the affidavits of the jurors themselves, accused was properly denied a new trial, notwithstanding affidavits by jurors that they deemed he was entitled to an acquittal, and that none of the jurors understood the offense of which they convicted him was a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392–2395; Dec. Dig. ⊂⊃ 957.]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

W. P. Sidwell was convicted of involuntary manslaughter, and, from the judgment and an order denying new trial, he appeals. Affirmed.

Pardee & Pardee, of Susanville, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by information duly filed in the superior court of Lassen county with the crime of murder, and, upon his trial on said charge, was convicted of the crime of involuntary manslaughter, and thereafter sentenced by the court to serve a period of one year in the state penitentiary. He appeals from the judgment of conviction and the order denying his motion for a new trial.

The homicide occurred at the town of Westwood, in said county of Lassen, on the 14th day of March, 1915. It appears to be conceded, although we have been unable to find the facts to have been shown by the evidence, that the town of Westwood has been brought into existence within the last three years by the Red River Lumber Company, a corporation, maintaining an extensive lumber manufacturing plant there; that said company owns all the real estate within said town or upon which it stands; and that the town has a population of approximately 2,500, all of whom are employés, or members of the families of employés, of said company. It appears from the record that the company maintains a number of boarding, lodging, and bunk houses, in which many of its employés are housed and boarded, and also a number of private residences for use by employés having families. One of the places so established and maintained by the company is the "Hotel Seville," in which a number of employés, principally those of the Spanish and Mexican races, occupied apartments. It seems that the company, from the beginning of the time at which it established its enterprise at Westwood, laudably attempted to maintain the town as a peaceful and law-abiding community, and to encourage and promote habits of sobriety and industry among its employés, and to that end adopted and promulgated a rule prohibiting gambling and the use of intoxicating liquors within the town limits among and by such employés. To enforce said rule, it was, quite naturally, deemed essential to police the town, and to some extent this was done, and thus a necessary and reasonable surveillance over the employés maintained. The defendant had been commissioned by the company to discharge the duties of a special police officer and, to vest him with authority to make arrests and otherwise enforce the law and the rules and regulations of the company within the limits of the town of Westwood, he was appointed a deputy sheriff by the sheriff of Lassen county. He had been given instructions by the officers of the lumber company to report to them any gambling among the employés of the company within the town which he might discover, and, furthermore, was instructed that, in the event he had reason to believe that gambling was being carried on in any room of any of the lodging and bunk houses, to break open the door of such room, if necessary, so that he might be able to identify and report to the company the names of the employés thus engaged in violating the rule against that practice.

The immediate facts and circumstances of the shooting are correctly told in the brief of counsel for the defendant as follows:

"About midnight, between the 13th and 14th of March, 1915, defendant, being on duty, took with him one Robert Weber, who was in the employ of the company and acting as night watch at the time, and started out to see if any of the men were gambling in any of the company's lodging or bunk houses. At about half an hour after midnight in the morning of March 14th, they came to a lodging house known as the Hotel Seville, and, seeing from the outside that there was light in one of the rooms on the first floor of the building, they went inside and by listening at the door of room No. 8, they heard what they believed to be the noise of gambling from within, and, finding the door locked, defendant determined to break it open. With this in view, according to his statement, he took his pistol—a Colt army special, double action revolver of 38 caliber—from his hip pocket and placed it in his left hand, so that he might take the door knob in his right hand and put his right shoulder against the door. The gun was not cocked—of this he is very positive—but the very instant the door was broken open the gun was discharged. This is shown by the evidence of five witnesses for the prosecution who were in the room at the time.

"By the evidence of the prosecution it is shown that there were, at the time, in the room, nine persons, all of them being Spaniards. They were sitting around a table gambling. One sat in a chair behind the table facing the door. Three sat on a bed on the left-hand side of the room and two on a chair, which was turned down, between the table and the door, so that the

one man could sit on the legs of the chair, and the other on the back of the chair; the top of the chair back resting on the bed which was on the right-hand side of the room as you go in.

"The man sitting on the legs of the chair, with his back to the door, was Francisco Escrivano, the one who was killed. The evidence shows that he was shot through the body, the bullet having entered a few inches above the crest of the hip and about half an inch to the left of the spine, the point of exit being about 1½ inches above the navel and half an inch to the left of the middle line of the front of the body, the bullet having taken a horizontal course through the body, perforating the stomach and the bowels in several places.

"Defendant testified that he first thought, when he heard the discharge of the gun, that some one in the room had shot him, but he soon realized that he was not hit and that Escrivano was wounded. In any case, it is clear from the evidence that Escrivano immediately made an outcry in Spanish, and got up and moved about in such a way as to lead the witnesses to think at first that he was wounded in his leg. Almost immediately upon discovering that the man was wounded, and believing the wound to be in the leg, and therefore not necessarily serious, Sidwell gave his gun to Weber, told him to keep all the men in the room, and ran upstairs in the building to the clerk's room where there was a telephone, and called up a nurse at the hospital, to have the doctor come at once to the Seville, that a man was shot in the leg. He then went back downstairs, by which time the man's friends had opened his clothing and discovered that he was shot through the body. When the defendant returned to the room and found this state of facts and found the man on, or partly on, his feet, he told the men to lay him on one of the beds; that he was too badly hurt to be allowed to stand up and walk around; and then immediately ran upstairs again and called up the stable to have a conveyance sent at once, to use as an ambulance, to take the man to the hospital. After coming downstairs the second time, Sidwell became impatient because the doctor did not arrive promptly and, after a few minutes, started to the hopsital to see what was delaying him. He met the doctor near the hospital and returned with him to the Seville. Escrivano was placed in a wagon—on a cot—but, the road being rough and causing him much pain, the cot was taken from the wagon and he was carried to the hospital by hand; the defendant assisting him. The doctor gave such attention to the case as was possible, but Escrivano died about 8 o'clock on Monday evening, March 15th."

The above embraces a synoptical statement of all the facts brought to the attention of the jury.

The defendant complains: (1) That the evidence is insufficient to support the verdict; (2) that the court erred to his prejudice by its rulings excluding certain testimony; (3) that it likewise erred in its refusal to adopt and read to the jury certain instructions proposed by him; (4) that prejudicial error was committed in the order denying him a new trial on the ground of the alleged misconduct of the jury whereby a fair and due consideration of the case was prevented.

[1] While it instructed the jury that the Red River Lumber Company, being the owner of the Hotel Seville, had the right to make a rule that no gambling would be permitted in any room or part of said hotel and the further right to "direct and instruct the defendant to use all lawful means for the purpose of detecting persons engaged in gambling" in any of the rooms of said hotel, the court refused to instruct, as requested by the defendant, that the said company had the right to direct and authorize the accused to break into such rooms or houses, if necessary, for the purpose of ascertaining whether the rule of the company against gambling was being violated, and that the defendant, when breaking into the room of the deceased on the occasion of the shooting, "was actually within his legal rights." To the contrary, the court told the jury that the breaking into the room of the deceased by the defendant "was a wrong."

The court refused to permit the defendant to show that the penalty of violating the rule against gambling would be the discharge of those found engaged therein from the employment of the company, and, furthermore, disallowed testimony offered by the defense which would have shown or tended to show that the employés of the company expressed dissatisfaction with the company's inhibition against gambling and that certain of them, not named and perhaps not individually known, had threatened to resist by violent means any attempt of the defendant or any special officer of the company to enter their rooms for the purpose of detecting them in the act of violating said rule.

"Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: (1) Voluntary—upon a sudden quarrel or heat of passion. (2) Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Pen. Code, § 192.

Thus it will be observed that, while involuntary manslaughter may be committed in two different ways, the Legislature has not recognized, as between those two ways, any distinction in the degree of turpitude characterizing that crime. In other words, the crime is that of involuntary manslaughter whether the killing be committed in the execution of an unlawful act, etc., or in the execution of a lawful act, etc., or where death, not willfully or intentionally produced, is, nevertheless, caused by the gross or culpable negligence of the defendant—negligence which, in degree, goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence for which the party guilty of it may be held criminally liable.

Now, conceding that the court erred in instructing the jury that the defendant committed a wrong by breaking open the door of the room in which the deceased and others were supposed to be gambling, or, in other words, that the defendant had no legal right to break into a room or house of the company for the purpose of apprehending its employés in the act of violating the rule against gambling; conceding further that the court should have allowed the defendant

to prove that the employés were dissatisfied with said rule and had threatened to do violent injury to the defendant or any other employé who might undertake to detect them in the act of gambling in the houses or rooms of the company, and further assuming that the court erred in not permitting the defendant to show what would be the result to the employés if found in the act of gambling contrary to said rule; conceding, furthermore, what is true as a legal proposition, that the defendant had the right to carry a deadly weapon upon his person and the right, in view of the threats above referred to and which had previously been communicated to him, to carry such weapon in his hand at the time he attempted to ascertain whether gambling was going on in the room in which the fatal shooting occurred—conceding, we say, the legal integrity of all the foregoing propositions, still one of the issues involved in the charge against the defendant was whether, in the handling of the weapon, at the time of the fatal shooting, he was culpably negligent, and, if so, whether such negligence was the cause of the death of the deceased, and, in view of the conclusion of the jury that the accused was guilty of involuntary manslaughter, which crime involves no element of intent but proceeds solely from a degree of negligence which makes the act of killing unlawful, it cannot be conceived or justly be declared that he suffered any prejudice by reason of the alleged errors complained of, for, by the verdict, he was given the full benefit of whatever force there might have been in the excluded testimony and the instructions proposed by him but disallowed by the court. Whether the killing was the result of "the commission of an unlawful act, not amounting to a felony," or occurred "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection," the defendant could obviously have been convicted of no less a crime than that of which he was found guilty, even if the testimony and the instructions whose disallowance by the court constitutes the ground of the objections under consideration had been admitted and given. In other words, it being true, as the Code section declares, that involuntary manslaughter may be committed while the party responsible for the killing is doing a lawful act, and, assuming that the rejected testimony and instructions would have conveyed to the jury certain facts and principles of law in all respects sound and pertinent to the charge as laid in the information, yet if the evidence was sufficient to convince the jury that the discharge of the weapon was directly due to to the gross or culpable negligence of the defendant in the handling of the weapon at the time of its discharge and that such negligence was the cause of the death of Escrivano, then, since he was found guilty of the lowest crime of which he could be convicted under the information, the rulings excluding the proffered testimony and disallowing the proposed instructions could not have had a harmful or prejudicial effect upon the substantial rights of the accused.

As we conceive it, the principle thus applied is the same as where an erroneous instruction peculiarly applicable to a charge of murder of the first degree has been given and the verdict is one of guilty of murder of the second degree or of manslaughter. Repeatedly it has been held that in such case, even though the instruction might be prejudicially erroneous where the verdict was of the first degree, a verdict of guilty of the lesser degree of murder or of manslaughter would render the instruction innocuous in its effect upon the rights of the accused.

[2, 3] We now come to a consideration of the proposition, urged with much vigor by the defendant, that the jury were not justified by the evidence in finding him guilty of any crime or degree thereof embraced within the crime charged.

The question, however, with respect to the evidence which this court is alone authorized to determine, is whether we can say, from the record, as a matter of law, that the jury were not justified in finding the verdict they returned; and it may just as well here be stated that, after a careful review of the whole record, we are constrained to the conclusion that we would not be justified in so declaring. In other words, the evidence as it is brought before us is such that whether the defendant was culpably negligent in the handling of the weapon at the time the fatal shot was discharged therefrom and, if so, whether such negligence was the cause of the death of Escrivano, are questions which it was for the jury to determine and not within the legal competence of this court to review.

The general facts of this most unfortunate affair are given above. But precisely how or in what manner the pistol was discharged, the evidence does not disclose, nor, indeed, under the circumstances, is it to be supposed that any one would know, unless it was the defendant himself. He, however, declared that he could not, except by mere conjecture, explain the direct cause of the discharge of the weapon, although the theory advanced by the defense is that he must have had his finger upon the trigger of the weapon when he was in the act of forcing the door open and have unconsciously pulled the trigger as the door gave way under the force he put upon it.

The weapon, according to the evidence and the testimony of the defendant himself, was what is known as a "self-cocker" and operates automatically; that is, it is one of those revolvers that are discharged by means of pressure upon or the pulling of the trigger. As seen, at the time the defendant attempted

to and did shove the door in, he held the weapon uncocked in his left hand, using his right hand and shoulder to break open the door. The instant the door gave in from the force applied to it by the defendant, the weapon exploded. In other words, the giving way of the door and the discharge of the pistol were approximately simultaneous. The only plausible explanation of the cause of the discharge is that either the trigger came in contact with some part of the door when it was forced open in such manner as to throw the lock back or, as the defense suggests, the defendant had his finger upon the trigger at the moment he exerted the force necessary to shove the door in and at the same instant of time involuntarily pulled the trigger—a movement which could be influenced or caused by the exertion employed in breaking open the door by means of the force required to be exerted for that purpose. This latter theory is the more plausible of the two and, as seen, coincides with the view of the defendant as to the cause of the discharge of the weapon. It, however, only emphasizes the fact of the recklessness in handling a loaded firearm near the presence of others when the party handling it is at the same time attempting some other act which must necessarily distract his attention from the weapon. But whatever might have been the direct cause of the discharge of the weapon, the fact remains that it was discharged through some cause while in the hand of the defendant and while he was engaged in forcibly effecting an entrance into a room where there was gathered a number of persons sitting about a table in close proximity to the door broken open by him and of whose presence there he was aware.

The handling of a loaded firearm in a public street or in a building or other place where a number of people are assembled or are passing to and fro is always attended with more or less danger, even where some degree of care is exercised in the handling of such weapon; but how much more danger must there be in the handling of such weapon by a person at a time when his mind is occupied by another matter of paramount concern to him. His mind could not at that time be upon the weapon to such a degree as to enable him to handle it with the care and caution with which ordinarily he would probably handle it. That the defendant's mind was not upon his weapon as he was forcing the door open is very clear from the fact that he did not know precisely how it came to be discharged. It would seem to be true that the act of the defendant in holding in his hand a loaded weapon at the time he was engaged in forcing an entrance into the room, thus bringing into play much, if not all, of his physical power, and with his mind centered upon getting into the room, itself constituted gross or culpable negligence. At all events, the jury could reasonably have so viewed that act, and their verdict implies that they did thus view it, and, as before stated, we are unprepared to say, as a matter of law, that they reached an erroneous conclusion, or that the result of their consideration of the evidence is not justified.

[4] The next and last point to be considered involves the question of the alleged misconduct of the jury.

It appears that, after the case had been submitted to the jury and the latter had retired to the jury room for deliberation and had thus been out for some time, they caused to be conveyed to the judge information that they desired further instruction as to the amount of punishment to which the defendant would be amenable in the event of the return of a certain verdict. The court thereupon ordered the jury to be brought before it, and, this being done, the foreman, after stating that they had not agreed upon a verdict, remarked:

"The jury would like to ascertain the degree of punishment that would follow conviction of either one of the degrees of murder charged in the complaint."

To which the court replied that, except as to the crime of murder of the first degree, the matter of punishment was wholly a province of the court, and, consequently, one with which the jury had no concern, and declined to give them any information upon the subject. The jury were thereupon returned to the jury room for further consideration of the case.

In support of his motion for a new trial upon the ground of the asserted "misconduct of the jury by which a fair and due consideration of the case has been prevented" (section 1181, subd. 3, Pen. Code), the defendant filed and introduced affidavits by two of the jurymen in which they alleged that they were at all times during the deliberations of the jury of the opinion that the defendant was entitled to an acquittal at their hands and so voted up to the time that they were led to believe that the crime of involuntary manslaughter "was and is not a felony under the laws of the state of California; and affiants further say that to the best of their knowledge and recollection each and every member of said jury, while deliberating upon said case, expressed himself as believing that the crime of involuntary manslaughter is and was not a felony under the laws of the state of California"; that, had they known or believed that the crime of involuntary manslaughter was a felony under the laws of the state of California, they "never would have consented or agreed to a verdict of guilty of such crime in said action."

The reply to the contention that the showing thus made entitled the defendant to a new trial is that the affidavits of jurors cannot be received or considered for the purpose of impeaching their verdict. People v. Azoff, 105 Cal. 632, 39 Pac. 59; People v. Soap, 127

Cal. 408, 411, 59 Pac. 771; People v. Emmons, 7 Cal. App. 685, 95 Pac. 1032. In the Soap Case, supra, the ground of the alleged misconduct of the jury was precisely the same as that upon which the defendant in the case at bar based his affidavits alleging misconduct. The court in that case said:

"It has been definitely settled that the affidavit of a juror cannot be received to impeach the verdict except where it is the result of a resort to the determination of chance."

We have now considered and disposed of all the points urged for a reversal.

The judgment and the order appealed from are affirmed.

CHIPMAN, P. J. I concur.

BURNETT, J. I concur in the judgment and the foregoing opinion, but I desire to add that, in my judgment, if the defendant had shown the facts that he sought in vain to introduce in evidence, it would have afforded no justification nor excuse for his conduct in needlessly imperiling the lives of the men in the room. The mere circumstance that gambling was being carried on was not sufficient, as I view it, to warrant the defendant in breaking down the door, with a loaded pistol in his hand. Especially would this be true when he had reason to believe that a fatal affray might ensue. His desire and that of the company to suppress gambling was, of course, commendable; but the method resorted to was too drastic. Human life is too precious to be jeopardized for the purpose of ascertaining whether parties are engaged in a peaceful game of poker. Defendant should have directed the inmates to open the door before resorting to such violence, and I think he should have gone away rather than plunge into the room with his loaded revolver in his hand. Our aversion to vice should not blind us to the more vital consideration of life itself.

29 Cal. App. 31

LUND et al. v. LACHMAN. (Civ. 1562.)

(District Court of Appeal, First District. California. Nov. 20, 1915. On Petition for Rehearing, Dec. 20, 1915.)

1. SALES ⟸369—REMEDIES OF SELLER—SUIT FOR BREACH OF CONTRACT.

Where the buyer of wine bottles refused to accept them, and title thereto had not passed from the sellers, who thereupon resold the bottles at private sale, their only remedy was to sue for damages for breach of the contract of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1083, 1084; Dec. Dig. ⟸369.]

2. SALES ⟸384—REMEDIES OF SELLER—SUIT FOR BREACH OF CONTRACT—DAMAGES—STATUTE.

In a suit for damages by the sellers of wine bottles against the buyer, who refused to accept, the measure of damages was regulated by Civ. Code, § 3353, providing that in estimating damages the value of property to a seller is deemed to be the price which he could have obtained therefor in the market nearest the place at which the property should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098–1107; Dec. Dig. ⟸384.]

3. SALES ⟸384—REMEDIES OF SELLER—ACTION FOR BREACH — DAMAGES — STATUTE — "MARKET VALUE."

Under said section, where the sellers of wine bottles, upon the buyer's refusal to accept, commissioned their agent to resell, who, being ignorant of the condition of the market, did so at private sale below market price, which, at the time, was over the contract price, the sellers could not recover the difference between the price at which their agent sold and the contract price, since the statute does not provide that the value of property to the seller is the price which he, personally, or his agent, can obtain for it, regardless of the market price, while "market value" is the highest price of a commodity in the market where it is offered for sale which those having the means and inclination will pay, a value controlled by the condition of the market with reference to supply and demand, rather than by the selling ability of the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098–1107; Dec. Dig. ⟸384.

For other definitions, see Words and Phrases, First and Second Series, Market Value.]

4. SALES ⟸334—REMEDIES OF SELLER—RESALE—TIME.

While a seller of goods need not resell immediately after repudiation of the contract of sale by the buyer and his refusal to accept, nevertheless he must exercise reasonable diligence in locating the nearest market and ascertaining the prevailing market price for the rejected goods to sell thereat.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 920; Dec. Dig. ⟸334.]

5. SALES ⟸383 — REMEDIES OF BUYER — ACTION FOR BREACH—MARKET VALUE—SUFFICIENCY OF EVIDENCE.

In an action by the sellers of wine bottles, who, upon the buyer's refusal to accept, resold at private sale through their agent, who, through his ignorance of the market, secured less than market price, evidence *held* sufficient to justify a finding that the market price for bottles prevailing on the day and for many days after their tender and rejection by the buyer was at a substantial advance over the contract price which would have covered the expense of drayage, storage, and insurance for a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1097; Dec. Dig. ⟸383.]

6. SALES ⟸384—REMEDIES OF SELLER—ACTION FOR BREACH—DAMAGES.

Where the sellers of wine bottles failed, after rejection by the buyer, to take advantage of prevailing market prices so much greater than the contract price that a sale in the market would have made them whole, they could not predicate a claim for damages on account of interest upon damages accruing from the breach, or for compensation for making a resale at less than market price in the form of a commission upon the price obtained.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098–1107; Dec. Dig. ⟸384.]

On Petition for Rehearing.

7. APPEAL AND ERROR ⟸1073—DISPOSITION —REVERSAL—FAILURE TO GRANT "NOMINAL DAMAGES."

Where a judgment is erroneous only in that it fails to include "nominal damages," an inconsiderable, trifling sum, it will not be reversed,

unless it be made to appear that such damages, if allowed, would have carried costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240–4247; Dec. Dig. ⟸ 1073.

For other definitions, see Words and Phrases, First and Second Series, Nominal Damages.]

8. New Trial ⟸74—Grounds—Failure to Include Nominal Damages.

Where a judgment is erroneous only for failing to include nominal damages, new trial will not be granted unless such damages would have carried costs.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 150; Dec. Dig. ⟸74.]

9. Costs ⟸22—Costs in Superior Court—Amount of Judgment.

Under Code Civ. Proc. §§ 1022, 1025, regulating the matter, to carry costs a judgment of the superior court must amount to $300, so that a judgment for nominal damages will not do so.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 47–73; Dec. Dig. ⟸22.]

10. Sales ⟸384—Remedies of Seller—Action for Breach of Contract—Nominal Damages.

Where the contracted sellers of wine bottles, upon the buyer's refusal thereof, failed to resell at a prevailing market price that would have more than made them whole, they were entitled only to nominal damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098–1107; Dec. Dig. ⟸384.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by Henry Lund and Henry Lund, Jr., copartners, etc., against Arthur Lachman. From a judgment for defendant and an order denying them a new trial, plaintiffs appeal. Judgment and order affirmed.

H. W. Glensor, of San Francisco, for appellants. Jesse H. Steinhart, of San Francisco, for respondent.

LENNON, P. J. This is an action for damages for the alleged breach of a contract to purchase personal property. The appeal is from the judgment in favor of the defendant and from the order denying a new trial.

The facts of the case as revealed by the pleadings and proof are substantially these: On November 30 and December 1, 1910, the defendant entered into two contracts with the plaintiffs for the purchase of certain specified quantities of claret quart bottles, to be shipped from Sweden during the months of February or March, 1911. The contract price was $5.85 per gross, and delivery was to be made from the ship's side at San Francisco. The bottles arrived at San Francisco on the steamship Strathbeg on June 15, 1911. They were tendered to the defendant on June 16, 1911, and refused by him. The bottles were thereupon removed to a warehouse by the plaintiffs, where they were stored and insured, and from time to time sold at private sale at varying prices for the aggregate sum of $2,912.85, which was $12.15 less than the sum total of the purchase price specified in both contracts.

The trial court in its findings of fact found that the plaintiffs did not use due or any diligence in making sales of the bottles; that the several sums obtained therefor at the several sales were not separately or in toto the highest obtainable market price; and that plaintiffs were not compelled to have such bottles removed to a warehouse because of the defendant's breach of the contracts.

[1, 2] The bottles having been sold at private sale, and it being an admitted fact in the case that title to the bottles had not passed from the plaintiffs, it is conceded, as it must be, that plaintiffs' only remedy was damages for the breach of the contracts (Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926), and that the measure of the damages alleged to have been thereby sustained is to be found in section 3353 of the Civil Code, which provides that:

"In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale."

In addition to claiming that the findings are contrary to the evidence concerning the market value of the bottles and the necessity for their removal to a warehouse as a result of the defendant's breach of the contracts, it is insisted that the plaintiffs should have been allowed 5 per cent. commission as compensation for the cost of making the several resales of the bottles.

[3] The evidence adduced on behalf of the plaintiffs shows that the bottles were sold at a series of sales made during a period of time extending from July 6, 1911, to March 20, 1912, at approximately $5.75 per gross, and there was some evidence, competent and uncontradicted, adduced upon behalf of the defendant to the effect that during the month of June, 1911, there was in the city and county of San Francisco, the place where the bottles should have been accepted by the defendant, a well-established and active market price for bottles similar to those contracted for by the defendant, which ranged from $6.25 to $7.25 per gross. The evidence also shows that the business of the plaintiffs was that of steamship freighters, importers, and exporters, and that the sale of the bottles in question was intrusted to a salesman of the plaintiffs, whose specialty was that of selling iron, coke, and pig iron; and Carl Bundschu, manager of the Gundlach-Bundschu Wine Company, as a witness for the defendant, testified that:

"About in the month of July, 1911, there was sold to us by Henry Lund & Co. a gross of claret bottles at $5.85 a bale. That was below the

market price, cheaper than I could buy elsewhere."

The salesman of the plaintiffs, in explanation and justification of the price procured for 387 bales of the bottles in question, which he had sold in or about the month of March, 1912, to one Rosenberg, testified that at that time he was unaware of the fact that there was a scarcity of bottles in the local market resulting from a scarcity of bottles in Germany and Sweden, and that it was this fact known to Rosenberg at the time of the sale which prompted the latter to make the purchase.

Counsel for the plaintiffs, in effect, concede that such evidence was sufficient to warrant and support the finding of the trial court that the plaintiffs had failed and neglected to procure the highest obtainable market price for the bottles, if section 3353 of the Civil Code is to be construed "as requiring the seller, regardless of his business capacity or ability along the particular line of goods forming the subject-matter of the broken contracts, to go into the open market and obtain for the rejected goods a price as high or higher than any other firm or individual is getting. * * *" In other words, it is the contention of the counsel for the plaintiffs that it was the intent and purpose of section 3353 of the Civil Code to provide that the value of the property to the seller is the price which he personally could obtain for it, regardless of what the market price thereof may have been. That this contention is utterly without merit is, we think, manifest upon a casual consideration of the language employed in the Code section under discussion; but, even if that were not so, the section has, in effect, been held to mean that the seller of rejected property who seeks to recoup his loss, if any, by a private sale, must resort to such resale in the open market and at market values. Hill v. McKay, 94 Cal. 5, 29 Pac. 406; Wilson v. Gregory, 2 Cal. App. 312, 84 Pac. 356; Welch v. Nichols, 41 Mont. 435, 110 Pac. 89. Obviously the market value of a commodity is the highest price in the market where it is offered for sale which those having the means and inclination to buy are willing to pay for it; and it is equally obvious, we think, that market values are created and controlled by the condition of the market with reference to supply and demand, rather than by the particular or peculiar selling ability of the seller.

[4, 5] This view of the law compels the conclusion that the evidence sustains the finding of the trial court concerning the failure of the plaintiffs to procure the highest market price obtainable for the bottles in question; and, inasmuch as there is some evidence tending to show that at the very time the contract was breached, and subsequently, there was at San Francisco an active market for bottles of the character and quantity called for in the contracts in controversy, with a market price therefor ranging from $6.25 to $7.50 per gross, which was far in excess of the contract price, it cannot be said that the evidence does not support the finding of the trial court to the effect that the plaintiffs were not compelled to store the bottles because of the defendant's failure to accept them. While it was not incumbent upon the plaintiffs to make the resale immediately after the repudiation of the contract by the defendant, nevertheless the plaintiffs were required to exercise reeasonable diligence in locating the nearest market, and ascertaining the prevailing market price for the rejected bottles; and there can be no doubt that there was sufficient evidence to justify the trial court in finding that, if the plaintiffs had seen fit to seek and take the market price for the bottles which prevailed on the day and for many days following their arrival and tender and rejection at San Francisco, they could have sold them at a substantial advance over the contract price which would have more than covered the expense of drayage, storage, and insurance for a reasonable time had such expense been found to be necessary, and therefore in no event would the plaintiffs have been entitled to recover such expense from the defendant.

[6] What we have said thus far in effect disposes of the point that the plaintiffs were entitled to interest upon the amount of damage accruing from the defendant's breach of the contracts, and to compensation for making the resale in the form of a commission upon the price obtained. Assuming that the plaintiffs ordinarily would have been entitled to recover such items as a part of their damage, nevertheless it is obvious that, if the plaintiffs failed—as the court upon sufficient evidence found—to take advantage of prevailing market prices which would have more than made them whole, they cannot now predicate a claim for damage upon such items any more than upon the other elements of damage already considered.

The view which we have taken of the meaning and intent of section 3353 of the Civil Code compels the conclusion that the trial court did not err in its rulings permitting evidence of the prevailing market value during the period following the tender and rejection of the bottles.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

On Petition for Rehearing.

PER CURIAM. [7-10] On petition for rehearing the only point urged is that the original opinion failed to take cognizance of the point presented and discussed in the briefs of counsel for the plaintiffs that the judgment should be reversed because the trial court refused to allow the plaintiffs at least nominal damages. While this point did not escape the attention of this court upon the original consideration of this case, a discussion of it was inadvertently omitted from the opinion. It will suffice to say at this time that it is the

settled rule that, where a judgment is erroneous only in the particular that it did not include nominal damages, it will not be reversed nor a new trial granted unless it be made to appear that such damages, if they had been allowed, would have carried costs. Sutherland on Damages, § 11; Kenyon v. Western Union, etc., Co., 100 Cal. 454, 35 Pac. 75. Nominal damages have been defined to mean merely an inconsiderable, trifling sum, such as "a penny, one cent, six cents" (Davidson v. Devine, 70 Cal. 519, 11 Pac. 664; Maher v. Wilson, 139 Cal. 514, 73 Pac. 418); and to carry costs a judgment of the superior court must amount to the sum of $300 (Code Civ. Proc. §§ 1022, 1025). Such a judgment obviously could not be considered to be one for nominal damages as above defined (Broads v. Mead et al., 159 Cal. 765, 116 Pac. 46, Ann. Cas. 1912C, 1125); and, as the judgment in the present case would have to amount to $300 before it could carry costs, it follows that a judgment for nominal damages would not carry costs. We are satisfied that in no event could the plaintiffs, under the pleaded and proven facts of the present case, have been allowed more than nominal damages; consequently the error, if any, in the particular stated will not suffice under the authorities above cited to warrant the reversal of the judgment or the granting of a new trial.

The petition for a rehearing is denied.

29 Cal. App. 45

MARTHA WASHINGTON COUNCIL NO. 2, DAUGHTERS OF LIBERTY OF CALIFORNIA et al., v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, et al. (Civ. 1768.)

(District Court of Appeal, First District, California. Nov. 23, 1915. Rehearing Denied Dec. 23, 1915. Denied by Supreme Court Jan. 20, 1916.)

1. JUSTICES OF THE PEACE ⟸159—APPEAL—UNDERTAKINGS—DISMISSAL—STATUTE.

Code Civ. Proc. § 974, gives an appeal from the judgment of a justice's court at any time within 30 days after its rendition, and section 978A provides that the undertaking on appeal shall be filed within 5 days after the filing of the notice of appeal, and that notice of its filing shall be given to the respondent, who may except to the sufficiency of the sureties within 5 days thereafter, and that unless they or other sureties justify within 5 days thereafter, the appeal shall be regarded as if no undertaking had been given. Petitioner suffered judgment in justice's court, and duly filed and served a notice of appeal and an undertaking on appeal, with notice to plaintiff therein of the filing, and plaintiff duly excepted to the sufficiency of the sureties named in the undertaking, and petitioners without attempting to have such sureties justify, on the next day filed a new undertaking, with notice thereof to plaintiff, and on plaintiff's motion the appeal was dismissed on the ground that the sureties on the first undertaking or other sureties in their stead had failed to justify after exception to their sufficiency. *Held*, that the dismissal was proper.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550–578; Dec. Dig. ⟸159.]

2. JUSTICES OF THE PEACE ⟸159 — APPEAL UNDERTAKING—VALIDITY.

An appeal undertaking was not invalid by reason of the inadvertent omission of the word "house," in the expression "is a householder," in that part referring to the qualifications of the sureties.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550–578; Dec. Dig. ⟸159.]

Petition for mandamus by Martha Washington Council No. 2, Daughters of Liberty of the State of California, and others against the Superior Court of the State of California, in and for the City and County of San Francisco, and George E. Crothers, one of the judges thereof. Writ denied.

Clarence A. Henning, of San Francisco, for petitioners. T. C. Van Ness, Jr., of San Francisco, for respondents.

KERRIGAN, J. In this proceeding the petitioners seek the issuance of a writ of mandate to compel the respondent to vacate a certain order made by it, dismissing an appeal taken by the petitioners from a judgment rendered in an action tried in the justices' court. Such judgment was entered on the 31st day of December, 1914, in favor of one E. F. Trimble, the plaintiff therein, against the petitioners here who were the defendants in that action. Thereafter, and on the 30th day of January, 1915, the petitioners filed and served a notice of appeal from the judgment of the justices' court, and on the same day filed an undertaking on appeal, and served notice on the plaintiff therein of the filing thereof. Subsequently, to wit, on February 3, 1915, the plaintiff excepted to the sufficiency of the sureties named in the undertaking. Fearing that said undertaking was defective because of the omission of the word "house," in the expression "is a householder," in that part of the bond referring to the qualifications of the sureties, the petitioners made no attempt to have the sureties on that bond justify, but on February 4th filed a second undertaking on appeal, in which the omission was inserted, and on the same day served the plaintiff with notice of the filing of the new undertaking. Upon motion of the plaintiff the superior court, after a hearing had thereon, dismissed the appeal upon the ground that the sureties upon the undertaking of January 30, 1915, or other sureties in their stead, had failed to justify after written exception to their sufficiency had been served as provided by law. It is to compel the vacating of such order of dismissal that the writ of mandate in this proceeding is sought.

[1] We think the order of the superior court must be sustained. An appeal from the judgment of a justices' court may be taken at any time within 30 days after the rendition of the judgment, and the appeal is taken by filing a notice with the justice and

serving a copy thereof on the adverse party. Code Civ. Proc. § 974.

"The undertaking on appeal must be filed within five days after the filing of the notice of appeal, and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice of the adverse party, to the amounts stated in the affidavits, the appeal must be regarded as if no such undertaking had been given."

[2] According to the wording of the latter part of section 978A, Code of Civil Procedure, we do not doubt that it was the duty of the appellants, after the exception to the sufficiency of the sureties was duly taken, to cause those sureties—or others in their place—to justify after notice and within the time specified in the statute, and that, in failing to do so, the appeal was unavailing. It may be that the course of action adopted by the appellants in filing the second bond would have been correct if the first bond, as they seem to suppose, was absolutely void because of the failure to declare in the affidavit accompanying it that the sureties were freeholders or householders. In that event the bond might perhaps have been regarded as almost a blank piece of paper, but the first undertaking in fact filed was not invalid by reason of the inadvertent omission of the word "house." Rauer's Law & Collection Co. v. Sup. Court, decided Feb. 11, 1915 (Sup.) 146 Pac. 866.

That part of section 978A of the Code of Civil Procedure relating to the justification of sureties is but a re-enactment of the same matter which theretofore was a part of section 978 (Jeffries v. Sup. Ct., 13 Cal. App. 193, 196, 109 Pac. 147), and hence the early cases construing that language, of course, are unaffected by the amendment. In the case of Wood v. Superior Court, 67 Cal. 115, 7 Pac. 200, the appellant in perfecting his appeal from a judgment in the justices' court, gave an undertaking, and upon exception having been taken to the sufficiency of the sureties the appellant, instead of having those sureties—or others in their stead—justify, filed a new bond with new sureties, and in so doing, says the court—

"he gave no notice as required by the last clause of section 978 of the Code of Civil Procedure. Such being the case, 'the appeal must be regarded as if no such undertaking had been given.' The statute is peremptory. Without the justification of the sureties named in the undertaking, or other sureties in their stead, upon notice to the adverse party, the appeal was not perfected, and the superior court had no jurisdiction of the case."

That case was followed by the Supreme Court in Herting v. Sup. Ct., 10 Pac. 514.[1] There, after notice had been filed and served on appellant, excepting to the sufficiency of the sureties in an undertaking on appeal from a judgment of the justices' court to the superior court, a new undertaking was filed, with new sureties, but no notice of the justification of the sureties in that undertaking was given to the adverse party; and it was held that the appellant had lost the benefit of his appeal.

In Allen v. Napton, 24 Mont. 450, 455, 62 Pac. 686, the court passed upon the point here involved, and construed the same language. There, too, exception to the sufficiency of the sureties upon an appeal bond had been taken. Within the 5 days allowed for the justification of the sureties the appellant filed and gave notice of the filing of a new undertaking, executed by sureties other than those who had signed the first undertaking. None of the sureties justified, nor was notice that they would justify ever given. The court held that the section was mandatory; that, unless the original sureties, or other sureties, justified within 5 days after the exception taken, upon notice to the adverse party, the appeal must be regarded as if no such undertaking had been given; the appellate court in such a case had no jurisdiction of the action upon the appeal—citing Wood v. Sup. Ct., supra; McCracken v. Sup. Ct., 86 Cal. 74, 24 Pac. 845; Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296.

For the reasons stated, we think the appeal was not effectual for any purpose, and that the superior court acquired no jurisdiction of the case.

Counsel for the petitioner in his brief has, for some reason not apparent to the court, seen fit to indulge in a flood of abuse directed against his opponent. Especially is this court surprised at the conduct of counsel in this respect, inasmuch as respondent's counsel presented his argument with courtesy, dignity, and ability. Such a brief is of no assistance to this court, nor in our opinion should its files be marred by a document of the character in question. It is therefore ordered that the said brief of petitioner be stricken from the files.

For the reasons heretofore stated the writ is denied.

We concur: LENNON, P. J.; RICHARDS, J.

28 Cal. App. 371

HUGHES v. CHUNG SUN TUNG CO.

(Civ. 1536.)

(District Court of Appeal, First District, California. Sept. 18, 1915.)

1. APPEAL AND ERROR ⊜935—PRESUMPTIONS FAVORING COURT BELOW—STATUTE.

Where the order of the trial court setting aside its first judgment was made within the time prescribed by Code Civ. Proc. § 473, providing that on application made within six months the court may relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, in the absence of

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 69 Cal. xv.

a record showing the basis of the court's action, such order will be presumed to be regular.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3783–3786; Dec. Dig. ⇐ 935.]

2. Appeal and Error ⇐82 — Finality of Determination—Order After Judgment.

An order of the court vacating and setting aside a judgment, being an order made after final judgment, was appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 379–385, 414, 416, 478, 479, 482, 483, 517–522; Dec. Dig. ⇐82.]

3. Appeal and Error ⇐871—Decisions Reviewable—Order on Appeal from Judgment—Statute.

Under Code Civ. Proc. § 956, providing that on appeal from a judgment the court may review the verdict or decision and any intermediate order or decision excepted to involving the merits or necessarily affecting the judgment, except a decision or order from which an appeal might have been taken, where defendant took no direct appeal from an appealable order of the court vacating and setting aside its judgment for defendant, the insertion, in defendant's notice of appeal from a second judgment recovered by plaintiff on his second amended complaint, of the language that the appeal was taken from "every interlocutory and intermediate order made in said case adverse to defendant," did not bring up for review the order of the court vacating the former judgment, the time for an appeal from which had expired.

[Ed Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3526–3529; Dec. Dig. ⇐ 871.]

4. Pleading ⇐248—Amendment.

In an action by a loan broker for a commission, where the original complaint sued for commissions for the procurement of a loan which defendant was alleged to have received and accepted under an express contract with the plaintiff allowing the latter a certain percentage for the procurement of such loan, allowance of the filing of the amended complaint, averring that plaintiff had performed his contract to procure the loan in the required amount, but that defendant had refused to accept it, was not improper as introducing a new cause of action, since the gravamen of the action was the breach of the contract, and its averment in one form or other would not amount to a change in the nature of the action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689–706, 708½, 709; Dec. Dig. ⇐248.]

5. Brokers ⇐63 — Contract with Loan Broker—Breach.

Where defendant agreed to take a loan of $26,000 from any party, if negotiated, and to pay plaintiff loan broker a commission of 7½ per cent. on the amount, and defendant either accepted and received the loan and then refused to pay the commission, or refused to accept and receive the loan when procured by plaintiff broker, defendant broke its contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94–96; Dec. Dig. ⇐63.]

6. Appeal and Error ⇐1011 — Review — Findings Below.

A finding of the trial court on substantial conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. ⇐ 1011.]

Appeal from Superior Court, City and County of San Francisco; A. E. Graupner, Judge.

Action by Jessie J. Hughes, administratrix, substituted in place of Jesse Hughes, deceased, against Chung Sun Tung Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hearing denied by Supreme Court, 154 Pac. 301.

Wm. Hoff Cook, of San Francisco, for appellant. Wm. F. Herron, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in favor of plaintiff for the recovery of commissions claimed to be due under a contract to procure a loan, and it is also an appeal expressly taken from "every interlocutory and intermediate order made in said case adverse to defendant."

[1-3] The facts of the case requisite to a review of the questions presented upon this appeal are substantially as follows: The plaintiff brought this action to recover his commissions, alleging the procurement of the loan in question in his original and first amended complaints. Issue being joined, the case went to trial. At the close of plaintiff's case a motion for nonsuit was made on behalf of the defendant, and was granted by the court, and a minute record of judgment in favor of defendant was thereupon entered on September 19, 1912. On February 11, 1913, the court made an order vacating and setting aside said judgment, and also appears to have made an order permitting the plaintiff to file a second amended complaint. The moving papers and proofs upon which these two orders were predicated are not before the court, but the order of the court setting aside its first judgment having been made within the time permitted by section 473 of the Code of Civil Procedure, was within the power and jurisdiction of the court, and, in the absence of a record showing the basis of the court's action, will be presumed to be regular. Besides, this order of the court, being an order made after final judgment, was an appealable order, from which the defendant took no direct appeal. The insertion in defendant's notice of appeal of the language above quoted would not have the effect of bringing up to this court for a review the order of the court vacating the former judgment, since the time for an appeal from that order had long since expired. It cannot therefore be reviewed upon this appeal under the express exception of section 956 of the Code of Civil Procedure.

The plaintiff having filed his second amended complaint, and issue being joined thereon, the cause again proceeded to trial, at the conclusion of which the plaintiff recovered jugdment against the defendant for the sum of $1,950, with interest and costs. It is from this judgment that the defendant prosecutes this appeal.

[4, 5] It is the contention of the appellant that the court erred in permitting the plaintiff to file his second amended complaint for the reason that a new cause of action is therein attempted to be set forth. In his original and first amended complaints the plaintiff sued for commissions for the procurement of a loan of a certain sum of money, which the defendant was alleged to have received and accepted, under an express contract with the plaintiff allowing him a certain percentage for the procurement of such loan. In the second amended complaint the plaintiff averred that he had performed the terms of his contract by the procurement of the loan in the required amount, but that the defendant had refused to accept or receive the same. We do not perceive that this change in the form of the plaintiff's averment of the defendant's breach of his contract introduces a new cause of action. The contract between plaintiff and defendant is in the form of an application by the latter to the former, who was a loan broker, for a loan of $26,000, wherein the applicant agrees "to take the above loan from any party if negotiated, and will pay C. U. Barlow & Co. a commission of seven and one-half per cent. on the amount loaned." Under such a contract, the defendant's breach would consist in either accepting and receiving the loan and then refusing to pay the commission, or in refusing to accept and receive the loan when the brokers had procured it by the production of a person ready and willing to make the loan in the amount and according to the terms of the defendant's obligation; in which case the brokers would be entitled to their commissions. Maxon v. Jones, 128 Cal. 77, 60 Pac. 516. The gravamen of the action is the breach of the contract, and the averment of such breach in one form or the other would not amount to a change in the nature of the action. With the discretion of the court in permitting the plaintiff to file his second amended complaint we are not concerned upon this appeal, for there is no record before us showing the reason or lack of reason which led the court to make the order.

[6] The final contention of the appellant is that the findings of the court are not justified by the evidence, but upon a careful reading of the record we find that the testimony of the witness Stidger, if believed by the court, was sufficient to show that the plaintiff did actually produce a person ready and able and willing to make the loan in question. This being so, a substantial conflict in the evidence was presented to the court, and its finding thereon will not be disturbed upon this appeal.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(28 Cal. A. 371)

HUGHES v. CHUNG SUN TUNG CO. (S. F. 7611.)

(Supreme Court of California. Nov. 15, 1915.)

Action by Jessie J. Hughes, administratrix, substituted in place of Jesse Hughes, deceased, against the Chung Sun Tung Company. On petition to have the cause determined by the Supreme Court after judgment in the Appellate Court (154 Pac. 299). Petition denied.

PER CURIAM. The petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal for the First Appellate District, 154 Pac. 299, is denied. See Burke v. Maze, 10 Cal. App. 206, 211, 101 Pac. 438, 440; People v. Vaughn, 25 Cal. App. 736, 740, 147 Pac. 116, 117. See, also, Prince v. Hill, 149 Pac. 578, 580.

(171 Cal. 610)

MANNING v. APP CONSOL. GOLD MINING CO. et al. (S. F. 6741.)

(Supreme Court of California. Dec. 23, 1915. Rehearing Denied Jan. 22, 1916.)

1. CORPORATIONS ⟸542—FRAUDULENT CONVEYANCES — WHAT ARE — ASSUMPTION OF DEBTS.

A conveyance of the property of a corporation whereby the grantee company assumed the debts of the grantor is based on a valuable consideration, and is not fraudulent within Civ. Code, § 3442, declaring that a voluntary conveyance by an insolvent shall be fraudulent as to existing creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154–2160; Dec. Dig. ⟸542.]

2. CORPORATIONS ⟸542—FRAUDULENT CONVEYANCE.

Where one corporation conveyed all of its property to a foreign corporation so that threatened litigation might be conducted in the federal courts, instead of the courts of the residence of the grantor corporation, such fact does not show that the conveyance was fraudulent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154–2160; Dec. Dig. ⟸542.]

3. CORPORATIONS ⟸318 — TRANSACTIONS — RATIFICATION.

Where the directors of two corporations were the same persons, and the majority of the shares were owned by the same person, a transaction between the two corporations is only voidable, and may be ratified.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1363, 1364; Dec. Dig. ⟸318.]

4. CORPORATIONS ⟸123 — TRANSFERS OF SHARES—VALIDITY.

Where a pledge of corporate stock was not recorded on the books of a corporation, it is, under Civ. Code, § 324, valid as between the parties, and the act of the corporation in issuing a new certificate for the pledged stock cannot be questioned by a third person.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507–512, 537, 539–546, 569, 618; Dec. Dig. ⟸123.]

5. CORPORATIONS ⟸548 — ACTION TO SET ASIDE CONVEYANCE — EVIDENCE — SUFFICIENCY.

In a suit by a judgment creditor of a corporation to set aside a conveyance of its property to another corporation, which assumed the debts, evidence *held* insufficient to show that the conveyance was fraudulent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2182–2186; Dec. Dig. ⟸548.]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Daniel Manning against the App Consolidated Gold Mining Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Wm. M. Cannon, F. J. Solinsky, and Paul C. Morf, all of San Francisco, for appellant. Samuel M. Shortridge, of San Francisco, F. E. Cook, of Fresno, and Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondents.

MELVIN, J. Appeal by plaintiff from the judgment. Plaintiff sued as a judgment creditor of the App Consolidated Gold Mining Company (which hereafter we shall designate as the "App Company"). The complaint charged that certain conveyances and other transactions upon the part of the App Company and the other defendants were fraudulent, and that the property and assets of that corporation were transferred for the purpose of preventing him from securing anything in satisfaction of his judgment. We shall abbreviate the names of the other corporate defendants, the Rawhide Gold Mining Company and the Central Land & Trust Company to "Rawhide Company" and "Trust Company," respectively.

According to the allegations of the complaint the corporate defendants Rawhide and App Companies were engaged in gold mining in Tuolumne county. William A. Nevills owned a majority of the stock of each corporation. In February, 1902, the plaintiff, who was employed in a mine belonging to the App Company, was seriously injured by a falling timber. In April, 1902, the said corporation conveyed all of the property of which it was then the owner to the Rawhide Company in consideration of the issuance to it of $14,975 of the stock of the latter company; that consideration being named in the instruments of conveyance. In the month of May, 1902, plaintiff sued the App Company for damages on account of the injuries received in its mine, and in November of that year obtained judgment for $5,000. The order of court denying a new trial in that case was reversed by this court in March, 1906. On November 12, 1906, William A. Nevills (so it is alleged), owning a majority of the shares of stock of the App and the Rawhide Companies, and being indebted to the Trust Company for $100,000 loaned and advanced to him personally for his own use, procured the execution by the Rawhide Company of a promissory note in the sum of $100,000. On the same day, it is alleged, the Rawhide Company executed a trust deed conveying to F. H. Short and J. P. Bernhard in trust as security for the payment of the said note all of the mining property described in the complaint and other valuable property belonging to Nevills or to him and his wife, Delia F. Nevills, who is also a defendant in this action. In February, 1910, Manning's action against the App Company was again tried, resulting in a judgment in his favor for $17,500. An appeal was taken by the defendant, but it was not perfected, and the judgment became final in July, 1912.

It is also averred in the complaint that prior to the commencement of this action proceedings were pending in Tuolumne county to foreclose under the deed of trust; the amount then due on the promissory note being more than $120,000. It is alleged that the property conveyed by the App Company to the Rawhide Company was worth $500,000, and that after the said conveyance no assets of any sort out of which Manning could satisfy his judgment remained in the possession of the App Company.

The complaint also contains averments to the effect that Nevills dominated both mining corporations, and that all of the transactions were done according to his wishes and commands; that he owned 146,080 of the 150,000 shares of the stock in the App Company, and 14,980 of the 15,000 shares of the Rawhide; that the deed of conveyance from the former to the latter was without consideration, and that Nevills caused said conveyance to be made for the purpose of defrauding the creditors of the App Company, particularly the plaintiff. Upon information and belief it is pleaded that the indebtedness evidenced by the promissory note to the Trust Company has been paid by the proceeds from the pledged property; that Nevills and the officers of the Trust Company have conspired to pretend that no portion of the principal sum of the note has been paid and to cause the sale of said property under the terms of the deed of trust; that said property is to be purchased for them at such sales and to be conveyed at some future time to Nevills, and that such course has been and is to be pursued for the purpose of defrauding plaintiff and other judgment creditors; that in pursuance of said conspiracy the trustees have been notified of the alleged default in payment of the note, and have been directed to sell the property in accordance with the terms of the trust deed; and that the trustees have prepared to foreclose and unless they be restrained will sell the property, thereby impairing plaintiff's lien. The prayer is for judgment for the amount of plaintiff's claim, and, besides, the plaintiff asks for an accounting by the Trust Company for all moneys received by it from the Rawhide Company, from Nevills, and from the operation of the mining property described in the conveyances. Plaintiff also prays for restraining orders which will prevent further activities by any of the defendants looking to the disposition of the property, and especially does he ask that the trustees be restrained from any further proceedings under the deed of trust.

The substantial averments of the complaint are denied by the defendants in their answer. They deny any conspiracy to defraud creditors either in the transactions between the App and the Rawhide Companies, resulting in the purchase of the property of one by the other, and allege that the deed of trust was made in good faith and received by the Trust Company without any knowledge of any matters alleged in the complaint. The payment of the indebtedness evidenced by the promissory note is also denied, and they plead a judgment of the superior court given on July 8, 1912, whereby it was found that the Rawhide Company was indebted to the Trust Company in a sum in excess of $120,000, and, while admitting that the proceeds of the pledged properties have been applied to the indebtedness evidenced by the note, they assert that no accounting is necessary to determine the balance due, for the reason that such accounting has been ordered by the court in another action and has been accomplished.

The findings are to the effect that all of the transactions denounced in the complaint as fraudulent were in good faith, and that the trust company had no knowledge or notice of the alleged fraudulent practices in the dealings between the App and the Rawhide Companies. The court also found that the Trust Company knew of no claim or demand of the plaintiff against the App Company or of the suit for damages.

An attack is made by appellant upon the findings on the theory that the evidence does not support them. The plaintiff insists, moreover, that the evidence shows without contradiction a state of facts leading, as matter of law, to the conclusions for which he contends. These propositions are, in brief: (1) That the conveyance by the App Company to the Rawhide Company was made without consideration, with intent to hinder, delay, and defraud creditors of the App Company; (2) that the deed of trust was executed as security for the personal debt of Nevills and in pursuance of his intention to create a large indebtedness against the property so fraudulently transferred, ostensibly in the name of the Rawhide Company, with intent to hinder, delay, and defraud the plaintiff; (3) that the Trust Company at all times had full knowledge of all of the alleged frauds; and (4) that the indebtedness evidenced by the promissory note has been paid, but that Nevills and the Trust Company fraudulently conspired to pretend that no such payment had been made. Appellant seems to pin his faith upon the first and third propositions; therefore we will consider: (1) Whether or not there is any evidence to sustain the finding of the superior court that the conveyance of the App Company to the Rawhide Company was made for a consideration and without intent to hinder, delay, or defraud plaintiff; and (2) if it be determined that the finding was unsupported, and that said conveyance was made with the intent alleged, whether or not the Trust Company had knowledge of the fraud when the deed of trust was executed. If neither of these problems must be solved in favor of defendants, the judgment must be affirmed.

[1] Respondents insist that the question of fraudulent intent is one of fact to be determined by the trial court, and not one of law arising from the proven or admitted facts. It is the contention of respondents that there is no presumption of fraud arising out of the transfer of all of the property of the App Company to the Rawhide Company because there was not lacking a valuable consideration, and because the transfer was not made in contemplation of insolvency. Section 3442, Civ. Code. Mr. Ricketts, who was attorney for the App Company at the time of the said transfer, testified that the corporation did receive 14,975 shares of the Rawhide stock. Mr. Lang's testimony was to the same effect. It is true that the 14,975 shares were subject to a prior pledge to J. S. Doe, who held as collateral security for a loan to Nevills substantially all of the stock of the original issue of the Rawhide Company. The amount of the stock was reduced in accordance with the laws of West Virginia, in which state the Rawhide Company was chartered. It is stoutly asserted by appellant that there was obvious fraud in thus reducing the number of shares of capital stock while the original issue was outstanding and in Mr. Doe's hands, and that in any event the new issue was of no value because all of its equivalent was held by the pledgee. Respondents are of the opinion that the facts shown would only subject the new shares of the Rawhide to Mr. Doe's prior lien, and, as there were, according to the testimony of Mrs. Nevills, about $3,000,000 worth of securities in Mr. Doe's hands to protect a debt of something like $200,000, it could not be said that the shares transferred by the Rawhide to the App were without value because, under the doctrine of marshaling of securities, resort must first be had to other personalty held by the pledgee before he would be justified in applying the Rawhide stock to the payment of the debt of Nevills. There is much force in this position, but we are not compelled to consider the legality of the change in the amount of capital stock nor the value of the new stock when issued to support the finding that there was a valuable consideration for the transfer of the App Company's property. The Rawhide Company assumed the current indebtedness of the App Company in consideration of the deed, and debts were paid by it. The promise of a grantee to pay a grantor's indebtedness is a valuable consideration. Saunderson v. Broadwell, 82 Cal. 133, 23 Pac. 36; Gladwin v. Garrison, 13 Cal. 332; Carty v.

Connolly, 91 Cal. 19, 27 Pac. 599; Greenwalt v. Mueller, 126 Cal. 639, 59 Pac. 137. Such assumption removes the transaction from the operation of section 3442, Civil Code. The same principle was announced by the Supreme Court of Nevada in Ivancovich v. Stern, 14 Nev. 341.

[2-5] Mr. Ricketts testified that long before Manning was hurt a plan was discussed for transferring the property of the App (a Californian corporation) to the Rawhide; the primary purpose being to vest the property in the West Virginian corporation in order that certain threatened litigation might be conducted in the courts of the United States, rather than in those of this state. There was nothing essentially fraudulent, or even improper, in such a purpose. Nor did the fact that Nevills was the owner of practically all of the stock of both companies render the transaction fraudulent. Indeed, so far as Nevills was concerned, he was liable as a stockholder of either company, and was personally liable as a stockholder of the Californian corporation. At the time when the first judgment was given in favor of Manning, Nevills was evidently solvent because he and his wife offered themselves and were accepted as sureties on the appeal bond. It is argued that such a course was entirely inconsistent with any idea of trying to defeat the collection of Manning's claim, and that, if Nevills had sought fraudulently to prevent such collection, he would have made some apparent disposition of his individual property for the same purpose. There is force in this position, and doubtless the argument received due weight in the mind of the trial court. Nor is the fact that the directors of the App and the Rawhide Companies were all or most of them holding like positions in both corporations conclusive as to the bad faith of the transaction between them. Such dealings are not void, but voidable only, and may be ratified by either party by conduct having that legal effect. Sausalito Bay Land Co. v. Sausalito Improvement Co., 166 Cal. 306, 136 Pac. 57. It needs no argument to demonstrate that the stockholders of both companies by their subsequent actions ratified the transfer. For example, the Rawhide defended and compromised a suit which had been commenced in a federal court on a liability which was originally that of the App Company.

Doubtless it was an irregularity as against Doe for the Rawhide Company to issue the certificate for the reduced stock without naming Doe therein as pledgee. Spreckels v. Nevada Bank, 113 Cal. 274, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348. Notwithstanding the pledge to Doe, Nevills continued to own the stock, and the transfer of it to Doe, not having been entered on the corporation's books, was good only as between the parties. Section 324, Civ. Code. Doe was paid eventually, and the 14,975 shares of stock transferred by Nevills to the App Company was in essence the same stock which he had pledged to Doe. Nor does fraud inhere in the fact that Nevills furnished the consideration which passed between the corporations. He was virtually the sole stockholder of each company. If he transferred shares in the Rawhide, which he personally owned, to the App (of which he was the holder of practically all of the stock), it would not alter his financial interest.

We conclude, therefore, that to the trial court was given the duty of determining the question of alleged fraud as a matter of fact, and not as a matter of law arising from the undisputed or admitted facts; that there is a substantial basis for the court's conclusion that the transaction attacked by plaintiff was not fraudulent and void; that the findings in this regard are supported by evidence; and that we cannot, therefore, disturb the judgment.

The conclusion which we have reached makes it unnecessary to examine the other contentions of appellant relating to the transactions between the Trust Company, the Rawhide Company, Nevills, his wife, and others, because there is no alleged fraud connected with that branch of the case which is not charged as having its origin in the asserted original bad faith and alleged sinister practice by which the properties of the App Company were transferred to the Rawhide.

From the foregoing it follows that the judgment must be affirmed; and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.; SLOSS, J.

171 Cal. 633

In re SCHWARTZ et al. (S. F. 6892.)

(Supreme Court of California. Dec. 27, 1915.)

1. PARENT AND CHILD ⇐2—ABANDONMENT OF CHILD—CONDUCT OF PARENT.

Petitioner, on the birth of his daughter in 1906 and on the death of her mother a few days later, having then no home, asked his aunt, living with his father-in-law, to bring the child up, and left the child with her, and during the next four years visited relatives in Europe, worked in various places, and remarried in 1910, and in January, 1911, sued out a writ of habeas corpus to obtain custody of the child. In October, 1912, he obtained the vacation of an order of adoption consented to by the aunt as guardian, and in September, 1913, applied for revocation of her letters of guardianship, which had been granted in 1911 without notice to him. *Held*, in the absence of evidence that it was not for the child's best interest to be left with the aunt and of any demand on him for its support, not to show abandonment of the child by him.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4–32; Dec. Dig. ⇐2.]

2. PARENT AND CHILD ⇐2—CUSTODY—RIGHT OF FATHER—FITNESS.

In view of Civ. Code, § 197, declaring the father of a minor child entitled to its custody, the father, who was an industrious man of good habits having a comfortable home and whose

wife was willing to care for it, was competent and fit to have its custody, and was entitled thereto, as against a guardian who had been appointed without his consent.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4–32; Dec. Dig. ⇦2.]

Angellotti, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Bradley V. Sargent, Judge.

Petition by Adolph Schwartz for the revocation of letters of guardianship of Rosa Gertrude Schwartz, his minor child, issued to Amalia Schwartz, and for the termination of said guardianship. Petition denied, and petitioner appeals. Order reversed.

Olin L. Berry, of San Francisco, for appellant. George Appell and C. H. McConaughy, both of San Francisco, for respondent.

SHAW, J. Adolph Schwartz appeals from an order denying his petition for the revocation of letters of guardianship of Rosa Gertrude Schwartz, his minor child, issued to Amalia Schwartz on March 16, 1911, and for the termination of said guardianship.

The child has no property of any description. The said guardian was appointed solely upon the ground that the father had abandoned the child and that it needed the care and attention of some fit and proper person. In denying the petition of the father for revocation the court made findings to the effect that the father had abandoned the child prior to the appointment of Amalia Schwartz as guardian, and that he was not a fit or proper person to have its custody. We are of the opinion that the evidence does not justify either finding. The following is a statement of the facts shown by the evidence, relating to abandonment:

[1] Amalia Schwartz is the aunt of the child's father and mother, who were cousins. She was the sister of the father of Adolph Schwartz and of the mother of Sophie Schwartz, his wife, who was the daughter of Adam Stern. The wife of Stern was for many years in delicate health, and Amalia Schwartz lived as a member of the family of Stern and was the housekeeper. She had raised Sophie Schwartz, the wife of the appellant. Schwartz and his wife, at the time of her confinement, were living at the house of Adam Stern in Los Angeles. The child was born on December 4, 1906. Its mother died on December 18, 1906. Schwartz and Stern were both barbers by occupation. Upon the death of the child's mother, Schwartz, having no home or place to keep it, asked his aunt, Amalia Schwartz, to take the child and raise it, which she then agreed to do. Thereupon he left the child with her. Shortly after making this arrangement Schwartz left the house of his father-in-law and never afterwards lived there as a member of the family, although he visited the family several times a year. From 1906 to 1911 Schwartz lived in various places. He went first to Jamestown, Va., and then to Europe on a visit to his relatives. He also worked in Los Angeles and in Nevada, and in the beginning of 1910 he settled in Seattle and there married his present wife, by whom he has a child which was about two years old at the time of the making of the order appealed from. About the first of January, 1911, Mrs. Stern, Schwartz's mother-in-law, died. Upon learning of her death, Schwartz wrote to Adam Stern suggesting that he would take the child to his own home and away from the home of Stern. Up to that period the relations between the parties appear to have been entirely harmonious. His suggestion that he wanted to take the child himself was met with objections, and from that time forward all of his relatives manifested a disposition to resist his purpose. Stern wrote to Schwartz advising him not to attempt to take the child away, that it would make trouble. Thereupon Schwartz went to Los Angeles to get the child, and, failing to find it, caused a writ of habeas corpus to issue for its custody. This writ was served upon Stern, but not upon Amalia Schwartz. The child had been taken to San Francisco by Amalia Schwartz, and was at that time in the home of Calvin C. Eib, its uncle by marriage. Failing in this proceeding, Schwartz returned to Seattle. In March, 1911, without notice to Schwartz, Amalia Schwartz obtained the appointment as guardian in the superior court of San Francisco, as above stated, for the purpose of retaining custody of the child. In November, 1911, Calvin C. Eib and his wife, without the consent of Schwartz, obtained an order of the superior court of San Francisco whereby they adopted the said child, Amalia Schwartz consenting thereto as its guardian. In May, 1912, Schwartz moved to San Francisco and then discovered that the child was in the custody of Eib and wife. He then again resorted to a writ of habeas corpus to get the child and was defeated by the order of adoption and the guardianship, of both of which he then heard for the first time. In October, 1912, he applied to the superior court to set aside the order of adoption aforesaid, and in May, 1913, the said order was vacated accordingly. In September, 1913, he filed the present application for the revocation of the letters and termination of guardianship.

It is clear from this conduct of Schwartz that he never intended to abandon the child. Having arranged with his aunt for its care, it cannot be said that his conduct in allowing her to keep it was an abandonment. From all that appears in the evidence it was for the best interests of the child that it should be left with the aunt, at least until Schwartz married. There is some conflict in the evidence as to whether he contributed anything to the child's support. On the other

hand it does not appear that any demand was ever made upon him for assistance of that kind. Under the circumstances, his failure to pay for its maintenance did not constitute an abandonment. The evidence is insufficient to justify the finding that the child was abandoned by the father.

[2] With respect to the father's fitness to have the custody and care of the child, the evidence to sustain the finding is equally deficient. He appears to be an industrious person of good habits. He has a comfortable home into which he can take the child. His present wife is desirous of having the child and is willing to care for it. The finding that he is unfit to care for the child seems to be based entirely upon the fact of his making divers demands upon Stern and Eib for money as a condition of his consent that the child might be kept away from him. These occurred after the controversy arose, and in the course of his negotiations and efforts to get possession of his child. In February, 1911, he said to Charles Stern that he had had bad luck that year, and had been in the hospital, and that if he could get $500 he would consent to allow the child to remain where it was, and made a like proposal to Adam Stern, asking for $1,000. He was referred by Adam Stern to Mr. Eib. Thereupon he began the proceeding in habeas corpus, which, as before stated, failed of its object. In May, 1912, in a conversation with Eib in San Francisco, he again intimated that if $1,000 were paid he would not press his claims for the child. No other conduct of his was proven tending to show unfitness for the care of the child. The appellant himself denies that he made these requests as a condition of giving up the child. Whatever may have been the reason for his conduct in this particular, we do not think it is sufficient to justify the finding that he is not a fit and proper person to have the care and custody of his child. The court below appears to have made its decision as it did because of its belief that the financial interests of the child would be promoted if it were left with its relatives, rather than given over to its father. The law does not recognize this as a cause for depriving the father of the custody of his own child. No sufficient reason appears why the father should not be allowed to take care of and rear his child, as he apparently desires to do. The father is competent and fit to have its custody, and, being willing and able to care for it, he is entitled thereto. Civ. Code, § 197. The guardianship is no longer necessary and should be terminated. We think the court below erred in refusing the relief asked by the father.

The order is reversed.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.; LAWLOR, J.

ANGELLOTTI, C. J. I dissent, being of the opinion, after full consideration of the record, that the evidence sufficiently supports the finding of abandonment.

171 Cal. 637

GRAY v. UNION TRUST CO. OF SAN FRANCISCO. (S. F. 6761.)

(Supreme Court of California. Dec. 31, 1915. Rehearing Denied Jan. 28, 1916.)

1. APPEAL AND ERROR ⊂=150 — RIGHT OF TRUSTEE—BENEFIT OF OTHERS.

In an action to terminate a trust to manage the property and to pay the net income to the trustor during her lifetime, and providing that on her death the property should go as provided in her last will, or, if she left no will, to her heirs at law, the defendant trustee had a right to appeal from a decree for plaintiff if it believed that the rights of other persons than the trustor would be impaired or destroyed by its termination, as it owed precisely the same duty to protect the rights of the indeterminable class of beneficiaries as to protect the rights of the trustor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934–946; Dec. Dig. ⊂= 150.]

2. TRUSTS ⊂=135 — CONSTRUCTION — "DRY TRUST"—STATUTE.

Such trust was not a "dry trust," since active duties were imposed on the trustee during the life of the trustor, and after her death in ascertaining the persons entitled to take the property; and, under the express provision of Civ. Code, § 863, the trustee of such express trust took the whole legal title.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 178; Dec. Dig. ⊂=135.

For other definitions, see Words and Phrases, First and Second Series, Dry Trust.]

3. TRUSTS ⊂=59—REVOCATION—STATUTE.

Such trust instrument, reserving no power of revocation, created a trust irrevocable by any act of the trustor, as, under the express provision of Civ. Code, § 2280, a trust cannot be revoked by the trustor, after its acceptance by the trustee and beneficiaries, unless the declaration of trust reserves a power of revocation in the trustor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 78–81; Dec. Dig. ⊂=59.]

4. TRUSTS ⊂=61—TERMINATION—POWERS OF EQUITY—PARTIES.

It is only when all the parties interested in a trust are before a court, when each is sui generis and all join in the application that a court of equity ever terminates a valid trust, and, even in such circumstances, it does not do so by force of the application but only when such a decree is proper, and even then the court is not required to terminate the trust, but may do so in its discretion; and, conversely, equity has no power to terminate the trust if all the parties in interest are not before the court, as Civ. Code, § 2280, declares that a trust shall not be revocable except by the consent of all the beneficiaries.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83–87; Dec. Dig. ⊂=61.]

5. TRUSTS ⊂=140—ESTATE OF BENEFICIARIES —VESTED "REMAINDER"—STATUTE.

A trust in real and personal property was created to manage and invest and to pay the income to the trustor for life, irrevocable during her lifetime, and under which on her death the property should go as provided in her last will, and, if she left no will, to her heirs at law

according to the succession laws of California existing at its creation. Civ. Code, § 769, declares that when a future estate other than a reversion depends on a precedent estate, it may be called a "remainder," and be created and transferred by that name. Section 773 provides that a remainder may be created to commence at a future day and be limited upon a life estate, and section 781 provides that a general or special power of appointment shall not prevent the vesting of a future estate limited to take effect in case such power is not vested. *Held*, that the trust created vested remainders in the trustor's heirs, subject to divestiture only upon her exercise of the power of nomination by will.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 183–187; Dec. Dig. ⊂⊃140.

For other definitions, see Words and Phrases, First and Second Series, Remainder.]

6. REMAINDERS ⊂⊃14—ALIENATION.

Such remainders in trust, whether regarded as vested or contingent, were alienable.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 10; Dec. Dig. ⊂⊃14.]

7. DEEDS ⊂⊃128—RULE IN SHELLEY'S CASE—EFFECT OF ABOLITION.

The effect of Civ. Code, § 779, repealing the rule in Shelley's Case, was to restore to courts of equity their right to construe apt words to create a remainder as a limitation, in accordance with its plain import and intent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413–415, 419–421, 427; Dec. Dig. ⊂⊃128.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Helen D. Gray against the Union Trust Company of San Francisco, to terminate a trust. Decree for plaintiff, and defendant appeals. Reversed, with directions to deny plaintiff the relief sought.

Heller, Powers & Ehrman, of San Francisco (Devlin & Devlin, of Sacramento, of counsel), for appellant. Edwin L. Forster and Robert R. Moody, both of San Francisco, for respondent.

HENSHAW, J. Plaintiff, by two instruments of the same date and forming "parts of the same transaction," made by one of them a transfer to defendant, absolute in form, of certain property, real and personal. By the second, contemporaneous therewith, she declared the trusts upon which the defendant, as trustee, was to hold this property. At the time when plaintiff executed the transfer and trust agreement she was and still is an unmarried woman over the age of 21 years, having no child nor other lineal descendant. Plaintiff's mother, however, is living, and her mother would be entitled to inherit, and succeed to all the property, real and personal, of plaintiff if she should die intestate and unmarried, leaving her mother surviving. Plaintiff also has other relatives now living who would be entitled to succeed to and inherit her property if she should survive her mother and thereafter die intestate unmarried, leaving no child surviving her and leaving surviving her the other relatives referred to or any of them. Helen D. Gray subsequently brought this action to terminate the trust, her contention being that, notwithstanding she did not reserve in the instruments creating it any power of revocation, nevertheless by virtue of the terms of the trust itself it is determinable at her pleasure. The terms of the trust itself therefore demand presentation.

The conveyance was made to defendant "to manage said trust property as hereinafter provided." The property subject to the trust came to plaintiff through the will of one Mary E. Bithell. The "original investment" of funds received from the estate of Mary Bithell could be made only with the concurrence of the trustor. After this original investment, made with the concurrence of the trustor, the trustee is empowered "thereafter from time to time to make investments and reinvestments as in its discretion may seem necessary and proper without consulting the trustor." Certain limitations upon the power of the trustee to make these investments are declared, but they have no bearing upon the question presented on this appeal. "The net income and revenue and profit, less the charge for services of the trustee, shall be paid by said trustee to said trustor," and an accurate account is to be kept. The trustee is entitled to receive for its services 2 per cent. of the gross income of the trust property, and finally the trust instrument declares:

"This trust shall be irrevocable and shall last during the lifetime of said trustor, and upon her death the trust property shall go to and vest as she shall provide in her last will and testament, and leaving no last will and testament, said property shall go to and vest in her heirs at law, according to the laws of succession of the state of California as such laws now exist."

The facts were stipulated, the stipulation embracing the matters of fact above set forth. Drawn from these facts the court made additional findings of fact which are in reality misplaced conclusions of law. The most important of these is as follows:

"That plaintiff is the only person having any interest in any of the real or personal property mentioned in the said assignment or in the said agreement, except said defendant, Union Trust Company of San Francisco, for the compensation which it is entitled to receive for its services as trustee, under the terms of the said trust agreement."

[1] It was under this finding, which manifestly is a conclusion of law embodying the court's construction of the trust and its determination that defendant held but the naked fee, while every beneficial interest in all of the property was vested in plaintiff, that the court concluded that the trust was one which should be dissolved and terminated by its decree, and gave judgment accordingly. From that judgment defendant appeals, and no serious objection can be raised to its right to appeal. Indeed, it is its duty to

do so if it believes that there be other persons than Helen Gray whose rights would be impaired or destroyed by the dissolution of this trust. Those persons, if they exist, would be Helen Gray's "heirs at law according to the laws of succession of the state of California as such laws now exist." But those persons, in the contingency provided for by the trust, would not take as inheritors from Helen D. Gray. The laws of succession as they existed at the time of the creation of the trust would fix the class entitled to take, and that class would take, not as heirs of Helen Gray by virtue of her intestacy, but as a class designated in the trust instrument in the event that Helen Gray failed to exercise her power to nominate others. In other words, by a change in the laws of succession conceivably it could happen that those who would be entitled to take under the trust instrument in the event of the death intestate of Helen Gray, would no one of them be an heir at law of Helen Gray at the time of her death. And, finally, upon this proposition it should be pointed out that upon the death of Helen Gray intestate, it would not be the court in probate which would determine to whom the trust property should go. The class entitled to take would be determined by a court of equity in an action brought by the trustee to determine that precise question. The trustee, therefore, owes precisely the same duty to protect the rights of this indeterminable class of beneficiaries as it does to protect the right of the named beneficiary, Helen D. Gray.

[2, 3] The ultimate question then is the power of the court of equity to terminate such a trust as this. The primary questions first to be determined, and in whose determination the answer to the ultimate question will be found, go to the nature and scope of the trust itself. What then are the nature and scope of the trust? First there is conveyed to the trustee the whole legal title, since so much is plainly necessary for the purposes of the trust (Civ. Code, 863), which general purposes are to give to plaintiff the usufructuary benefit of the property during her lifetime and upon her death to see that the property goes to her nominees under her will, or, failing of such nomination, to those who are her heirs at law at the time of her death under the laws of succession as they existed at the time of the making of the trust. Plaintiff's usufructuary interest in the whole estate during her life is her equitable life estate, to which is added the power of nominating those who shall take the legal and equitable fee at her death and thus terminate the trust. The trust itself is not a dry, naked trust, since active duties are imposed upon the trustee during the life of the plaintiff, and a no less active duty upon her death in causing to be determined, should she fail to nominate, those entitled to take the property. The settlor or trustor reserved no power of revocation, and the trust is therefore irrevocable by any act of plaintiff. Civ. Code, § 2280; Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659; Scrivner v. Dietz, 84 Cal. 297, 24 Pac. 171; Kopp v. Gunther, 95 Cal. 63, 30 Pac. 301; Salisbury v. Bigelow, 20 Pick. (Mass.) 174; Stone v. Hackett, 12 Gray (Mass.) 227; Viney v. Abbott, 109 Mass. 300.

We have so far refrained from using the word "remainder" or "remaindermen" in connection with this trust, for the creation by the trust of such remainders and remaindermen is the very heart of the controversy between these litigants. By appellant it is contended that such remainders are created and with them estates in the remaindermen, which it is beyond the just exercise of the powers of equity to destroy. Upon the other hand, it is contended that no such remainders are created; that the whole equitable estate is in the trustor, plaintiff herein, and that she is entitled to address herself to equity for the relief here obtained—the relief which will terminate a dry and naked trust, establishing the legal estate in the person who possesses the full equitable estate.

[4-6] It is only when all the parties in interest are before a court, when each is sui generis, and all join in the application, that a court of equity ever terminates a valid trust. And even when all these circumstances exist, equity does not do so by force of the application, but only when a decree so doing is meet and proper. When such circumstances exist power is in the court of equity to terminate the trust, but with that power is not necessarily imposed the duty so to do. It is still discretionary. Perry on Trusts, § 920; 39 Cyc. 99; Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566, 100 Am. St. Rep. 99; Hildreth v. Eliot, 8 Pick. (Mass.) 293; Wenzel v. Powder, 100 Md. 36, 59 Atl. 194, 108 Am. St. Rep. 380; Godfrey v. Roberts, 65 N. J. Eq. 323, 55 Atl. 353; May v. Walter's Executors, 97 S. W. 423, 30 Ky. Law Rep. 59; In re Lewis' Estate, 231 Pa. 60, 79 Atl. 921; Estate of Yates, 149 Pac. 555. The converse of this proposition follows as matter of course. If all the parties in interest are not before the court, equity has no power to terminate the trust. Civ. Code, 2280; 2 Perry on Trusts (6th Ed.) § 920; Brown v. Brown, 97 Ga. 531, 25 S. E. 353, 33 L. R. A. 816; 39 Cyc. 99. The importance of this consideration arises from the fact that if remainders and remaindermen were created, admittedly the latter were not before the court and its decree must fall. And thus by this different method of approach we are brought to the vital consideration in the case: Were such remainders created? Our Civil Code, § 769, declares that:

"When a future estate, other than a reversion, is dependent on the precedent estate, it may be called a remainder, and may be created and transferred by that name."

We have in this trust apt language to create such a future estate, dependent for its enjoyment upon the termination of a precedent life estate. We have therefore apt language to create a remainder, and it is quite permissible that it should be created to commence at a future day and be limited upon a life estate. Civ. Code, § 773. There is in this trust a power of appointment or nomination reserved to the trustor. It can be exercised in but one way, and that is by her will. But such power of appointment does not prevent the vesting of the future estate in remainder. Civ. Code, § 781. Everything then which the law contemplates shall exist for the creation of equitable remainders or remainders in trust is found in this trust. Whether they be regarded as vested or contingent is immaterial, for in either case the estate and interest are alienable. Davis v. Willson, 115 Ky. 639, 74 S. W. 696; McDonald v. Bayard Sav. Bank, 123 Iowa, 413, 98 N. W. 1025; Sikemeier v. Galvin, 124 Mo. 367.[1] But in truth these remainders are to be regarded as vested remainders, subject to divestiture only upon the exercise of the power of nomination by will reserved to the trustor. A case substantially identical with this was presented by Crackanthorpe v. Sickles, 156 App. Div. 753, 141 N. Y. Supp. 370. There, as here, the plaintiff, an unmarried woman, conveyed property to a trustee to invest and manage and pay the net income thereof to her during her life, and at her death to distribute it to such persons as she might designate by her will, or, should she die intestate, then to divide the property among her lawful issue, which she might leave surviving. In that case, as in this, plaintiff sought a dissolution of the trust, claiming to be the only person beneficially interested therein. The court in disposing of these contentions said:

"It must therefore be determined just what the interest of these children is. The effect of the deed was to vest in the plaintiff an equitable life estate in the property, with a general power of appointment by will to any person or persons whom she might designate. In default of an appointment of successors to the property pursuant to the power, the deed created a remainder to the lawful issue of the plaintiff who should survive her. It is a well-established rule, both of the common law and by statute, in this state that estates in remainder which are limited to take effect upon default in the exercise of a power of appointment are not prevented from vesting by the existence of the power, but take effect in the same manner as if no power existed, subject, however, to be divested by an exercise of the power. * * * By virtue of this clause of the deed there sprung into being upon the birth of each child of the plaintiff a vested remainder, subject to open up and let in afterborn children, and to be divested either by the death of such child without issue before the death of the plaintiff or by the plaintiff's exercising her power of appointment by will. It is needless to add that such an interest is alienable. Moore v. Littel, 41 N. Y. 66; Campbell v. Stokes, 142 N. Y. 23, 36 N. E. 811; Matter of Chapman, 133 App. Div. 337, 117 N. Y. Supp. 679; Shindler v. Robinson, 150 App. Div. 875, at page 881, 135 N. Y. Supp. 1056; New York Real Property Law, § 40. It follows, therefore, that the children of the plaintiff are persons beneficially interested in the deed of trust, and it cannot be revoked without their consent. They are also necessary parties defendant."

[7] Respondent places reliance upon certain cases as supporting the decree of the court terminating this trust. Those cases, however, deal with a dry, naked trust, or with a trust where every party in interest is before the court in joining in the application or rest expressly or by necessary implication upon the rule in Shelley's Case. But this ancient rule was of feudal origin and policy, and did deliberate and designed violence to the deed of the grantor or the will of the testator, to the end that the laws of inheritance should prevail over the wish of the grantor or testator. It arbitrarily declared that apt words which indisputably created a remainder in the heirs should be held as a "limitation." In other words, as a definition of the estate which the grantee or devisee took, and that that estate was the fee simple, the remaindermen being thus cut off and taking nothing. So obnoxious was this rule to justice that it was always subjected to rigidly strict construction, till finally in many states, as in this state, it was absolutely repealed. Civ. Code, § 779; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049. The effect of the repeal of this arbitrary rule is to restore to courts of equity their right to construe this language, in whatever instrument it may be found, in accordance with its plain import and intent.

A brief review of the cases relied on by plaintiff should follow the general statement concerning them which has been given above. The first of these is Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566, 100 Am. St. Rep. 99. Mrs. Hammack had conveyed certain property to her daughter, Mrs. Eakle, in trust, to pay over the rents and profits of the property to the mother during her lifetime and after her death to pay them to her son, Henry Hammack. There was no remainder over after the termination of these equitable interests for life. Mrs. Hammack died, leaving as her heirs four children, Mrs. Eakle, Mrs. Bean, George and Henry Hammack. Mrs. Eakle resigned as trustee, and Ingram, defendant in the action, was appointed in her place. Mrs. Hammack's four children who had thus inherited the trust property, and one of whom was beneficially interested in the rents and profits of the property during his life, all joined in their petition to the court to have the trust annulled. Every party in interest was before the court. The only person whose rights could be injuriously affected by the termination of the trust was Henry Hammack, who joined in the request that it be terminated. Under this condition the court in equity terminated the trust, not under the compulsion of any rules or principles of equity, but because all the parties in interest being before it, all assenting and

[1] 27 S. W. 551

indeed requesting that the court do this thing, it was within its power so to do in a proper case, and it considered that to be a proper case. Manifestly this decision has no bearing upon the questions involved in the case at bar, where the gravamen of the complaint is that all of the parties in interest are not before the court and are not consenting. It is perfectly plain, for example, that if Henry Hammack had objected, the court in equity could not have destroyed his equitable life estate.

In Dodson v. Ball, 60 Pa. 492, 100 Am. Dec. 586, the rule in Shelley's Case, prevailing in Pennsylvania, is the unquestioned foundation of the construction of the trust and of the decree given. The discussion is too long to quote, but the holding is that the words employed bring the trust within the rule in Shelley's Case; that remainders therefore are not created; that all the equitable interest is in Mrs. Dodson; and that the legal estate should therefore be executed in her. And a sufficient exemplification of this may be found in the following single sentence, where that court, after reviewing many of its own authorities, said:

"Those cases decide that a devise for life, with remainder to children and their heirs, and in some of the cases with superadded words of distribution, gave an estate of inheritance to the life tenant."

In Raffel v. Safe Deposit & Trust Co., 100 Md. 141, 59 Atl. 702, the plaintiff had executed a deed of trust to pay the net income of the property conveyed to her, "reserving, however, the right by a last will and testament to bequeath and devise all the property that may be a part of the trust estate" and upon failure to execute such last will the part undisposed of at the time of her death "to vest in her next of kin or heirs according to law." The case is not a simple one in its facts. The equitable questions touching the construction of the instrument are complicated by the contention of the trustor that she did not understand what she was doing; that she believed she had retained a power of revocation; that she was inexperienced in business matters and did not at all understand the effect of her deed. Discussing these considerations, sufficient in themselves to work an avoidance of the trust, the court said:

"According to the facts and preponderance of proof in the case the appellant did not intend by the deed to surrender control of her property, and that it was executed by her under a mistaken belief as to her power to revoke it. It also appears that she was misadvised as to the legal effect of the deed and her rights under it."

So far as the construction of plaintiff's deed is concerned, the rule in Shelley's Case prevailing in the state of Maryland, the court's discussion is addressed to the application of that rule, to a review of its cases based on that rule, and the determination is reached that plaintiff is the sole party in interest since—

"there are no vested rights in remainder created by the deed, nor are the rights of third parties or creditors in any way involved."

The court's conclusion upon the whole matter is that:

"A deed executed under such circumstances, * * * cannot be upheld, nor 'treated as the free, voluntary, and unbiased act of the grantor.'"

Cornwell v. Orton, 126 Mo. 360, 27 S. W. 537, was not an action to terminate a trust, but an action in ejectment brought by the heirs at law. The grantor conveyed property to a trustee on the trust that he would allow Mrs. Cornwell to occupy the property conveyed and have all the rents and profits thereof, and that the trustee would, at any and all times thereafter, at the request and direction of said Catherine Cornwell, expressed in writing, signed by her, or by her authority, bargain, sell, mortgage, convey, lease, rent, or thereupon dispose of said premises or any part thereof, and that he would at her death convey and dispose of the premises and all profits and proceeds thereof in such manner, to such person or persons, and at such time or times, as Catherine Cornwell by her last will and testament, or by any other writing signed by her or her authority, direct or appoint, and in default of such appointment then he would convey said property to James Cornwell, his heirs and assigns, James Cornwell being the husband of Catherine. The contention upon the one hand was that the deed vested a fee-simple estate in Mrs. Cornwell, and that the direction of the trustee to convey to James Cornwell, his heirs and assigns, in the event that Catherine Cornwell failed to nominate, was a nugatory provision, as it was an attempt to create a remainder upon an absolute fee. The opposing contention was that under the true construction of the deed it conveyed a life estate only to Mrs. Cornwell, with power in the trustee to convey the fee in remainder to her husband or his heirs, in the event that she failed to exercise her right to appoint. The court considered at length the terms of the trust, the absolute power of disposition given to Mrs. Cornwell over all of the property during her lifetime, the compulsion upon the trustee to do any and all things concerning the property which Mrs. Cornwell might direct, declared that the language was inadequate to create a mere life estate, and was fully adequate to the creation of a fee simple absolute, and determined that the trust was a naked trust, and that the fee simple absolute did vest in Mrs. Cornwell; wherefore the remainder attempted to be erected upon it was void. It needs no argument to show that such a conclusion could not and would not be arrived at in construing a trust such as this, where the beneficiary of the equitable life estate not only has no power of disposition of the corpus of the trust property, but no power to control its investments, no power even to dispose of the property except by a disposition taking effect upon her death un-

der her will, which, to be a will, must of course be an instrument complying with all the terms of our statutes in regard thereto.

Sears v. Choate, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320, was an action brought by the plaintiff to terminate a trust created for his benefit by the will of his father. By this will the father devised his residuary estate to trustees, who were to pay to plaintiff at the age of 21 a certain sum of money; thereafter the sum of $4,000 annually until he was 25 years of age; thereafter $6,000 annually until he was 30 years of age; and thereafter $10,000 annually. This son was his only child and sole heir at law. There was no limitation over to any person upon the death of this son. The court points out this fact, saying:

"There is in the will no limitation over of the estate in any contingency to any other person."

The son was the sole person in interest, and was before the court, and says the court further:

"Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and * * * should have the control and disposal of it, unless some good cause appears to the contrary."

Here was a plain case where equity, not under compulsion, but in the exercise of its wise discretion, deemed it advisable to terminate a trust and did so. It presents similar features of equitable consideration to those which appeared in Estate of Yates, 149 Pac. 555, where this court refused to terminate a trust.

In Warner v. Sprigg, 62 Md. 14, the testator devised his estate to three trustees to hold for his three children, and then provided:

"After the decease of my said sons, respectively, their shares to go to their several heirs at law, as also the share of my said daughter, should she die, having made no testamentary disposal thereof."

It is held that the trust in the real estate involved no powers or duties in the trustees. By virtue of the statute of uses of St. 27 Henry VIII, ch. 10, it was therefore executed in the children, who thereby took legal estates under the will, while as to the devises to their heirs at law after their decease, under the rule in Shelley's Case, remainders were not created, but the children took the fee. In this state neither the statute of uses nor the rule in Shelley's Case forms a part of the body of our law.

In Angle v. Marshall, 55 W. Va. 671, 47 S. E. 882, a life tenant, becoming physically infirm, conveyed his life estate to a trustee to manage the farm, but always under the control and advice of the life tenant. This was all of the trust. The remaindermen—the children of the life tenant—subsequently conveyed their title, and the life tenant thereupon conveyed his interest to the same grantee. The trust deed of the life tenant declared that it was irrevocable. The court held that the trust deed was in fact nothing more than an agency or power of attorney, and that, notwithstanding that it was declared to be irrevocable, as the power was not coupled with an interest, it was always revocable. The inapplicability of this decision to the questions here calling for determination is, we think, most obvious.

This concludes the review of all the cases upon which respondent relies, and if it shall be thought that this review does not justify to the fullest extent the comments heretofore made as to their general inapplicability, it may be said in conclusion upon the matter that the question is satisfactorily and conclusively disposed of against respondent's contention by our own decision in Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049. There was a grant of lands to the "party of the second part, for and during his natural life, and to the issue and heirs of the body of the said party of the second part." This court, declaring that under the rule in Shelley's Case this language would vest the fee simple absolute in the party of the second part, held and declared that by force of section 779 of the Civil Code that rule was abrogated and remainders were created, saying:

"By section 779 of the Civil Code the term 'heirs' is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the plaintiff, but by virtue of the remainder which was created for them at the execution of the deed to him. This remainder, although not capable of immediate enjoyment (Civ. Code, § 690), and therefore denominated a future interest, is nevertheless an estate in the property capable of being transferred in the same manner as a present interest (Civ. Code, § 699). Counsel for appellant states in his brief that the only question on this appeal is 'whether the deed in question conveyed an estate in fee simple to plaintiff, or a life estate to plaintiff, with remainder in fee to the issue and heirs of his body;' and we therefore limit our decision to this proposition, and hold that by the instrument in question a life estate only was conveyed to the plaintiff."

The conclusiveness of this determination, its immediate and direct bearing upon the language of this trust deed, are so plain as to relieve the question from the need of further discussion.

The decree appealed from is therefore reversed, with directions to the trial court to deny to plaintiff the relief sought.

We concur: MELVIN, J.; LORIGAN, J.

(171 Cal. 621)

WHITTEN et al. v. DABNEY et al. (MASON, Intervener; two cases).
(S. F. 6486, 6591.)

(Supreme Court of California. Dec. 27, 1915. Rehearing Denied Jan. 26, 1916.)

1. CORPORATIONS ⟸99—SALES OF STOCK—ISSUANCE IN PAYMENT OF PROPERTY.

It was within the power of a corporation to issue all of its stock in payment of leaseholds upon oil lands transferred to it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444–446; Dec. Dig. ⟸99.]

2. CORPORATIONS ⟸211—STOCKHOLDER'S ACTION ON BEHALF OF CORPORATION—PLEADING.

In a stockholder's action on behalf of the corporation against persons then or previously in control of the corporation, the issuance of all of the stock of the corporation to certain of the defendants in payment of leaseholds upon oil lands transferred to the corporation was not shown to be corrupt by alleging that it was the outcome of a conspiracy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814–818, 820, 821, 823, 824; Dec. Dig. ⟸211.]

3. CORPORATIONS ⟸204—STOCKHOLDER'S ACTION ON BEHALF OF CORPORATION—RELIEF OBTAINABLE.

A stockholder's action on behalf of the corporation may be maintained only for the purpose of redressing wrongs and impositions which the corporation itself has suffered, and individual wrongs of the stockholders are not subject to redress in such an action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 783–790; Dec. Dig. ⟸204.]

4. CORPORATIONS ⟸204—STOCKHOLDER'S ACTION ON BEHALF OF CORPORATION—RELIEF OBTAINABLE.

Where persons, to whom all the stock in a corporation was issued in payment of property, falsely represented in selling such stock that it was treasury stock, and that the proceeds of sales would go into the treasury and be used in developing the corporation's business, such fraudulent representations did not constitute a wrong against the corporation, but merely gave the defrauded purchasers a right to proceed against the persons making the fraudulent representations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 783–790; Dec. Dig. ⟸204.]

5. CORPORATIONS ⟸211—STOCKHOLDER'S ACTION IN BEHALF OF CORPORATION — COMPLAINT.

In a stockholder's action for an accounting the complaint showed that the corporation agreed to issue all of the stock to D. and M. in payment for leaseholds on oil lands, but that it was not issued; that D. and M. agreed to contribute 250,000 shares to be treated as treasury stock, which offer was accepted; that afterwards when this was a fully completed gift, the agreement was amended so that stock theretofore sold was to be considered as treasury stock and the proceeds of sales paid into the treasury and other stock sufficient to make up the 250,000 shares taken over by the corporation; that the proceeds of sales were not turned over to the corporation; that D. and M. agreed to sell the stock to B. and agreed that he should have the naming of the entire directory; that M. and D. would vote for such directors as he should designate, and that he would sell the treasury stock turning the proceeds into the treasury, less 50 per cent. to be retained as commission; that thereunder B. took and retained absolute dominion and control of the corporation; that to stimulate sales of stock false dividends were declared out of proceeds of sales of stock; that D. and B. owed the corporation money and had falsified the corporation's books so that the indebtedness appeared to be paid, specific instances of this being given; that B. took commissions from sales of stock without authority from the corporation and with the knowledge of the other defendants, and that he falsely represented the financial condition and future prospects of the corporation as an aid to the plan of stock jobbing into which defendants had entered. *Held*, that this complaint charged sufficient facts to demand an investigation and inquiry by a court of equity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814–818, 820, 821, 823, 824; Dec. Dig. ⟸211.]

6. LIMITATION OF ACTIONS ⟸37 — LIMITATIONS APPLICABLE—STOCKHOLDER'S ACTION —"LIABILITY CREATED BY LAW."

Code Civ. Proc. § 338, subd. 4, requires actions for relief on the ground of fraud or mistake to be brought within 3 years, and provides that the cause of action is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Section 359 provides that that title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture or to enforce a liability created by law, but that such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability was created. *Held*, that a stockholder's action to require an accounting by persons controlling the corporation whose fraudulent acts had caused loss to the corporation, was governed by section 338, and not by section 359, since while every liability is in a sense created by law, section 359 uses the phrase "liability created by law" as referring to liabilities in the nature of penalties or forfeitures.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182–186, 477; Dec. Dig. ⟸37.

For other definitions, see Words and Phrases, First and Second Series, Liability Created by Law.]

7. LIMITATION OF ACTIONS ⟸100—COMPUTATION OF PERIOD OF LIMITATION—STOCKHOLDER'S ACTION.

Notice to stockholders in a corporation of the fraudulent acts of persons in control of the corporation for such a length of time as would bar an action by them on behalf of the corporation did not bar the rights of the corporation when prosecuted by another stockholder, as limitations will not run against the corporation while it remains in control of a board of directors accused of participation in the fraud, and a stockholder suing on behalf of the corporation sues purely as a trustee, and while he has an unquestioned right to sue it is in no sense his duty to sue.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480–493; Dec. Dig. ⟸100.]

8. CORPORATIONS ⟸207½, New, vol. 10 Key-No. Series—STOCKHOLDER'S ACTION IN BEHALF OF CORPORATION — COMPROMISE AND SETTLEMENT.

In a stockholder's action for an accounting against a person in control of the corporation and persons who formerly owned all of the stock, a judgment was rendered for defendants on demurrer and an appeal taken, pending which an agreement was made between plaintiffs and certain of the defendants reciting that there had been a complete settlement and adjustment between plaintiffs and such defendants as to all claims of plaintiffs against such defendants; and that it was not deemed advisable to dismiss

the appeal as to such defendants at that time, but providing that if the appeal was sustained and the cause remanded the plaintiffs should amend so as to eliminate such defendants. *Held*, that a motion to dismiss the appeal as to such defendants based on such composition agreement was not properly before the appellate court, as a stockholder suing on behalf of the corporation sues as a trustee, and will not be permitted to take any act which has not first received the sanction of the court, and until the trial court, after scrutiny and examination, should determine that the composition agreement fully protected the corporation's rights, it could not be given the slightest efficacy.

9. ATTORNEY AND CLIENT ⟸75—MOTIONS FOR SUBSTITUTION OF ATTORNEYS.

In a stockholder's action on behalf of the corporation, a motion for the substitution of other attorneys in place of those appearing for the corporation could better be made and determined in the trial court than in an appellate court, and where the judgment must be reversed a motion for such substitution would be denied without prejudice to its renewal in the trial court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110–119; Dec. Dig. ⟸75.]

10. COSTS ⟸98 — PERSONS LIABLE — INTERVENERS.

Where, in a stockholder's action on behalf of the corporation, a stockholder other than the original plaintiff petitioned for and obtained leave to intervene and filed a complaint in intervention, the trial court's discretionary power with respect to costs did not authorize it to award against him any costs which accrued before he connected himself with the litigation.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 383; Dec. Dig. ⟸98.]

Department 2. Appeals from Superior Court, Alameda County; William S. Wells, Judge.

Action by D. D. Whitten and others against Joseph B. Dabney and others, in which Frederick E. Mason intervened. From a judgment for defendants on demurrer, plaintiffs and intervener separately appeal. Reversed and remanded.

Kemp, Mitchell & Silberberg, of Los Angeles, and Gibson & Woolner, of Oakland, for appellants. W. B. Rinehart, of Oakland, and W. H. H. Hart, of San Francisco, for respondents. John Ralph Wilson, of San Francisco (Walter G. Bonta, of San Francisco, of counsel), for intervener.

HENSHAW, J. Plaintiffs, as stockholders of the Dabney Oil Company, sued defendants Dabney, Miley, and Butler, alleging certain fraudulent impositions practiced by them upon the Dabney Oil Company, resulting in great loss to that company. They asked for an accounting on behalf of the company against these defendants, and a recovery into the treasury of the company of the amount of which it might be determined that the company had been defrauded. A conspiracy to commit these asserted fraudulent acts is charged against the three men. Their control of the corporation through its board of directors and the refusal of the corporation upon demand to prosecute this action is also set forth. Frederick E. Mason, another stockholder, petitioned for leave to intervene, and permission was granted. His complaint in intervention set up the same wrongs pleaded by plaintiffs and joined with them in their prayer for relief.

A general demurrer was interposed to these complaints and was sustained. So also was a demurrer raising the bar of the statute of limitations to the prosecution of the action. From the judgment which followed, plaintiffs appeal in San Francisco No. 6486. From that same judgment the intervener appeals in San Francisco No. 6591. Both of these appeals present the same asserted error of the court in sustaining the general demurrer for absence of facts. Both, too, present a like question upon the bar of the statute of limitations. In both also is involved the question of the right of defendants Dabney and Miley to be dismissed from the action by virtue of a composition agreement entered into between them and the plaintiffs, to which composition agreement the intervener was not a party. And, finally, the intervener's appeal (San Francisco No. 6591) presents a minor question of the imposition upon him of certain costs growing out of the award of the judgment in favor of the defendants.

[1-3] Saving in the particulars which may be pointed out the complaints of plaintiffs and intervener may be treated as a single pleading and spoken of as the complaint. The complaint charged that in January, 1901, the defendants "entered into a conspiracy to defraud the future stockholders of the Dabney Oil Company." In furtherance of this conspiracy they caused the Dabney Oil Company to be incorporated, and Dabney and Butler conveyed to it certain leaseholds upon oil lands which they owned and which were of the value of $50,000, the Dabney Oil Company issuing and transferring to Dabney and Miley for these leaseholds all of the stock of the corporation, the directors agreeing to issue to Dabney and Miley, or to such persons as they should direct, this stock as fully paid up and nonassessable stock of the corporation. It was quite within the power of the corporation for it to issue all of its stock in payment of the property which it received. Turner v. Markham et al., 155 Cal. 562, 102 Pac. 272; Garretson v. Crude Oil Co., 146 Cal. 184, 79 Pac. 838; Lum v. A. W. & V. Co., 165 Cal. 657, 133 Pac. 303, Ann. Cas. 1915A, 816. Up to this point, therefore, no illegal or fraudulent conduct is shown, and the acts of these defendants, so far innocent in themselves, were not made corrupt by designating them as the outcome of a "conspiracy." And we here pause to point out that there seems to have been some confusion in the mind of the pleader as to the wrongs which he could right in this form of action. Thus he charges the creation of the conspiracy as being designed "to defraud the future stockholders of the Dabney Oil Company." But

no one of the individual wrongs of any of the stockholders is subject to redress in this action. Plaintiffs are allowed to prosecute this action by virtue of their stockholder's relationship to the corporation, but only for the purpose of redressing wrongs and impositions which the corporation itself had suffered. Turner v. Markham et al., supra. These stockholders, as plaintiffs, therefore occupied a strict fiduciary relationship to the corporation whose interests they were representing. Their position may not inaptly be compared to that of a guardian ad litem, to which consideration we will later return.

[4, 5] Proceeding now with the complaint and summarizing its allegations of wrongdoing on the part of these defendants, those allegations amount to this: That Dabney and Miley, having thus acquired title to all the stock of the corporation, entered into a secret agreement with Butler, by which upon terms Butler should purchase from them this stock, and for the purpose of inducing the public to purchase this stock they represented to intending purchasers that the stock was treasury stock and that the proceeds from the sale of it would go into the treasury of the company and be used in developing the oil mining industry of the corporation. Again we must pause to say that these fraudulent representations, however injuriously they may have wronged the purchasers of stock, do not constitute a wrong against the corporation, which does not appear at this time to have had any treasury stock at all. The right of the individual stockholder thus defrauded would manifestly be simply the right to proceed against the wrongdoers who had made these fraudulent representations to his injury. However it does appear that in furtherance of the design of these defendants to unload their stock upon the market as treasury stock they did commit certain flagrant wrongs upon the corporation itself. Thus it is made to appear that the stock was not issued to Dabney and Miley, but remained in the corporation stock book subject to issue upon their demand. In August, 1901, they agreed in writing to contribute of their holdings 250,000 shares of the stock, to be designated and treated as treasury stock, and this offer was accepted by the corporation. In 1902 these defendants procured the corporation to accept an amendment to the terms of this gift, which at the time was a fully completed gift. By this amended agreement all of the stock sold prior to March, 1902, was to be considered treasury stock, and the proceeds thereof, amounting to $76,000, accruing from the sale of 99,000 shares was to be paid into the treasury of the corporation, and additional stock of Dabney and Miley (in indicated proportions) was to be taken over by the corporation as treasury stock sufficient to make up the 250,000 shares. It is charged that this was but a colorable transaction, and that Dabney, Butler, and Miley failed and refused ever to turn over to or credit the corporation with this $76,000. In March, 1902, Dabney, Miley, and Butler entered into a secret agreement whereby Butler was to buy the stock of Dabney and Miley, making payments at specified times in specified amounts. It was agreed that Butler "shall have the naming of the entire directory of the company," and Miley and Dabney agreed that they would always vote their remaining stock "for such persons as directors as shall be designated by" Butler. And finally this agreement provided that Butler would from time to time sell the treasury stock and turn into the treasury of the company the proceeds thereof, "less 50 per cent. which he shall retain as commission." Under these agreements Butler took the active management and control of the corporation in 1902, and continued in such absolute possession, dominion, and control through dummy directors up to and including the date of the commencement of the action. To stimulate the sale of the stock false dividends were declared and paid, not out of the earnings of the corporation, but out of the proceeds of the sale of the stock. Further it is charged that Dabney and Butler owed the corporation large sums of money; that they never paid these indebtednesses, but caused false credits to be entered and appear on the books of the corporation, whereby these indebtednesses were made to appear to have been paid and canceled. Specific instances of this are given. Further, it charged that Butler took commissions to the amount of $38,000 from the sale of the treasury stock of the corporation without authority from the corporation; that these acts of wrongdoing and misappropriation of funds were either known to the defendants, or were done by Butler in furtherance of the conspiracy to unload their stock, in which the three defendants had joined. Finally it is charged that from time to time Butler, for the purpose of stilling the alarms of the stockholders and lulling them into repose, put forth false representations as to the financial condition and future prospects of the corporation, and specifically in 1908, sent out a circular report to the stockholders in which he declared that he had never "received one cent in salary or one cent in cash or stock as dividends upon my holdings, or one cent of advantage from the company in any way, either directly or indirectly. * * * It is true I have sometimes been forced to sell stock, but I have never sold any except to procure money to loan to the company, or to use directly in the promotion of its interests." The falsity of these representations is asserted, and it is charged that they were made in aid of the iniquitous plan of stock jobbing into which the defendants had entered.

This sufficiently indicates the gravamen of the charges of wrongdoing as they affect the corporation, and it certainly needs no discussion to establish that they charge sufficient facts to demand an investigation and

inquiry by the court of equity, to which the appeal has been made. So true and so apparent do we think this is that we conclude that the court sustained the demurrer upon the ground that the statute of limitations was well pleaded, and to this proposition we next come.

Plaintiffs allege that in 1905 one Gilbane, a stockholder, "and a few other stockholders, all residents of Providence, Rhode Island," attempted to secure full knowledge of the condition of the affairs of the corporation. They employed an accountant to examine the books of the corporation. He was allowed to examine only the books which were turned over to him by Butler as the books of account. They were not the original books, but contained only rewritten portions of the books. In 1906 this accountant made an incomplete report to these stockholders and stated these facts, and, further, that it appeared from his investigation that Dabney and Butler were indebted to the corporation, but that Butler informed him that portions of the rewritten books were erroneous in this particular, and that the original books and a correct accounting would show the contrary, namely, that the corporation was indebted to Butler and Dabney. Butler told him the books were in California, and Gilbane made a trip to California to obtain them. Butler informed him that the books were in the possession of Dabney, and Gilbane was unable to find Dabney in California. On 1907 Gilbane again came to California to find the books, and was again unable to locate Dabney or the books. Returning to New York, where Butler was located, he learned that Butler was in Europe, and was unable to do anything further before 1908. In 1908 Dabney was in Europe and the books could not be located. Butler continued to represent that the original books would show the true state of the accounts of himself and Dabney with the corporation, and that the corporation was largely indebted to them. Throughout 1908 Gilbane's efforts to secure further information were fruitless. In 1909 he came again to California and then saw Miley and Dabney, and was told by them that none of the money obtained from the sale of any of the stock of the corporation belonged to the corporation, but that all of the stock of the corporation and all of the proceeds of the sales thereof were the property of Dabney, Miley, and Butler. The agreements hereinbefore referred to between Dabney, Miley, and Butler were then for the first time exhibited, and their existence for the first time made known to Gilbane. Up to this time the existence of these agreements had been sedulously concealed from Gilbane and all the other stockholders. Shortly after this, in 1910, Gilbane disclosed to these plaintiffs the information which he had thus acquired, including his knowledge that dividends had been paid out of the capital of the corporation. Prior to this information thus received in 1910, the plaintiffs had no knowledge or suspicion of the existence of any of these facts, or of any such wrongdoing upon the part of the defendants. These plaintiffs were not amongst nor of those stockholders who induced Gilbane to make these investigations, but promptly after receiving this information from Gilbane they instituted this action, after demand upon and the refusal of the corporation so to do.

[6] Touching the question of which provision of the statute of limitations is applicable to this action, discussion is indulged in. Unquestionably the right to prosecute this action is governed by the provisions of section 338, subdivision 4, of the Code of Civil Procedure. It is not the action contemplated by section 359 of the same Code "to enforce a liability created by law." True it is that, in a sense, every liability enforceable by action is one created by law. But section 359, when it uses that phrase, is dealing with liabilities in the nature of penalties or forfeitures (noscitur a sociis) as is clearly disclosed by a reading of the section. This same construction was put upon the language of a like statute by the court of New York in Brinckerhoff v. Bostwick, 99 N. Y. 190, 1 N. E. 663.

Respondents argue that from this pleading it is shown that the stockholders' alarms were excited; that they instituted inquiry and were thus put upon notice in 1906, and that this action not having been commenced until 1910 they have waited too long, and relief must be denied. This contention demands again a brief consideration of this peculiar character of action.

[7] A stockholder who institutes it sues purely as a trustee to redress corporate injuries. He has the unquestioned right to sue, but it is in no sense his duty to sue. An individual stockholder may be put upon notice that his corporation has been defrauded. Indeed, complete disclosure of these facts may be made to him. He gives consideration to the time, trouble, and expense of the litigation and the loss in which he would be involved if he failed to prevail, and decides that he will not begin the suit. Some years afterwards another stockholder for the first time gains knowledge of these same facts and institutes the action. It is susceptible of demonstration that the first stockholder knew of all these matters, and that as to him this right of action may be barred. Is this also a bar to the prosecution of the same action by another stockholder who has acted promptly upon learning of the fraud? Clearly this cannot be so. So long as the corporation itself remains under disability and is powerless to act by virtue of the fact that its control is in the hands of a board of directors accused of participation in the frauds, the statute of limitations does not run against it. It is like the minority of an

infant. His rights are not lost until he, after attaining majority, acquiesces for the prescribed time, and by acquiesence affirms the acts done against his interests. So that even if it be said (and in saying it we do not decide it) that such a complaint as this shows that the plaintiff stockholder has waited too long before commencing his action, and that therefore the plea of the statute of limitations must be sustained against his action, this does not operate as a bar to the corporate rights when prosecuted by another stockholder. Otherwise we would have the anomalous and absurd condition presented of a complacent stockholder waiting for three years, pleading facts showing that his right of action was thus barred and thus sweeping away every right of the corporation by the judgment which would have to follow. Whatever, therefore, may have been the rights of the Providence stockholders to prosecute this action after notice, the right of these plaintiffs is not barred under their allegation that they first acquired notice and knowledge of the efforts of the Providence stockholders in 1910.

[8] A motion is made by defendants Dabney and Miley to dismiss the appeals as to them. This motion is based upon an unusual agreement entered into between the plaintiffs and Dabney and Miley after the rendition of judgment in the trial court and appeal taken to this court. It is declared that under the circumstances it is deemed advisable that the appeals from the judgment in favor of Miley and Dabney should not be dismissed at the present time, but plaintiffs stipulate that if the appeal is sustained and the cause remanded to the trial court "that as soon as the said cause shall be so returned to said superior court the plaintiffs shall cause their said complaint to be so amended as to eliminate any cause of action against the said Dabney and said Miley, and that the said plaintiffs will not ask said court or any court for any judgment against the said Dabney and Miley or either of them." All this is based upon a recital that "there has been a complete settlement and adjustment between the plaintiffs and defendants Miley and Dabney as to all claims of the plaintiffs against said Miley and Dabney as set forth in the plaintiffs' complaint." Herein is the extraordinary misconception of the nature of this litigation and of the rights of the plaintiffs under it, to which we have heretofore had occasion to advert in discussing their complaint. And here again it becomes necessary to call attention to the fact that these plaintiffs have no personal wrongs for which they are entitled to seek redress in this action.

"The stockholder does not bring such a suit because his rights have been directly violated, or because the cause of action is his or because he is entitled to the relief sought. He is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court." 3 Pom. Eq. (3d Ed.) § 1095.

And yet we find in this agreement the plaintiffs declaring that there has been a complete settlement and adjustment "of all claims of the plaintiffs against Miley and Dabney as set forth in plaintiffs' complaint." What is the exact situation of a plaintiff in such an action? He is a trustee pure and simple, seeking in the name of another a recovery for wrongs that have been committed against that other. His position in the litigation is in every legal sense the precise equivalent of that of the guardian ad litem. The guardian ad litem stands as the representative of some person incompetent to sue or be sued directly. He is appointed by the court to represent that incompetent's interests; to prosecute or defend with the highest diligence and good faith. The stockholder beginning this action does not even occupy the position of a creditor suing on his own account and on account of his fellow creditors. In the latter case the creditor plaintiff has a direct personal interest in the litigation, and within limitations not here necessary to discuss, may deal with that litigation as his own. But the stockholder acts in purely a representative capacity. He is a guardian ad litem by virtue of statutory authority, empowered to do precisely what a guardian ad litem appointed by a court may do. He has gone into equity seeking redress for a corporation under disability to obtain relief itself, precisely as the guardian ad litem goes into court to obtain like redress for a client under disability by reason of incompetency or nonage. The principles governing the conduct of a guardian ad litem are in full strictness applicable to the conduct of such a plaintiff stockholder. Not only should a plaintiff in such a fiduciary capacity be willing to take no act that did not first receive the sanction of the court of equity to which he has appealed, but, more than this, he is not permitted to take any act without such sanction. Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212. Where an action is prosecuted by a guardian ad litem, the infant is the real party. Bowers v. Kanaday, 94 Ga. 209, 21 S. E. 458. And the guardian ad litem cannot even be considered a party to the cause. Thomason v. Gray, 84 Ala. 559, 4 South. 394; Baltimore & Ohio R. R. Co. v. Fitzpatrick, 36 Md. 619; Tate v. Mott, 96 N. C. 19, 2 S. E. 176; Duffy v. Pinard, 41 Vt. 297; Ingram v. Little, 11 Queen's Bench Div. 251. And what are the principles governing the conduct of a guardian ad litem? It is the right and duty of the court to protect the interests of the incompetent represented by the guardian ad litem and to exercise supervision over the conduct of that guardian. Hutchinson v. McLaughlin, 15 Colo. 492, 25 Pac. 317, 11 L. R. A. 287; Lloyd v. Kirkwood, 112 Ill. 329; Hauly v. Crozier, 14 La. Ann. 304; Revely v. Skinner, 33 Mo. 98; Newland v. Gentry, 18 B. Mon. (Ky.) 666;

Alling v. Alling, 52 N. J. Eq. 92, 27 Atl. 655; Moore v. Moore, 4 Sand. Ch. (N. Y.) 38; Richards v. Tenn., etc., R. R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712.

"The court must be satisfied that the incompetent has had a full opportunity to have his day in court by a proper and suitable guardian, and should see, notwithstanding any admission of facts even by such guardian that his rights are not sacrificed." 22 Cyc. 632; Austin v. Charlestown Female Sem., 8 Metc. (Mass.) 198, 41 Am. Dec. 497; Bloom v. Burdick, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; U. S. Bank v. Ritchie, 8 Pet. 128, 8 L. Ed. 890.

The court and not the guardian ad litem has the power to compromise the rights of minors under suitable circumstances. So far, therefore, as this motion to dismiss is concerned it is not even properly before this court for consideration. It is based upon the composition agreement above adverted to. That composition agreement is cognizable by the trial court alone, and will not be given the slightest efficacy until, after scrutiny and examination, it shall be determined by that court that the corporation's righs are fully protected.

It follows that the motions of defendants Dabney and Miley to dismiss the appeals so far as they are concerned should be and are denied, and they will address to the trial court whatever application for relief they may think they are entitled to under their agreement with plaintiffs.

[9] A motion has been made to substitute other attorneys for the attorney of record of the corporation. Opposing affidavits are filed upon the motion. It has already been said that the judgment of the trial court must be reversed. This reversal opens the case to the full equity jurisdiction of the trial court. The motion for substitution can the better be made and determined there, and is here denied without prejudice to its renewal in the trial court. The same disposition is made of the motion to substitute the corporation in the place of the plaintiffs and intervener. This motion may be renewed before the trial court, which will grant or decline to grant it, with due regard to the direct rights of the corporation itself and to the indirect rights of its stockholders.

[10] Finally, intervener appellant complains of an award made against him for costs arising before he was connected with the litigation. It was unquestionably erroneous for the court to have awarded costs against the intervener, which costs accrued before he connected himself with the litigation. Railsback v. Patton, 34 Neb. 492, 52 N. W. 277. The discretionary power of the court in the matter of these costs does not go to the extent here exercised.

The judgments appealed from are therefore reversed, the motions denied, and the causes remanded.

We concur: LORIGAN, J.; MELVIN, J.

171 Cal. 466

PEOPLE v. ROBBINS. (Cr. 1908.)

(Supreme Court of California. Dec. 14, 1915.)

1. CRIMINAL LAW ⟸511 — ACCOMPLICES — CORROBORATION.

Under Pen. Code, § 1111, as amended by St. 1911, p. 484, declaring a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence connecting the defendant with the commission of the offense, it is necessary that the evidence of corroboration shall tend to connect the defendant with the commission of the crime, and it is insufficient if it merely casts suspicion on accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. ⟸ 511.]

2. CRIMINAL LAW ⟸511 — OFFENSES — EVIDENCE—CORROBORATION.

In a prosecution for the crime against nature, evidence of corroboration of accused's accomplice *held* insufficient to warrant conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. ⟸ 511.]

3. CRIMINAL LAW ⟸507 — OFFENSES — "ACCOMPLICE."

Where a boy 16 years of age accompanied accused to a room without objection and made no protest to accused committing the crime against nature, making no complaint until questioned by others, the boy was an accomplice, and his testimony must be corroborated before conviction can be had.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. ⟸ 507.

For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

4. CRIMINAL LAW ⟸511 — ACCOMPLICES — CORROBORATION—STATUTES.

Amendment of 1911 (St. 1911, p. 484), whereby Pen. Code, § 1111, formerly declaring that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself and "without the aid of the testimony of the accomplice" tends to connect defendant with the crime, and the corroboration is not sufficient if it merely shows the commission of the offense, was changed so as to omit the expression "which in itself and without the aid of the testimony of the accomplice" did not change the meaning of the statute, and will not allow a conviction upon accomplice testimony, where the accomplice is corroborated only as to statements concerning acts having no essential connection with the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. ⟸ 511.]

5. CRIMINAL LAW ⟸511—ACCOMPLICES—OFFENSES.

Proofs of mere suspicious circumstances and of an opportunity to commit the crime will not warrant conviction on the testimony of the accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. ⟸ 511.]

Lawlor, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Samuel P. Robbins was convicted of the crime against nature, and from the judgment

and an order denying new trial, he appeals. Reversed.

George A. Knight, J. F. Sheehan, and Knight & Heggerty, all of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and C. M. Fickert and Alexander O'Grady, both of San Francisco, for the People.

MELVIN, J. The District Court of Appeal of the First Appellate District filed an opinion in this case, but this court ordered the transfer of the action, to the end that we might further consider the two questions: (1) Was the complaining witness an accomplice? and (2) If an accomplice was he sufficiently corroborated?

The opinion of the learned District Court of Appeal was as follows:

"The defendant in this case was informed against and convicted of the infamous crime against nature, and thereafter sentenced to 5 years in the state prison. The appeal is from the judgment and from an order denying a new trial.

"The only evidence adduced upon the entire case as to the actual commission of the offense is to be found in the testimony of the complaining witness, a boy of about the age of 16 years. His testimony reduced to narrative form is as follows: 'I live at 1638 Baker street and go to school at the Emerson primary school. On September 15, 1913, I was living there with my father, mother, grandmother, uncle, and the landlady of the house, Mrs. Nute, who is the housekeeper. I know and for 5 years past have known the defendant, Samuel P. Robbins. On September 15, 1913, he came to my house at about 3 o'clock in the afternoon. I heard from him before he came to the house. When I came home to lunch at about 12 o'clock he phoned and asked me if he could come up and see me at the house, and I said, "Yes," and he said he would be up about 3 o'clock. I saw him at 3 o'clock in the hall of my residence. I said, "How do you do?" He replied, saying, "How do you do?" We went into the dining room and played dominoes for 25 minutes. Then we went down into the yard and played a game of tennis ball for 25 minutes. After that we went upstairs to the bathroom because he wanted to wash his hands. We entered the bathroom together, as he had asked me to go there with him. He locked the bathroom door. It locks with a bolt and he put a handkerchief over the lock. He pulled down the shade on the window, not all the way but only about halfway down. The glass on the window is lumpy glass that you can't see through, that is, it is frosted. Robbins let the water run in the faucet in the washbasin.'

"Further details of the testimony of this witness as to what occurred need not be narrated here. It will suffice to say that his testimony was to the effect that the crime alleged was perpetrated upon him in the bathroom; and that while in the consummation of the act charged a noise was heard at the bathroom door, and the defendant thereupon said he must stop because he was afraid of being caught. Further testifying, the witness said in substance that after he heard the noise at the door Robbins, the defendant, washed his hands with the flowing water in the basin and rearranged his clothes, unlocked the door, and, after saying good-bye, left the house.

"Mrs. Nute, the landlady and housekeeper above referred to, was called as a witness for the prosecution, her testimony, reduced to narrative form, being as follows: 'I live with the father and mother of the complaining witness. I have lived there 2 years and 4 months as a housekeeper. The boy is 16 years old. I was living with them on September 15, 1913. I do not know the defendant, Robbins, personally, but have seen him at the house of the father and mother of the boy. I saw him there on September 15, 1913. He was coming through the hall going to the dining room. He remained in the dining room 20 or 25 minutes with the boy; then he went down in the back yard with the boy and played ball with him about 20 or 25 minutes. The defendant, Robbins, then came up and went into the bathroom with the boy. They both entered and the door was closed. I was at my bedroom door and I saw Robbins and the boy enter the bathroom. I hear the door closed and bolt thrown back. I heard the bolt—a patent bolt—click. I went to my room, which looks out at the bathroom window in the light well right off of the hall the same as the bathroom. The bathroom window overlooks the light well, and so does mine. The bathroom window glass is frosted and cannot be looked through. I went into my room and looked through the lace curtains. It was kind of dark in my room. I looked over at the bathroom window. It was up about eight inches. It was open. I saw Robbins go up to the window and look over towards my room and pull the window down. I saw Robbins hauling on the window. My window is about eight feet from the bathroom window. I saw the window shade drawn down. I do not know who did it. Then I went out of my room to the bathroom door and heard the water running. It had been running quite a while before I got there. I was going to stand at the door and listen, but my hand accidentally knocked against it and made a noise. I heard Mr. Robbins talking to Sidney, but could not hear what he said. I stepped back to the kitchen, stayed there about five minutes, and saw Sidney and Mr. Robbins come out. I did not see Robbins after that. I went into my room and closed the door. There is no keyhole in the bathroom, simply a bolt. If there had been I would have peeked through it like any other woman.'

"The primary point presented upon this appeal is that the evidence shows that the complaining witness was an accomplice in the crime charged, and that the defendant was convicted upon the uncorroborated testimony of an accomplice.

[1, 2] "It is conceded, as indeed it must be, that the complaining witness was an accomplice; and that the verdict and judgment cannot be sustained, unless there is in the record evidence sufficient to corroborate the story told by the complaining witness. Section 1111 of the Penal Code explicitly declares that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. It will thus be seen that the statute imperatively makes corroboration of the testimony of an accomplice an essential prerequisite to the conviction of a defendant where the crime charged rests primarily and solely upon the testimony of an accomplice; and it is apparent, therefore, that the court has no control over the subject except to apply the statute. The court has no discretion in the matter, but is bound to apply the statute indiscriminately to all cases wherever an accomplice appears as a witness, and the state's case depends solely upon his uncorroborated testimony.

"We are of the opinion that the circumstances attending and preceding the entrance of the boy and the defendant into the bathroom, as narrated by the witness Mrs. Nute, are not sufficient singly or all together to constitute that corroboration which, in the eyes of the law,

will support a verdict founded primarily upon the testimony of an accomplice. The rule in this behalf is well and tersely stated in 12 Cyc., at page 456, where it is said: 'It is necessary that the evidence corroborating an accomplice shall connect or tend to connect the defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused. It must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it. * * * But where the circumstances, when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside.'

"In the present case the entrance of the defendant and the boy into the bathroom after having played a game of tennis was neither unnatural nor suspicious; and the fact that the bathroom door was closed and locked, and the window pulled down and the shade partly drawn, would not ordinarily be considered as preparation for an evil purpose. The turning on of the water in the bathroom was but natural and to be expected under the circumstances; and the fact that the conversation of the boy and the defendant could not be heard outside the bathroom door is of no particular significance. Necessarily a conversation carried on behind a closed door is more or less muffled. None of these facts and circumstances is inconsistent with the innocence of the defendant. On the contrary, they are all consistent with an innocent purpose. People entering a bathroom for the usual and ordinary purposes of such a room as a matter of course lock the door and draw the blinds and use the water at hand. Surely if all of these circumstances be consistent with an innocent purpose, it cannot be said that any of them tended to connect and implicate the defendant with the commission of the offense charged. The fact that the defendant had an opportunity to commit it is of no particular significance as far as corroboration is concerned. Of course the opportunity of the defendant to commit the particular crime for which he is on trial may always be shown in connection with other facts to establish his guilt; but we know of no rule which holds that mere opportunity to commit a crime is an incriminating corroborating circumstance. Following the rule that evidence offered for the purpose of corroborating an accomplice must tend to connect the accused with the offense charged, it has been held that there must be corroborating testimony by some witness other than the accomplice as to some act or fact which is an element of the offense charged. Cooper v. State, 90 Ala. 641, 8 South. 821. Therefore the fact that the witness Mrs. Nute either intentionally or inadvertently struck the door of the bathroom while she was endeavoring to hear the conversation of the boy and the defendant, was a comparatively unimportant fact which, in our opinion, had no tendency to connect the defendant with the commission of the offense. At its best it did no more than confirm the boy's testimony that he heard a noise at the door, but it does not tend to show that the defendant was engaged in a criminal act. The fact that the suspicion of this witness was aroused because she saw the defendant and the boy enter the bathroom, is not in our judgment corroborative evidence in any sense of the term, The most that can be said in favor of the prosecution upon this phase of the case is that for some reason not explained or detailed the suspicions of the witness were aroused; but it is the rule, and the well-settled rule, in this state, that the corroborative evidence required to convict the defendant in addition to that of the accomplice is not sufficient if it merely tends to raise a suspicion of the guilt of the accused. This is all that the circumstances of the present case did in the mind of the witness Mrs. Nute; and we are satisfied that those circumstances as narrated by her upon the witness stand could do no more than raise a suspicion in the minds of the jury as to the guilt of the defendant. Mere suspicion, as has been shown, will not suffice as corroborative evidence; and where the evidence relied upon as corroborative of the accomplice is, as in the present case, only such as to raise a suspicion of the guilt of the defendant, the verdict must be set aside."

[3] We are in accord with the foregoing discussion and with the conclusions reached. The learned Attorney General insists that he did not "concede" in the hearing before the District Court of Appeal that the boy was an accomplice. Be that as it may, he has made the point here that, so far as the testimony reported in the transcript shows, it does not necessarily appear that there was any consent to the defendant's acts, but merely passive submission. The obvious answer to this is the simple one that the burden of proof is upon the prosecution. If the alleged victim of defendant's depravity was not sui juris, that was something for the prosecution to prove. People v. Dong Pok Yip, 164 Cal. 143, 127 Pac. 1031, is cited as authority upon this question. In that case the child upon whom the assault was committed was a little fellow 9 years of age, and not of ordinary intelligence for his years, and it was held that his mere failure to repulse the assault of the defendant was not in law a consent. In this case the facts were different. The boy was 16 years of age, and while it appears that he had only attended school for a short time, there was nothing in the evidence to indicate that he was not possessed of the average mentality of lads of his age. According to his own testimony he submitted to a removal of a part of his clothing by the defendant, and even obeyed the suggestion of the latter that he assume a posture convenient for the perpetration of the crime. He made no outcry and no complaint until Mrs. Nute interrogated him, on the following day, with reference to the occurrences in the bathroom. His conduct as described by himself was within the meaning of the definition of an accomplice in People v. Coffey, 161 Cal. 448, 119 Pac. 907, 39 L. R. A. (N. S.) 704, where Mr. Justice Henshaw, delivering the opinion of the court, said:

"Where the act requires the co-operation of two persons, and their co-operation is criminally corrupt, the relationship of accomplice is at once established, as in adultery and fornication."

That this case was tried upon the theory that the boy was an accomplice there can be no doubt. The learned judge of the superior court properly instructed the jury upon the necessary corroboration of an accomplice which would justify a conviction. He gave no definition of the term "accomplice," and left to the jury the decision of no question of fact upon which, under the law, it would follow that the complaining witness was or was not an accomplice. We are convinced that this course was the proper one, because tak-

ing the testimony of the complaining witness as true, he was undoubtedly an accomplice.

[4] Was the boy sufficiently corroborated? Before discussing this question we will dispose of the contention of the learned Attorney General that the rule with reference to corroboration has been changed by the amendment of 1911 to section 1111 of the Penal Code. Before its amendment that statute was as follows:

"A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."

In the year 1911 the section was amended and its language is now as quoted below:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Stats. 1911, p. 484.

It is argued that this section, as amended, may be paraphrased as follows:

"A conviction can now be had on the testimony of an accomplice if he is corroborated by other evidence, which not necessarily in itself, but with the aid of the testimony of an accomplice, tends to connect the defendant with the commission of the offense."

This is only another way of interpreting the section to mean that a conviction may be had upon the testimony of an accomplice if the prosecution can produce any corroboration of any of his statements even if the acts described by him and so corroborated have no essential connection with any crime and may be as consistent with innocence as with guilt. It is not our duty to speculate with reference to the intention of the Legislature in passing any given law, but if we should hazard a guess upon that subject we should say that probably the language contained in the section in its earlier form, but omitted from the later enactment, was thought by the legislators to have a tendency to mislead jurors into the false belief that a complete case for the prosecution must be established without reference to the testimony of the accomplice. Whatever may have been the purpose in modifying the phraseology of the section, we cannot see that its meaning has been changed at all. In discussing the reasons for the rule, Mr. Justice Henshaw, in the opinion in the case of People v. Coffey, supra, said (161 Cal. 438, 119 Pac. 901, 39 L. R. A. [N. S.] 704):

"In this state, the rule of positive law since the year 1851 is as has been declared in section 1111 of the Penal Code. Time has not changed the value of such evidence, and succeeding Legislatures have retained the rule, the amendment to the section in 1911 not materially affecting it."

It may be that the quoted language was not necessary to the decision as the old form of the law was under discussion, but the reason for retaining the rule was before the court, and it was interesting as well as valuable to note that no material change had been made in the statute in so many years. Whether the language just quoted from the opinion in the Coffey Case was there obiter or not, it expressed the truth, and we adopt it in this opinion.

The counsel for the state specifies nine reasons and an incidental matter which, it is asserted, amount to corroboration of the lad's testimony. We quote them from one of the briefs as follows:

"(1) Defendant meeting the boy at the latter's house.

"(2) The preliminary games in the dining room and back yard.

"(3) Going into the bathroom with the boy.

"(4) Then the closing of the door.

"(5) Then the locking of the door.

"(6) Then the additional precaution of Robbins pulling the window down.

"(7) The further act of pulling down the curtain although the glass in the window was frosted.

"(8) The noise at the door made by Mrs. Nute as her hand accidentally struck the same while listening.

"(9) The parties emerging together, not immediately, but about five minutes after.

"Incidentally, and in addition to the above, the defendant testified he was 56 years of age, and Mrs. Nute testified that the boy was 16 years old, so the disparity of the ages of the defendant and the boy made this quite an unusual friendship, and therefore is a circumstance to be considered. It would not be so unusual were they related."

We have examined these alleged corroborations in detail, and we cannot see how, singly or in combination, they tend to corroborate the boy's testimony except that they show opportunity of the defendant to have committed such a crime as the boy described. That is not enough. It was in evidence, without contradiction, that the defendant was on terms of friendship with the boy's father and mother, and that he had frequently visited the house. He went there openly and played with the boy innocent games in the dining room and out of doors. What was more natural than the going of the man and the boy to the bathroom to wash their hands after their game in the yard? The closing and locking of the door were not indices of guilt, even if it be conceded that defendant and not the boy performed those acts. There was no corroboration on the part of any one of the boy's statements that Robbins did these things. Mrs. Nute simply "heard the lock click." But even if we regard that as corroboration of the boy's statement, there was nothing sinister in the closing and locking of the door. Nothing could be more natural than these simple precautions on the part of the man or the boy to prevent any one from entering the room while they were removing the dirt from their hands and faces. There was nothing more than enough, perhaps, to create a mere suspicion in the fact, if it were a fact, that Robbins made some adjustment of the window, but there is only

partial corroboration of the boy's testimony on that matter by Mrs. Nute. The complaining witness did not say a word about the lowering of the window. He said that defendant pulled the shade halfway down, although the glass was frosted. Mrs. Nute said that she saw Mr. Robbins go to the open window and pull the window down. This she observed from the window of her room across the light well. She said that she saw the shade pulled down. Of course, she could not tell by whom. It is true that the boy and Mrs. Nute agree about the noise at the door, but that corroboration is absolutely unimportant. If the two persons in the bathroom were engaged in perfectly innocent occupations, the noise made by the woman at the door would have been heard by them. The length of time occupied by the man and boy in the bathroom was not an unusual period for the washing of their hands and faces. It by no means indicated the commission of a crime. Nor was the friendship of the middle-aged man for the lad anything to cast suspicion upon the former. In these days of the "big brother movement" thousands of men throughout the country are systematically cultivating the friendship of boys, to the end that the influence of mature thought and association with men may aid in the development of the best qualities of the children. Viewed in the light most damaging to the defendant, the only thing which may be said of the corroborated circumstances related in the boy's testimony is that they might arouse suspicion of wrongdoing on the part of Mr. Robbins. But men are not and should not be convicted of degrading crimes upon mere suspicion plus the story of an accomplice. The useless pulling down of the shade over the frosted window is no more a suspicious circumstance against defendant than is the statement of the boy against the verity of his story when he says that Mr. Robbins covered with a handkerchief the lock of the door which Mrs. Nute says had no keyhole. On cross-examination the boy averred that there was a keyhole in the door. Mrs. Nute most emphatically testified that there was none, and added that if there had been she would have looked through it "like any other woman." We do not mean to insinuate that either the boy or the woman deliberately told an untruth about the keyhole. We simply seek to emphasize the danger of convicting a defendant on "suspicious circumstances."

[5] The proofs of mere suspicious circumstances and of opportunity to commit a crime are never sufficient to justify a conviction upon the testimony of an accomplice. People v. Thompson, 50 Cal. 480; People v. Smith, 98 Cal. 218, 33 Pac. 58; People v. Koening, 99 Cal. 576, 34 Pac. 238; State v. Willis, 9 Iowa, 582; People v. Morton, 139 Cal. 725, 73 Pac. 609.

It follows that the judgment and order must be and they are reversed.

We concur: SLOSS, J.; HENSHAW, J.; LORIGAN, J.

LAWLOR, J. I dissent. Apart from the question of the legal characteristics of an accomplice, which I do not find necessary to discuss, I am satisfied that the judgment of the lower court should be upheld upon two grounds: First, that under the evidence the jury could have found that the minor was not an accomplice; and, second, assuming that he was an accomplice, his testimony was sufficiently corroborated.

I think it is clear that the jury could have found, as matter of fact, that the minor was not a willing or corrupt participant in the crime, in that he did not form the criminal intent to co-operate with appellant in its commission. A word about the evidence on this point. There is no suggestion in the record that the minor was consulted beforehand concerning the commission of the act, or that he, in any manner, affirmatively participated therein. The jury may have concluded from the evidence that he never acquiesced in the act. It does not appear that he protested against the criminal conduct of appellant, but, nevertheless, if he did not form the intention to join in the commission of the crime, it cannot be said that he consented. Levering v. Commonwealth, 132 Ky. 666, 117 S. W. 253, 136 Am. St. Rep. 192, 19 Ann. Cas. 140. On the subject of consent it was stated in People v. Dong Pok Yip, 164 Cal. 143, 147, 127 Pac. 1031, 1032:

"There is a decided difference in law between mere submission and actual consent. Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. 'Consent' differs very materially from 'assent.' The former implies some positive action and always involves submission. The latter means mere passivity or submission, which does not include consent." (Citing authorities.)

It was said in State v. Orrick, 106 Mo. 111, 17 S. W. 176, 329, that:

"Mere consent to a crime, when no act is given, and no encouragement rendered, does not amount to a participation." (Citing Whar. Cr. § 211d, and other authorities.)

To hold that the minor consented to the act, expressly or impliedly, is to declare that he acted "voluntarily." Whar. Crim. Ev. § 440. The jury was therefore called upon to decide whether the silence of the minor indicated that he performed a voluntary or involuntary part in the transaction. Whether the minor formed the intention to participate with appellant in the act was essentially a question for the jury, and he alone, could give direct testimony upon the point. The jury, however, could infer the state of his mind from the proven circumstances and find the fact either way. The silence or lack of

protest on the part of the minor would not be conclusive; it would only be evidence which it would be proper for the jury to consider in connection with other facts tending to solve the question whether he acted "voluntarily, and with common intent" united in the commission of the crime. Whar. Crim. Ev. § 440.

Under all the circumstances, the jury could well have found that the boy was not an accomplice upon any of the theories discussed, and, in my opinion, the judgment should be upheld on that ground alone. The question whether he participated corruptly in the crime should be determined strictly upon the evidence in this case and hence my views are not influenced by the facts in the case of Dong Pok Yip, supra. The minor in this case was only 16 years of age. He did not attend school until he reached the age of 11, notwithstanding that he lived with his parents and grandmother in apparently comfortable circumstances. The minor testified that he did not know, until Mrs. Nute, the housekeeper, informed him, that what appellant did was wrong. From the evidence the jury may have concluded that the minor did not possess the usual intelligence of one of his years, and that he was completely under the control of appellant, who was old enough to be his grandfather. In the eyes of the jury he probably appeared as a passive, undeveloped boy, subject to the will of the appellant and they judged the case accordingly. Furthermore in considering whether the boy consented it must be kept in mind that before the crime was committed appellant preliminarily performed another act upon the minor, which was probably intended to anticipate his resistance to the offense charged and at the same time stimulate appellant's own abnormal desires.

But if the minor was an accomplice his testimony was nevertheless sufficiently corroborated. I shall first consider the character of the corroborative testimony required. The amendment of section 1111 of the Penal Code (Stats. 1911, p. 484) repealed the clause therein—"which in itself, and without the aid of the testimony of the accomplice." The adjudications touching this clause are to the effect that the corroborative evidence must be independent of the testimony of the accomplice. In People v. Compton, 123 Cal. 403, 411, 56 Pac. 44, 48, the rule is thus expressed:

"It could * * * connect him with the crime by considering it with the testimony of the accomplice; yet, if it was necessary so to consider, it would not be legally sufficient. It is legally sufficient only if, standing alone, it tends so to connect him." People v. Morton, 139 Cal. 719, 73 Pac. 609; People v. Lynch, 122 Cal. 501, 55 Pac. 248; People v. Creegan, 121 Cal. 554, 53 Pac. 1082; People v. Sternberg, 111 Cal. 3, 43 Pac. 198.

But the repealed clause was not a part of section 1111 when the case was tried, and it is therefore sufficient, on this appeal, if any corroboration is shown—and it may either be entirely independent of the testimony of the accomplice or confirmatory thereof, provided that it tends to connect the appellant with the crime.

Now, as to the degree of proof required of the corroborative evidence: In People v. Barker, 114 Cal. 617, 46 Pac. 601, it was said:

"The strength or credibility of the corroborating evidence is for the jury. It 'need not be strong; it is sufficient if it tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to but little weight.' People v. McLean, 84 Cal. 480 [24 Pac. 32]. Nor need it extend to every fact and detail covered by the statements of the accomplice. People v. Kunz, 73 Cal. 313 [14 Pac. 836]; People v. Cloonan, 50 Cal. 449."

But although more is required by way of corroboration than to raise a mere suspicion, yet the corroborating evidence is sufficient if it tends to connect the defendant with the commission of the offense, although it is slight and entitled, when standing by itself, to but little consideration. People v. Clough, 73 Cal. 348, 351, 15 Pac. 5; People v. Melvane, 39 Cal. 614; Kent v. State, 64 Ark. 247, 253, 41 S. W. 849; State v. Hicks, 6 S. D. 325, 60 N. W. 66. It is not necessary to corroborate the testimony of the accomplice by direct evidence. It is sufficient if the connection of the accuser with the alleged crime may be inferred from the corroborative evidence in the case.

These instructions were given to the jury:

"No one can be convicted upon the uncorroborative testimony of an accomplice. * * * If the proof in this case does not satisfy your minds to a moral certainty and beyond all reasonable doubt of the guilt of this defendant, it is your duty to find a verdict of not guilty. It is also the law, and I give it to you in this case in behalf of the defendant, that no one can be convicted upon the uncorroborated testimony of an accomplice. No matter how strong a suspicion of the guilt of the defendant may be established in the minds of the jury by the testimony of an accomplice, no conviction can be had upon such testimony, unless corroborated in some material point."

The testimony of the accomplice is sufficient to prove the actual commission of the offense. People v. Leavens, 12 Cal. App. 178, 106 Pac. 1103; People v. Thompson, 16 Cal. App. 748, 117 Pac. 1033; People v. Barnnovich, 16 Cal. App. 427, 117 Pac. 572. Can it be maintained that, as matter of law, there was not sufficient corroborating evidence within the meaning of the rule to connect appellant with the commission of the crime? The testimony of the minor and Mrs. Nute is fairly stated in the majority opinion, and it will not be necessary to refer to it at length.

Mrs. Nute saw appellant and the boy enter the bathroom together and close the door, and then heard the click of the bolt in the door. She saw the appellant glance over toward where she was concealed behind a lace curtain in her own room and lower the window of the bathroom, and observed by the shadow on the frosted glass that the

shade was drawn, but, of course, she could not determine by whom. The boy testified that appellant drew the shade, and, from Mrs. Nute's statements, it is a fair inference, in support of his testimony, that appellant, who lowered the window, also drew the shade. While the fact that Mrs. Nute entertained suspicions of appellant's purpose is not in any sense proper evidence on the question, yet her vigilance throughout may be considered in testing the accuracy of her observations. From her position in her own room she heard the water running quite a while before she started for the bathroom door to listen. She heard the voice of appellant in a low key. It doubtless seemed significant to the jury that the pair were in the bathroom together such a length of time before she made the noise at the door; that they still remained for five minutes; and that appellant should leave the house as soon as he came out of the bathroom.

The inquiry naturally arises from these facts, Why did appellant and the boy go to the bathroom together; why bolt the door, glance over toward where Mrs. Nute was concealed behind the lace curtains, lower the window, and draw the shade? It is incomprehensible that all these precautions would have been taken if the sole object was "to wash their hands." The record is silent on the point whether the bathroom afforded the usual accessories, and this is important in view of the elaborate precautions to avoid observation. Moreover, if the quoted expression was intended to include another use of the bathroom, the indelicacy of such a suggestion would not help the position of appellant.

If the jury believed the testimony of Mrs. Nute, it could have found that the minor was corroborated on "a material point," which the trial court instructed the jury was required. But there was further evidence which may have influenced the jury and led them to reject the testimony of appellant. Does it not seem strange that after making an appointment with the boy at noon for 3 o'clock the domino and tennis games should be of such short duration? It was proper for the jury to consider the conduct of appellant when he was arrested and questioned in the presence of the boy, and thereupon made the incomplete answer: "I don't see why that boy should say that, I did not do." Nor when he said to the officer, on the way to the prison: "I do not know how you feel about it. * * * You are entitled to your opinion and I am entitled to mine. It is his word against my word." His replies were not indicative of one falsely accused, and hardly represented the attitude of an innocent man charged with an unspeakable crime.

His general reputation for the traits involved was put in issue. Code Civ. Proc. § 2053; Pen. Code, § 1102. Two of the five witnesses called on his behalf were asked, on cross-examination, if they had ever heard that he was accused of similar acts upon two other boys of the age of 16 years, which questions were answered in the negative. In rebuttal, the prosecution called the two boys, both of whom gave testimony that his general reputation for the traits involved was very bad. The officer in the case gave similar testimony.

From a study of the entire evidentiary record it is clear that the conduct of appellant throughout was of an equivocal import, which the jury could have resolved either in favor of his guilt or his innocence. It has found against his innocence, and, if the evidence under any theory of fact is susceptible of such a finding, it should not be disturbed on appeal.

(171 Cal. 649)

PEOPLE v. MILLER. (Cr. 1972.)

(Supreme Court of California. Jan. 3, 1916.)

1. CRIMINAL LAW ⊂⊃789—DEFENSES—INSANITY—DEGREE OF EVIDENCE REQUIRED.

In a prosecution for murder, it was error to require the defendant to establish his defense of insanity by a preponderance of the evidence, at the same time defining "preponderance of the evidence" as that degree of evidence which proves to a moral certainty and produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds, since that definition is in effect a definition of proof beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1851, 1880, 1904–1922, 1960, 1967; Dec. Dig. ⊂⊃789.]

2. CRIMINAL LAW ⊂⊃561 — EVIDENCE — DEGREE OF PROOF—"REASONABLE DOUBT."

A "reasonable doubt" is not a mere possible doubt, but is the absence of an abiding conviction to a moral certainty of the truth of the charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. ⊂⊃561.

For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

3. CRIMINAL LAW ⊂⊃560—"PREPONDERANCE OF THE EVIDENCE."

"Preponderance of the evidence" means only that the evidence on one side outweighs the evidence on the other, not necessarily in number of witnesses or quantity, but in its effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1266; Dec. Dig. ⊂⊃560.

For other definitions, see Words and Phrases, First and Second Series, Preponderance.]

4. CRIMINAL LAW ⊂⊃789 — EVIDENCE — DEGREE OF PROOF REQUIRED—STATUTES.

Code Civ. Proc. §§ 1826, 1835, defining certain degrees of evidence, have no application to the question as to what is meant by an instruction placing upon the defendant the necessity of establishing his defense of insanity by a preponderance of the evidence, since those sections relate only to the character of evidence sufficient to sustain a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1851, 1880, 1904–1922, 1960, 1967; Dec. Dig. ⊂⊃789.]

5. CRIMINAL LAW ⊂⊃1186—APPEAL AND ERROR—REVERSAL.

Where the court required the defendant in prosecution for murder to establish his defense of insanity beyond a reasonable doubt, the error was not such that the decree could be affirmed in accordance with Const. art. 6, § 4½, pro-

hibiting reversal on account of errors in procedure or misdirection of the jury unless the court is of the opinion that the error prejudiced the defendant, where the evidence was such that the jury might reasonably have found for the defendant under a proper instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215–3219, 3221, 3230; Dec. Dig. ⊂⊃1186.]

6. CRIMINAL LAW ⊂⊃1086 — RECORD ON APPEAL—CONTENTS.

On appeal the record should not contain the arguments of the counsel on questions of law arising during the trial, since they serve no useful purpose, and their insertion is not required by law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2770, 2772, 2794; Dec. Dig. ⊂⊃1086.]

In Bank. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Thomas Miller was convicted of murder in the first degree, and he appeals. Reversed and remanded for new trial.

John W. Heaney, of San Francisco, and W. C. Gammill, of Santa Barbara, for appellant. U. S. Webb, Atty. Gen., and E. W. Squier, of Santa Barbara, for the People.

ANGELLOTTI, C. J. The defendant, charged with murder in the unlawful killing of one Clarence A. Baker, was convicted of murder in the first degree, and adjudged to suffer death. We have an appeal by him from the judgment.

The only defense was that defendant was insane at the time he killed the deceased. The court correctly instructed the jury, in substance, in view of the settled law of this state, that while it was essential to a conviction that the guilt of the defendant be established to their satisfaction beyond all reasonable doubt, except on the single question of insanity, that as to insanity the burden of proof was on defendant, and that it was incumbent on him to show insanity by a preponderance of the evidence before he could be acquitted on that ground. The jury were explicitly and correctly instructed that it was not necessary for defendant to show his insanity beyond all reasonable doubt, but only by a preponderance of evidence, as in civil cases, and also that the proof must be such in amount that, if the single issue of sanity or insanity of the defendant should be submitted to a jury in a civil case, they must find him insane; that, in other words, insanity may be established "by a preponderance of evidence merely." But, having so fully and correctly instructed the jury, the learned trial judge gave a further instruction as to what was meant by the term "preponderance of the evidence," which, so far as we can find, was the only instruction given on the subject. This was as follows, viz.:

"Preponderance of the evidence means that degree of evidence which proves to a moral certainty, or, in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds."

The court refused to give an instruction requested by defendant reading in part as follows, and being in all other respects a correct statement of the law:

"Then what is the term 'preponderance of the evidence'? By preponderance of evidence is meant the greater and superior weight of evidence; and, if the evidence of insanity preponderates in the slightest degree in favor of the defendant, you must find him not guilty."

[1] Defendant's main contention on this appeal is that the instruction given was erroneous, and we are satisfied that this contention is well based. It is plain to us that the definition thus given by the court was substantially the same as that of proof beyond a reasonable doubt, and that certainly a jury of laymen could find no possible distinction. It is clear that our law contemplates, as does the law generally, a material distinction between the two terms. Always has it been the established rule in this state that proof of guilt beyond all reasonable doubt is essential to the conviction of one of a crime, while a mere preponderance of evidence is sufficient in a civil case, and this rule is expressly stated in section 2061 of our Code of Civil Procedure. The existence of this distinction was fully recognized by the trial judge in this case, who advised the jury as to the necessity of proof of guilt beyond all reasonable doubt, and that defendant was required to prove his insanity only by a preponderance of evidence.

[2] The term "reasonable doubt" was fairly enough defined by him, in accord with the definition thereof given by Chief Justice Shaw in Commonwealth v. Webster, 5 Cush. (59 Mass.) 320, 52 Am. Dec. 711, which has been adopted by the courts of this and practically all other states as the best definition, viz.:

"It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. * * * The evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it."

In instructing the jury as to the meaning of the term "proof beyond a reasonable doubt," the trial judge, in line with this definition, expressly told the jury that "moral certainty only is required or that degree of proof which produces conviction in an unprejudiced mind"; and again that "the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously

upon it." Clearly the jury was thus given substantially the same definition of both the terms "preponderance of evidence" and the term "proof beyond a reasonable doubt," thus making it essential for the defendant to establish his defense of insanity by evidence showing the same to the satisfaction of the jurors beyond a reasonable doubt. That such is the effect of the instruction given is shown by what is said in People v. Wreden, 59 Cal. 393, and People v. Wells, 145 Cal. 142, 78 Pac. 470, where it is held that an instruction declaring that insanity "must be clearly established by satisfactory proof" is the full equivalent of one making it incumbent on a defendant to establish insanity beyond a reasonable doubt.

[3] No such definition of the term "preponderance of the evidence" as that given by the trial judge is sanctioned by the authorities. The term simply means what it says, viz.: That the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. As good a definition as we have found is that given in Hoffman v. Loud, 111 Mich. 156, 69 N. W. 231, where it is said:

"In civil cases a preponderance of evidence is all that is required, and by a 'preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests."

In Parker v. Hull, 71 Wis. 368, 37 N. W. 351, 5 Am. St. Rep. 224, it is said that to say that the evidence of one party must be more weighty, convincing, and satisfactory than the proof adduced by the other party is simply to state the rule of preponderance. In French v. Day, 89 Me. 441, 36 Atl. 909, it was held that an instruction requiring a "clear preponderance of evidence and convincing proof" was erroneous, and that a party was only required to prove his case "by a preponderance of the evidence," not by a "clear preponderance and by convincing proof." In Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077, the term is held to be properly defined as the greater convincing power of evidence, and it is said that on a trial that side has furnished the preponderance of evidence which has produced evidence of greater convincing power in the minds of the jury than that produced by the other side.

[4] Of course, these definitions do not mean that the "burden of proof" resting on a party to prove a particular fact, as in this case the burden of proof resting on defendant to prove insanity and thus rebut the presumption of sanity which the law declares, is lifted by the mere fact that he has produced a preponderance of evidence, for, as was well said in Ergo v. Merced Falls, etc., Co., 161 Cal. 339, 119 Pac. 103, 41 L. R. A. (N. S.) 79:

"The evidence tending to prove a fact might be so slight that it would fail to satisfy the jury of the existence of the fact, and yet it might be of greater weight than other evidence introduced which would tend to disprove the fact," and that "in such case the fact could not be said to be proven either by a preponderance of the evidence or at all."

The same idea was expressed in Anderson v. Chicago Brass Co., supra. The party on whom rests the burden to prove an alleged fact must produce evidence sufficient in quantity and character to warrant a jury in finding the fact to exist, in the absence of opposing evidence. The question what that evidence must amount to in order to legally support a conclusion by the jury has nothing at all to do with the question what is meant by the term "preponderance of the evidence." The party on whom rests such burden having produced sufficient evidence to support a conclusion in his favor, opposing evidence may also have been introduced, and then only does the question of preponderance of evidence arise. The situation may then be that, in view of the opposing evidence, the jury is in doubt, and not at all satisfied or convinced. In such a situation the decision must be based on the preponderance rule. If in the opinion of the jury the testimony preponderates in favor of the one on whom the burden of proof does not lie, or is equally balanced, the decision must be in his favor, and, if it preponderates ever so slightly in favor of the other party, he is entitled to a verdict. So that in civil cases a party may have established an essential fact by a preponderance of the evidence, although, in the light of all the evidence pro and con, the jury may not be satisfied to a moral certainty of the existence of the fact, and the whole evidence may not be such as to produce conviction in their minds. Under such circumstances, as said in Murphy v. Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365:

"The weight of evidence or preponderance of probability is sufficient to establish a fact in a civil case."

The question is not whether, in view of all the evidence, pro and con, the jury are satisfied to a moral certainty of the truth of the fact, or whether conviction as to that fact exists in their minds, but whether there is a preponderance of evidence in favor of the existence of the fact. We cannot avoid the conclusion that the instruction given on this matter most vital to defendant, the only instruction given on the subject, advised the jury that they could not find in his favor on the issue of insanity unless they were satisfied by the evidence, as a whole, "to a moral certainty" that he was insane at the time of the homicide, and "convinced" that such was the case, and we are satisfied that it could have been understood by the jury in no other way.

[4] The error of the learned trial judge in this connection was doubtless induced by certain rather carelessly drawn provisions contained in our Code of Civil Procedure enacted in an attempt to satisfactorily de-

fine or declare the degree of proof essential to the establishment of a fact by evidence. See sections 1826 and 1835, Code Civ. Proc. Manifestly these provisions are not in accord with other provisions of law in all respects, even on the subject to which they relate. For instance, in section 1835 it is attempted to declare what is "satisfactory evidence," defining it as that evidence "which ordinarily produces moral certainty or conviction in an unprejudiced mind," providing that such evidence alone will justify a verdict, and declaring that all other evidence is "slight evidence." Yet by other sections of the same Code it is declared that a presumption is evidence, and that it is a deduction which the law expressly directs to be made from particular facts, and many presumptions, conclusive and prima facie, are stated, and it is expressly provided that as to a prima facie presumption the jury is bound to find according to the presumption unless it be controverted. Of course, also, it is bound to find in accord with a conclusive presumption. See sections 1957, 1959, 1961, 1962 and 1963. All this is true, although the presumption may not be such as to ordinarily produce moral certainty or conviction of the fact presumed in an unprejudiced mind. But whatever force may be attributed to these sections and whatever they may be held to mean, they have no application to the question here involved, viz.: What is meant by the term "preponderance of evidence"? They purport to do no more than to attempt to declare what character of evidence will sustain a verdict, and even in that, as we have seen, when considered in connection with other provisions of law, they are not entirely correct. The instruction given in Ergo v. Merced Falls, etc., Co., supra, relied on by the Attorney General, was one given at the request of the defendant, which was complaining of another incorrect instruction given at the request of the plaintiff, and it was simply held that the instruction so given at the request of the complaining defendant was of such a nature that the court would not be justified in holding the other instruction sufficiently injurious to justify a reversal. The instruction was not upheld as a correct statement of the law.

[5] We regard the error thus made as one most substantially affecting the rights of defendant. In effect, as we have said, the jury was instructed that he could not be acquitted on the ground of insanity unless he established the fact of insanity to their satisfaction beyond a reasonable doubt. We have carefully examined the evidence in order to determine whether, in view of the provisions of section 4½ of article 6 of the Constitution, the judgment should be affirmed notwithstanding such error, and we are satisfied that the evidence was of such a nature that such a conclusion may not fairly be reached. In saying this we do not desire to be understood as intimating that it is our opinion that the jury should have concluded that the preponderance of evidence was in favor of the theory of insanity. The evidence elicited on the trial was of such a nature that a jury might reasonably find therein basis for a conclusion that insanity on the part of the defendant, within the meaning of our law, had not been shown by a preponderance of evidence. But, according to the record, the case made for defendant on this issue was a substantial one, and the evidence tending to show insanity was such that a jury might reasonably have found therein sufficient basis for a conclusion that the preponderance of the evidence was in favor of the theory of insanity. For aught we know, the jury did so conclude in this case, finding against the defendant on that issue solely because of the erroneous instruction. It is not suggested by the learned Attorney General that, if the instruction be erroneous, the facts nevertheless are such as to warrant an affirmance in view of the rule declared by the provision of the state Constitution referred to.

In view of our conclusion on the point discussed, it is unnecessary to consider any other point made for reversal.

[6] We find on an examination of the reporter's transcript of the proceedings at the trial that the same includes all arguments made by counsel to the court on questions of law arising during the trial. In the aggregate many pages of the transcript are devoted to this use. The incorporation of such arguments in a transcript for use on appeal serves no useful purpose. To the contrary, it not only impedes the examination of the record by an appellate court, but it also unnecessarily adds to the cost of the transcript to the county. The law does not require the insertion of any such matter in a transcript of the evidence to be used on appeal, and the trial judge should see that such a transcript is not unnecessarily lengthened by the incorporation of superfluous matter.

The judgment is reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

HENSHAW, J. I concur in the foregoing opinion of the Chief Justice. Section 1835 of the Code of Civil Procedure, like section 1826 of the same Code, is dealing exclusively with evidence in criminal cases. The difficulty is entirely cleared if to the sentence in section 1835, "Such evidence alone will justify a verdict," there be added "of conviction." That these sections have applicability solely to criminal cases is made manifest, not only by the history and development of the law governing criminal trials, but from two additional facts, each equally convincing. The one fact is that, if those sections were made to apply to trials by jury in civil cases, it is within bounds to say that 99 such cases out

of 100 would necessarily result in perpetual mistrials. The evidence in civil cases upon either side is most rarely of so convincing a character as to produce "moral certainty or conviction," and, if it be only such evidence in a civil case as "will justify a verdict," then it must result that no verdict can be rendered. As pointed out by the Chief Justice, this distinction is itself noted by our law in section 2061 of the same Code. In subdivision 5 of that section criminal cases and civil cases are put in immediate juxtaposition, and courts are advised to instruct their juries that in civil cases their "decision must be made according to the preponderance of evidence," while "in criminal cases guilt must be established beyond a reasonable doubt." The second fact, equally conclusive, is shown by the history of these two sections, derived from the notes of the codifiers and commentators. Every word of those notes establishes that the codifiers are dealing with the sufficiency of evidence in criminal cases. Thus, in the note to section 1826 it is said:

"The principal difference to be remarked between civil and criminal cases with reference to the modes of proof by direct or circumstantial evidence is, that in the former where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment than in the latter case which affects life and liberty."

While in the note to section 1835 it is said:

"To acquit upon light, trivial, and fanciful suppositions and remote conjectures, is a virtual violation of the juror's oath, and an offense of great magnitude against the interests of society, directly tending to the disregard of the obligations of a judicial oath, the hindrance and disparagement of justice, and the encouragement of malefactors. On the other hand, a juror ought not to condemn unless the evidence excludes from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he is so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests."

In their note to section 1835 the codifiers cite Starkie on Evidence, and Starkie's discussion then may well be quoted. This is what that learned author says:

"Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produces in the mind nothing more than a mere preponderance of assent in favor of the particular fact.

"The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt.

"But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale."

171 Cal. 658

WILLIAMS, Superintendent of Banks, v. CARVER et al. (No. L. A. 3652.)

(Supreme Court of California. Jan. 4, 1916. Rehearing Denied Feb. 3, 1916.)

1. STATUTES ⟸161—CONSTRUCTION.

Where there is an apparent conflict between two statutes touching the same subject, they should be construed, if possible, to give force and effect to each, as the law does not favor repeals by implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230–234; Dec. Dig. ⟸161.]

2. BANKS AND BANKING ⟸49—STOCKHOLDER'S LIABILITY—ENFORCEMENT BY SUPERINTENDENT OF BANKS—STATUTE.

St. 1909, p. 87, entitled "An act to define and regulate the business of banking," in section 136 providing that the superintendent of banks shall collect all debts due it, and may, if necessary to pay its debts, enforce individual liability of the stockholders, does not authorize the superintendent to enforce the constitutional liability of the stockholder to the creditor fixed by Const. art. 12, § 3, declaring that each stockholder of a corporation shall be liable for such proportion of its liabilities as his stock bears to the whole, since the constitutional right is personal to the creditor, enforceable by him under Civ. Code, § 322, and, not being a debt due the bank, is not enforceable by it or the superintendent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71–81½, 513, 534, 535; Dec. Dig. ⟸49.]

3. BANKS AND BANKING ⟸49—STOCKHOLDER'S LIABILITY—ENFORCEMENT BY SUPERINTENDENT OF BANKS—STATUTE.

St. 1909, p. 87, entitled "An act to define and regulate the business of banking," in section 136 providing that the superintendent of banks shall collect all debts due it, and may, if necessary to pay its debts, enforce the individual liability of the stockholders, only authorizes the superintendent to enforce against stockholders their liability due the bank, arising upon assessments or nonpayment of subscriptions to the corporate capital, constituting a common fund out of which to pay the cost of administration and corporate debts.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71–81½, 513, 534, 535; Dec. Dig. ⟸49.]

4. STATUTES ⟸107—TITLE — CONSTITUTIONALITY.

Under Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in its title, St. 1909, p. 87, entitled "An act to define and regulate the business of banking," by section 136 providing that the superintendent of banks many enforce the individual liability of stockholders, if it authorize him to enforce the liability of stockholders to creditors under Const. art. 12, § 3, is unconstitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121–134; Dec. Dig. ⟸107.]

In Bank. Appeal from Superior Court, Kern County; J. D. Murphy, Judge.

Action by W. R. Williams, as Superintendent of Banks, against L. J. Carver and others. From a judgment for defendants on their demurrers, plaintiff appeals. Judgment affirmed.

H. W. Johnson, Jr., of San Francisco, and A. A. De Ligne, of Sacramento, for appellant. Corbet & Selby, of San Francisco (Frederick B. Lathrop, of counsel), for respondent L. J. Carver. E. L. Foster, of Bakersfield, for respondents R. McDonald and others. C. C. Cowgill, of Sonoma, for respondent Sarah L. Conner. Thomas Scott, of Bakersfield, for respondent R. E. White.

VICTOR E. SHAW, Judge pro tem. This is an equitable action, brought by plaintiff, as superintendent of banks, to recover from the stockholders of the Kern Valley Bank upon their constitutional liability to the creditors thereof. To the first amended complaint defendants interposed demurrers upon both general and special grounds. Their demurrers were sustained by the court, which refused to allow plaintiff to further amend. Judgment followed, from which plaintiff appeals.

It appears that on May 12, 1911, plaintiff, as superintendent of banks, declared the Kern Valley Bank insolvent, for which reason and the fact that it was then unsafe and inexpedient for it to continue its banking business, he took possession of all its property and business for the purposes of liquidation, as provided by law. It is alleged:

"That the conditions and affairs of said Kern Valley Bank are such that, in order to pay the debts thereof, it has become and is necessary to enforce the individual liability of the stockholders of said bank, as provided for by the Constitution and other laws of the state of California, and by virtue of the authority vested in him by said Bank Act of the state of California plaintiff brings this action on behalf of all the creditors of said Kern Valley Bank."

There is attached to the complaint a list of the names of some 1,500 persons, to all of whom it is alleged the bank, within three years prior to the filing of the complaint, became indebted in the aggregate sum of $832,502.54; that by offsets said sum of $832,502.54 has been reduced to $717,574.48, upon which there has been paid, by the superintendent of banks, in the liquidation of its affairs, dividends in the sum of 40 per cent. upon the principal of said indebtedness, and that there remains due to said creditors the sum of 60 per cent. of the whole principal of said indebtedness; that the value of all assets of the bank now in the hands of the plaintiff do not exceed $107,636.10, which sum is—

"probably insufficient to pay the expenses necessary for the completion of the liquidation of the affairs of said bank and an additional dividend of not more than 15 per cent. of the principal of said original indebtedness."

The names of the stockholders, with the number of shares owned by each during the time when said indebtedness is alleged to have been incurred by the bank, together with the proportionate liability of each in the aggregate to all of the depositors based upon the number of shares so owned by each stockholder, are set out in the complaint. The prayer of the complaint is for judgment against each of said defendants in the several amounts specified as being the proportion of all the debts of the bank as the stock held by each bore to the entire subscribed capital stock of the bank, less the deduction which each defendant shall be entitled to by reason of the dividends theretofore paid, or which might thereafter be paid by plaintiff to said creditors.

[1] Plaintiff asserts right to maintain the suit under and by virtue of an act entitled "An act to define and regulate the business of banking" (Stats. 1909, p. 87), section 136 of which, in so far as material to the discussion, is as follows:

"The superintendent of banks shall collect all debts due and claims belonging to it, and upon the order of the superior court may sell or compound all bad or doubtful debts, and on like order may sell all real and personal property of such bank on such terms as the court shall direct; and may, if necessary to pay the debts of such bank, enforce individual liability of the stockholders by action to be brought within three years after the date of his taking possession of the affairs of such bank."

He insists that the "individual liability of the stockholders" therein mentioned, and which he is authorized to enforce, is the constitutional liability of the stockholder to the creditor fixed by section 3, art. 12, of the Constitution, which declares that:

"Each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation."

Section 322 of the Civil Code, after reenacting this constitutional provision, provides, among other things, that:

"Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each."

The Bank Act makes no reference to this section, nor to section 359, Code of Civil Procedure, which specifies the time when the maintenance of such action by the creditor shall be barred. The position of appellant with reference to these sections is that they "still provide such remedy in all cases except where a bank has been taken over by the superintendent of banks for the purpose of liquidation," in which case the constitutional right of the creditor to pursue the stockholder is, ipso facto, terminated, and the enforcement of the payment of his debt committed to the will of the superintendent of banks, who, if it be "necessary to pay the debts of such bank," may, notwithstanding the claim is barred under section 359, Code of Civil Procedure, bring an equitable action to recover the specific sum due from each stockholder to each creditor, and, when collected, pay to each creditor the sum so collected in his behalf. The law does not favor repeals by implication, and where there is an apparent conflict between two statutes touching the

same subject, the construction should be such as to give force and effect to both, if possible.

[2-4] The subject of the legislation, as expressed in its title, is "the business of banking." The constitutional liability of the stockholder to the creditor, as to which no mention is made in the act, is distinct and separate from such business; it constitutes no part of the assets or business of the bank. Two sources exist to which the creditor may look for the payment of his debt: One, the assets of the bank the affairs of which, if in liquidation, are controlled by the superintendent of banks; the other the stockholder therein, as to whom and his direct and primary liability to the creditor neither the bank nor the superintendent of banks has anything to do. Being distinct and separate claims, though based upon the same debt, the creditor may, so long as the bank is a going concern, pursue his remedy against either or both bank and stockholder, or waive it as to either or both. When the superintendent takes possession of a bank for purposes of liquidation, he succeeds to all the rights and property of the bank; but since the stockholder's liability to the creditor is no part of such property or assets, he has no power to act for or on behalf of the creditor in pursuit of his claim for such source. The right to do this is a personal right of the creditor, and, under the Constitutional provision, he not only possesses the right to enforce the same in an action at law in the manner provided by section 322 of the Civil Code, but may insist upon having the proceeds collected applied in liquidation of his debt, free from any depletion due to the intervention of another, or to the extravagance, mismanagement, or expense of the administration of such fund by any other person. Since it is not a debt due to the bank, neither it nor the superintendent of banks as its successor is concerned with the enforcement of such constitutional liability. The "individual liability of the stockholder" which the superintendent of banks is authorized to enforce, since it is not declared to be the constitutional liability due to the creditor, must be construed to be that due to the bank and arising upon assessments made, or nonpayment of subscriptions to the corporate capital, constituting a common fund out of which to pay the cost of administration and corporate debts. So construed, there is no conflict between the Bank Act and section 322, Civil Code; whereas, if we accept appellant's interpretation, the inconsistency is irreconcilable, and the creditor is deprived of his constitutional right to enforce the liability of the stockholder, upon whom additional burdens are imposed, since in the form of action here adopted the chances of all creditors, hundreds of whose claims in the case at bar are less than $5, suing to enforce the same, are largely augmented thereby. Moreover, if the provision be construed as authorizing the superintendent of banks to enforce the constitutional liability of stockholders to the creditors, then it is void as being obnoxious to the provisions of section 24, art. 4, of the Constitution, which provides that every act shall embrace but one subject, which shall be expressed in its title. As stated, the subject of the legislation, as shown by its title, is to "define and regulate the business of banking." The constitutional liability of the stockholders of a corporation to its creditors and the enforcement of such liability is no part of the business of banking. Hence, the subject of the legislation, if its purpose be to deprive the creditor of the right to enforce such liability and confer upon the superintendent of banks the power to act for and on behalf of the creditor in the collection thereof, is not embraced in the title. Indeed, there is absolutely nothing in the title indicating such a purpose on the part of the Legislature.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

Mr. Justice VICTOR E. SHAW, of the District Court of Appeal of the Second Appellate District, acted in this case under appointment by this court, in place of Mr. Justice LORIGAN, of this court, who was unable to act.

29 Cal. App. 49

O'REILLY v. ALL PERSONS, etc.

(Civ. 1432.)

(District Court of Appeal, Third District, California. Nov. 27, 1915.)

1. TAXATION ⇐831—TAX TITLES—RIGHTS OF TAX PURCHASER.

As the primary object in selling land for taxes is to enable the state to recover the amount due, a tax purchaser is a mere volunteer as to the amount paid on competitive bidding in addition to the taxes due, and, the tax title being invalid, he cannot recover such amount from the owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1645; Dec. Dig. ⇐831.]

2. APPEAL AND ERROR ⇐171 — THEORY OF CASE—CHANGE.

Where the case was tried below on the theory that an issue was whether defendants were bound to compensate plaintiff for the amount paid for his tax title in excess of the amount due for taxes, it could not on appeal be contended that no such issue was presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1063, 1066, 1067, 1161–1165; Dec. Dig. ⇐171.]

3. APPEAL AND ERROR ⇐1177 — REVIEW — FINDINGS.

Where, in a proceeding to establish title to land, it was found that plaintiff's tax title was invalid, the appellate court, no finding having been made, should not determine what amount plaintiff paid for his tax title on competitive bidding above the amount of taxes due, but the cause should be remanded for that purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597–4604, 4606–4610; Dec. Dig. ⇐1177.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by P. J. O'Reilly against All Persons, and especially against Josephine E. Hopkins and another, to establish title to two parcels of land. From the judgment, the named defendants appeal. Reversed and remanded, with directions.

Samuel M. Shortridge and T. J. Sheridan, both of San Francisco, for appellants. Frank J. Hennessy, of San Francisco, for respondent.

BURNETT, J. The action was brought under the McEnerney Act to establish title to two parcels of land. Appellants in their answer denied that plaintiff was the owner or in the actual possession of parcel A of the said real estate, and averred that they are and were at the beginning of the action, and had been long prior thereto, the owners of said parcel in fee simple absolute as tenants in common and in the possession thereof, and prayed that plaintiff take nothing as to said parcel, but they did not ask for affirmative relief. No question was raised as to plaintiff's ownership of the other parcel, and it is not involved in this appeal.

At the trial it developed that plaintiff claimed said parcel A under a tax title, and it was admitted that, if said tax title was invalid, then appellants were the owners of said tract, as claimed in their answer. The court found that the said defendants were at the time of the said tax sale, and ever since have been, the owners in fee simple absolute of said real property, and, further, that the said tax sale and the said tax deed executed pursuant to said sale and purporting to convey said property were and are invalid. These findings have not been questioned; the plaintiff not having moved for a new trial or appealed. The court further found, however:

"That the said plaintiff purchased said property from the state of California at a tax sale held on the 7th day of February, 1912, and paid for said property at said sale the sum of $740 in gold coin of the United States of America, and that said plaintiff has since said tax sale aforesaid expended the sum of $15.43 in the payment of taxes regularly levied upon said property."

And the court thereupon decreed that plaintiff have judgment against said defendants for the sum of $740, and interest, the further sum of $15.43, and that said judgment be a lien upon said parcel of real property, and that said defendants be directed to pay the same within 60 days, and in the event of their failure so to do that plaintiff be entitled to have a writ of execution to enforce the same, and that until said payment be made the judgment in favor of defendants be of no force and effect. The court did not find the amount of the taxes, penalties, interest, and costs which were chargeable upon said lands at the time of the said tax sale, but it was conceded at the trial that the amount of the same was $45.82.

Appellants appeal from the portion of said judgment requiring of them the payment of the said purchase price of said parcel of land, and they state in their brief that:

"The substantial dispute between respondent and appellants is whether plaintiff is entitled to the excess of the sum bid and paid by him over and above the taxes, interest, penalties, and costs justly chargeable upon the lands at the time of the invalid tax sale, and that is the sole question presented by this appeal."

[1] That question, it may be said, has been settled by a decision of this court, a petition for hearing in the Supreme Court being denied, and it is sufficient to quote the following from Cordano v. Kelsey, 151 Pac. 391:

"We do not think that the owner should be required to pay whatever competitive bidders may choose to offer for the land in addition to what the law makes it the duty of the owner to pay. The primary object of the state in selling the land is to recover the taxes, penalties, costs, etc., and this is indicated by the requirement of the law that the land must be sold for an amount not less than these enumerated charges. Whoever pays more at the sale does so as a volunteer and at the risk of the proceedings being found invalid. The rule contended for by appellants would relieve the purchaser of all risk, and make it possible for him to invest his money safely by purchases at tax sales at 7 per cent. interest, regardless of any infirmity in his title, and regardless of the amount he might bid for the property. This, we think, would crowd the rule off from its equitable foundations."

[2, 3] The only remaining question is whether upon the record as presented here this court can direct a modification of the judgment so as to require appellants to pay to plaintiff only the amount chargeable for taxes, penalties, and costs. Strictly speaking, no such issue was presented by the pleadings; each of the parties claiming the absolute title. The finding, therefore, as to the $740 was beyond the scope of the pleadings, but we find from the record brought up that evidence as to such payment and also as to the amount actually paid for taxes, penalties, and costs was received without objection, and, indeed, there is no controversy as to said amounts. Hence it could properly be said that the trial was had upon the theory that such consideration was involved in the issues submitted for decision, and neither party at this time could justly disclaim it.

There is no finding, though, as to the amount paid for taxes prior to said sale, and to pursue the course suggested by appellants would be for us to make a finding for the trial court, which, of course, would be a departure from a well-established rule. It is probably true that, if we should direct a modification as requested by appellants, it would be without prejudice, as was the case in Campbell v. Canty, 162 Cal. 382, 123 Pac. 266. However, the more orderly course, we think, and one no more burdensome, would be to direct the lower court to make the ad-

ditional finding in the usual manner. Indeed, appellants recognized the propriety of such action in their motion for a new trial.

It is therefore ordered that the judgment be vacated, and the order denying the motion for a new trial be reversed, and the cause is remanded for a new trial as to one issue alone, that is, the amount paid by respondent for taxes, penalties, and costs, and upon the determination and finding of said amount, with interest, it is ordered that judgment be entered requiring appellants to pay said amount and that upon the payment of said amount their title to said parcel of real property be established and quieted.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 59

TERRY v. RIVERGARDEN FARMS CO. et al. (Civ. 1413.)

(District Court of Appeal, Third District, California. Nov. 29, 1915.)

1. VENUE ⇐36—CHANGE OF—NATURE OF ACTION.

The nature of the action on a motion for change of venue is determined from the allegations of the complaint and character of the judgment which may be rendered on default.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 54, 55; Dec. Dig. ⇐36.]

2. VENUE ⇐40—CHANGE OF—PERSONAL ACTION.

Where the complaint sought rescission of a contract for the purchase of land and return of the purchase money, and no lien was claimed upon any property nor any interest in real property sought to be adjudicated, the action is personal in its nature, the cancellation of the contract being incidental merely to the principal relief; hence defendants are entitled to have the venue changed to the county of their residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 61; Dec. Dig. ⇐40.]

3. VENUE ⇐5—CHANGE OF—REAL ACTIONS.

An action will not be considered a real action for the purpose of determining its venue unless title or interest in real property is involved.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4–11; Dec. Dig. ⇐5.]

4. VENUE ⇐5 — CHANGE OF — RIGHT TO CHANGE.

Though plaintiff joined with a personal action an action involving title to real property, which, under Code Civ. Proc. § 392, should be tried in the county where it was located, such joinder does not deprive defendant of its right to have the personal action tried in the county of its residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4–11; Dec. Dig. ⇐5.]

5. VENUE ⇐40 — CHANGE OF — RIGHT TO CHANGE.

Where an action seeking a cancellation of a contract for the purchase of land was purely personal as to one of the defendants, the only relief sought being a money judgment for fraudulent representations, such defendant is entitled to have the venue changed to the county of its residence, though the title to real property be involved.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 61; Dec. Dig. ⇐40.]

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by J. R. Terry against the Rivergarden Farms Company, a corporation, and Stine & Kendrick. From an order granting defendants change of venue, plaintiff appeals. Affirmed.

A. G. Bailey, of Woodland, for appellant. Arthur C. Huston and Harry L. Huston, both of Woodland, for respondents.

BURNETT, J. [1] This appeal is from an order of the superior court of Yolo county granting a motion for a change of venue to the city and county of San Francisco. Appellant's attack upon the order is based upon the assumption that the action is for the determination of some right or interest in real estate within the meaning of section 392 of the Code of Civil Procedure. Manifestly, the nature of the case is determined from the allegations of the complaint and the character of the judgment which might be rendered upon default. McFarland v. Martin, 144 Cal. 771, 78 Pac. 239.

[2-4] It appears from the complaint that the action is one of rescission based upon the ground of fraud. Attached to the complaint is a copy of a contract entered into between the defendant Rivergarden Farms Company and the plaintiff, Terry. It seems that Stine & Kendrick, the other defendants, executed the said contract as attorney in fact for their codefendant. The contract is in the usual form for the sale and purchase of real estate.

The complaint sets forth that certain false and fraudulent representations as to the character and condition of the land were made by the defendants, and it concludes with this prayer:

"That the said contract of sale between plaintiff and defendants for the purchase and sale of said farms Nos. 603 and 604 aforesaid be canceled and declared to be not binding on this plaintiff; that it be adjudged that defendants repay plaintiff the sum of $2,172.12 cash gold coin of the United States, with interest thereon from the said month of November, 1913, at the legal rate; that plaintiff have his costs herein accrued; and for such other relief as may be proper and equitable in this cause."

As is apparent, the specific relief prayed for is the cancellation of the contract and a money judgment against the defendants. It is equally apparent that the main relief is the recovery of the sum of $2,171.12 in money; the cancellation of the contract being merely incidental to that consideration. No lien is claimed upon any property, nor is any right or interest in real property sought to be adjudicated. Manifestly, the judgment will not in any way affect the title to real property. To constitute a real action it must, of course, appear that title or interest in real property is involved. Clark v. Brown, 83 Cal. 184, 23 Pac. 289; Hammond v. Ocean Shore Development Co., 22 Cal. App. 167, 133

Pac. 978. Moreover, if we should admit that the action does concern real property in the sense of said section 392 of the Code of Civil Procedure, it is entirely clear that to the extent at least of said money judgment demanded it is a personal action, and, when a real and personal action are joined, the case may be transferred to the residence of the defendant. Smith v. Smith, 88 Cal. 572, 26 Pac. 356; Warner v. Warner, 100 Cal. 11, 34 Pac. 523; Donohoe v. Rogers, 168 Cal. 700, 144 Pac. 958. In the last of these it is said:

"The language that we have quoted from section 392 of the Code of Civil Procedure is very broad, and there can be no question as to its including an action to declare a trust in real estate, where land is the exclusive subject-matter of the litigation. See Booker v. Aitken, 140 Cal. 471, 74 Pac. 11; McFarland v. Martin, 144 Cal. 771, 78 Pac. 239. The cases cited by defendants in this regard are all cases in which real and personal actions were joined, and it is well settled that a plaintiff cannot deprive a defendant of his right to a trial of a personal action in the county of his residence, by uniting in his complaint a cause of action for the recovery of or the determination of an interest in real property."

The cases cited by appellant are easily distinguished, as is made apparent by a brief recital of the important facts therein.

Sloss v. De Toro, 77 Cal. 129, 19 Pac. 233, was an action in which a decree revesting the title was sought. The cancellation of a fraudulent sale was demanded and the reinvestment of the title to the land in plaintiff.

In Franklin v. Dutton, 79 Cal. 605, 21 Pac. 964, the plaintiff prayed for a reformation of a written contract of sale, and it was decided that the action was "for the determination of a right or interest in real estate." There is a palpable difference between an action to reform a contract of sale of real estate, and thus continue it in operation as a claim against the property, and where such relief is the only judgment sought and an action like this to rescind such contract and to recover back the consideration paid.

In Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139, it was not decided whether the action was a real action, it being declared by the Supreme Court:

"An action to set aside a deficiency judgment improperly rendered in another county, in a foreclosure suit upon ex parte application, after the right thereto had been lost by the decree, is within the equity jurisdiction of the superior court of the county in which the improper deficiency judgment was levied upon the land of the plaintiff. If such action is a real action, under section 392 of the Code of Civil Procedure, it is brought in the proper county; and, if not, the jurisdiction of the court is not affected by the right of the defendant to change the place of trial, and, if he fails to demand the transfer, he waives objection to the venue."

The local nature of the action of Grocers', etc., Union v. Kern, etc., Co., 150 Cal. 466, 89 Pac. 120, is clearly set forth in this quotation:

"An action by a purchaser for a specific performance of a contract for the sale of land, and to compel a conveyance under an allegation that the purchase price has been paid, pursuant to agreement, from the proceeds of sales of fruits and lands made by defendant, for which proceeds an accounting is sought, with judgment for a surplus alleged, is in its nature an action to determine a right or interest in real property under subdivision 1 of section 392 of the Code of Civil Procedure, which, wherever commenced, must be tried, upon demand by the defendant, in the county where the land is situated. The accounting of profits to determine payment of the purchase money and to obtain judgment for any surplus is merely incidental to the real cause of action and relief sought, and does not change the nature of the action."

Hannah v. Canty, 1 Cal. App. 225, 81 Pac. 1035, had for "its sole object to establish and enforce a trust in land," and, of course, was a local action.

Robinson v. Williams, 12 Cal. App. 515, 107 Pac. 705, was "an action to cancel a contract of purchase for nonpayment as provided, and to declare the payments made to belong to the plaintiff, and to have it determined that defendant has no right, title, or interest in and to any of the lands and premises described in the contract, and that plaintiff is the owner and entitled to the possession thereof," and was therefore correctly held to involve the determination of a right or interest in real property.

Bartley v. Fraser, 16 Cal. App. 560, 117 Pac. 683, did not call for a determination of the question whether the action was local or personal, since, as the court said, "in either event it was properly transferred to Mariposa county for trial."

[5] There is this further to be said that, as far as the action against Stine & Kendrick is concerned, it is clearly one for a money judgment in consequence of fraudulent representations. They were not a party to the contract of sale, and the action against them is not remotely connected with any interest in real property.

Assuming, then, for the sake of argument, that the action against the other defendant involves an interest in real estate, the plaintiff cannot thereby deprive Stine & Kendrick of their right to a trial of a personal action in the county of their residence. G. & S. Co. v. M. & H. F. C. Co., 107 Cal. 378, 40 Pac. 495. And the fact is that the change of the place of trial was made upon the motion of said Stine & Kendrick and to the place of their residence.

For additional authority we may cite Samuel v. Allen, 98 Cal. 406, 33 Pac. 273; Gallup et al. v. Sacramento & San Joaquin Drainage District, 151 Pac. 1142; Anaheim O. F. Hall Ass'n v. Mitchell, 6 Cal. App. 431, 92 Pac. 331.

We think the order was correctly made, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 63

RAGAN v. RAGAN. (Civ. 1422.)

(District Court of Appeal, Third District, California. Nov. 29, 1915.)

1. DEEDS ⊂=208—DELIVERY—EVIDENCE.
Evidence in a suit involving the question of delivery of a deed *held* sufficient to support a finding of delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625–632; Dec. Dig. ⊂=208.]

2. APPEAL AND ERROR ⊂=931 — REVIEW — FINDINGS ON CONFLICTING EVIDENCE.
In case of a finding on conflicting evidence, the appellate court must be controlled by that favorable thereto, there being no inherent improbability therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762–3771; Dec. Dig. ⊂=931.]

3. HUSBAND AND WIFE ⊂=267 — COMMUNITY PROPERTY—CONVEYANCES.
Under Civ. Code, § 172, providing that the husband cannot convey community property without a valuable consideration, unless the wife consent, her consent is unnecessary to his conveyance for a valuable consideration.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929–938; Dec. Dig. ⊂=267.]

4. EVIDENCE ⊂=471 — CONCLUSION—AMOUNT PAID.
The question, "What is your estimate of the amount of money you paid?" appearing to be one calling for the best recollection of witness, and to be so understood by him, he having stated that he had no memorandum of what he paid, and could not state it exactly, but that he had it in his mind, was not objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. ⊂=471.]

5. EVIDENCE ⊂=143—ADMISSIBILITY.
Sustaining an objection to the question "You thought it would be better to record the C. deed?" was not error; what witness thought of it being no consequence, aside from the fact that it was quite apparent from her conduct that she did think it was better to record that deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 424, 426–428; Dec. Dig. ⊂=143.]

Appeal from Superior Court, Kings County; W. B. Wallace, Judge.

Action by C. K. Ragan against Chase S. Ragan. Judgment for defendant, and plaintiff appeals. Affirmed.

H. Scott Jacobs, of Hanford, for appellant. John G. Covert, of Hanford, for respondent.

BURNETT, J. Plaintiff is the son, and defendant the brother, of one C. K. Ragan. Shortly after the birth of plaintiff, his mother obtained a divorce from his father, and the latter remarried in the year 1877. The father had no children by his second marriage, and he died intestate, on May 27, 1910, in the county of Kings, this state, leaving as his only heirs his widow, Mary E. Ragan, and plaintiff.

The complaint alleges that C. K. Ragan and his wife, after the year 1891, and prior to the 21st of November, 1906, acquired certain community property, including the land in controversy in this action, consisting of 80 acres of the value of $8,000; that on the 21st day of November, 1906, C. K. Ragan signed an instrument purporting to be a deed conveying to the defendant said 80 acres of land. It is alleged, on information and belief, that said deed was never delivered, that there was no consideration for it, that it was in the nature of a gift and was signed without the consent of the wife of said C. K. Ragan and with the intention on his part to defraud his wife and his son of their rights in the property. The complaint further alleged that plaintiff has been the owner of an undivided one-half interest in this real property since said 27th day of May, 1910. The prayer was for a decree quieting plaintiff's said title and canceling said pretended deed. The answer put in issue the material allegations of the complaint, and the findings and judgment were in favor of defendant.

In his reply brief appellant declares:

"It will be noticed from an inspection of these specifications (in the bill of exceptions) that the real question at issue was whether or not the deed under which defendant claims title was ever in fact delivered by plaintiff's intestate, C. K. Ragan. Plaintiff also specifies certain errors of law occurring at the trial and excepted to by him, consisting largely of rulings of the court in the admission of testimony."

[1] As to the sufficiency of the evidence to support the finding of delivery, we can perceive no possible doubt. The law is, of course, as quoted by appellant from Hayden v. Collins, 1 Cal. App. 263, 81 Pac. 1120:

"But it is absolutely essential to the validity and effectiveness of a deed in escrow that it be delivered to a third person for the grantee, beyond any power in the grantor to recall or revoke it. The grantor must clearly and unequivocally evidence an intent and purpose to part with the possession and control of the deed for all time. In short, the delivery and transfer must be irrevocable."

The question of escrow, however, need not be considered, as there is a sufficient showing to support the finding that:

"Said deed was thereafter, to wit, on or about the 25th or 26th of April, 1910, duly and regularly delivered by said C. K. Ragan to said defendant, Chase S. Ragan, at the home of said Chase S. Ragan."

Witness Charles Tomer testified:

"I visited C. K. Ragan frequently during his illness and talked with him about various matters. I remember a conversation with him about two weeks before his death; I remember the substance of what was said at that time about a deed to Chase S. Ragan of that land. Mrs. Chase Ragan was present. I can state the substance of the conversation. He said he had sold Chase Ragan that place, and he had paid for it and he had given him a deed."

Defendant testified:

"I bought the ranch and was to pay for it yearly. The agreement was oral. C. K. Ragan said that I could have this piece of land if I would pay him at the rate of 8 per cent. interest a year as long as he lived, providing he didn't live over ten years, if I would pay him $320 a year, and I spoke about not having the money then and he said he would let me have $500 the same as he did the ranch if I would pay him 8 per cent. on it, so I bought it under those conditions. * * * I told him I would take the ranch under those conditions and I took possession of the ranch; I don't know just exactly the day of the month, but it was in 1906; I came here to town and of course we talked it over and we had made the bargain for the ranch. * * * He handed me this deed; he says, 'Here, Chase, is the deed to your piece of land out there,' and he says, 'You take it and look at it and see that it is all right,' so I says, 'I don't know whether it is right or not,' and if my memory serves me right I took the deed over to Frank Hight and I think that Frank Hight found some little mistake in the deed and corrected it and I took it back and gave it to C. K. Ragan and asked him what he was going to do with it; he said he was going to put it in escrow; I didn't pay any attention to it; * * * I took him out to my house and looked after him; * * * he said if he died before the payments were made I was to have my deed and the place was paid for."

The witness further stated that he took possession of the land in pursuance of his agreement with C. K. Ragan, and, furthermore, that he put improvements upon the land of the value of $2,500, and that two or three weeks before his brother died—

"my wife and me was sitting by his cot; he was quite sick and he had that little tin box and was looking over his papers, and we sat there and he come to that deed and he handed it to me and he says: 'Chase, here is the deed to your place, and I told Judge Ferguson to take this deed in and have it recorded with the rest of them;' * * * and I saw him a day or two later and paid him for recording the deed."

There is other corroborative testimony, but from the foregoing it is certainly a rational conclusion that, about three weeks before he died, the grantor delivered to said grantee the deed with the intention that the title should vest absolutely in the latter, whatever doubt may be entertained as to the sufficiency of the first manual tradition of the deed to constitute a legal delivery.

[2] Of the contention that decedent had executed a prior deed of the same premises to Ida M. Ragan, the wife of defendant, and therefore had no title to convey to respondent, it is sufficient to say that there is sufficient evidence to support the theory that said deed was never delivered, and, if delivered, that it was subsequent to the de-

livery of said deed to respondent. It is hardly necessary to add that we must be controlled by the evidence favorable to respondent's contention rather than that which seems to support appellant's view. Extended consideration is devoted in the briefs to the question of the credibility of the evidence in support of the findings, but it is not of moment here, since we discern no inherent improbability therein.

[3] The second point made by appellant is that the deed to respondent was and is void because in contravention of that portion of section 172 of the Civil Code providing that the husband "cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto." There would seem to be force in the contention of respondent that this provision was enacted for the sole benefit of the wife, and that no other person could or would have a right to complain of its violation, and that since she was not a party to the action or directly or indirectly interested therein, the objection cannot be considered. However, the soundness of this view need not be asserted, as there is an answer to appellant's contention that cannot be gainsaid. The court found on sufficient evidence that the husband conveyed the property not only for a valuable, but for an adequate, consideration. This unquestionably he had a right to do, under said section 172, without the consent of his wife. The evidence in support of this finding is set forth in the brief of respondent, and need not be repeated here. The court being of the opinion—and that opinion being legally supported—that the husband had conveyed the property for a valuable consideration, it was, of course not erroneous to sustain an objection to the offer to show that the wife's consent to the transfer was not obtained. This consideration, as well as the question whether said land was community property, was rendered immaterial by the finding and evidence already mentioned as to the sale for a valuable consideration.

[4] An objection as calling for the conclusion of the witness was made by appellant to this question asked of defendant:

"Well, what is your estimate of the amount of money you paid, Mr. Ragan?"

The context, however, shows that counsel was calling for the best recollection of the witness, and the question was so understood. He had stated that he had no memorandum of the amount he had paid and he could not state it exactly, but he had it in his mind. The evidence was somewhat uncertain, but we think it was admissible for what it was worth.

[5] We can see no error in sustaining an objection to the following question asked of Mrs. Ragan:

"And you thought it would be better to record the Chase S. Ragan deed?"

What she thought in reference to it was of no consequence, and, besides, it was quite apparent from her conduct that she did think it was "better" to record that deed. It may be said, also, that she substantially answered the question subsequently.

Two other alleged errors in ruling upon the admissibility of evidence are suggested, but they seem so inconsequential as not to merit specific attention. Indeed, in view of the theory of the case adopted by the trial court, it could not be held that any or all of the rulings upon the admission of evidence, if technically erroneous, resulted in any prejudice.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 87

GLINDEMANN v. EHRENPFORT.

(Civ. 1580.)

(District Court of Appeal, First District, California. Dec. 1, 1915.)

1. FRAUD ⟸58—VALUE AT TIME OF SALE—NECESSITY OF EVIDENCE.

Judgment for plaintiff in an action for fraud in the sale of stock cannot stand, absent evidence of its value at time of sale.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. ⟸58.]

2. FRAUD ⟸58—VALUE AT TIME OF SALE—STOCKS—DIVIDENDS—EVIDENCE.

Failure to pay dividends on stock is not evidence, in an action for fraud in its sale, that it had no value.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. ⟸58.]

3. FRAUD ⟸59—MEASURE OF DAMAGES.

The damages for fraudulent representations in the sale of stock is the difference between its value at the time and what it would have been had the representations been true.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60–62, 64; Dec. Dig. ⟸59.]

4. LIMITATION OF ACTIONS ⟸179—FRAUD—COMPLAINT.

Relative to the statute of limitations, the allegation of the complaint, in an action for fraud, that it was not known or discovered by plaintiff till a certain day, is insufficient to excuse delay in bringing action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 668, 669; Dec. Dig. ⟸179.]

Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by William Glindemann against William Ehrenpfort. From an adverse judgment and order, defendant appeals. Reversed.

Liess & Sweasey, of San Francisco, for appellant. James M. Hanley, of San Francisco, for respondent.

LENNON, P. J. This action was brought to recover damages alleged to have been suffered by plaintiff, William Glindemann, by reason of certain alleged false and fraud-

ulent representations made by defendant concerning the value of certain shares of corporate stock, and the interest or dividends that such stock paid, whereby plaintiff was induced to purchase said stock from the defendant. The case was tried with a jury, which rendered a verdict in favor of the plaintiff for the sum of $420, and this appeal is from the judgment rendered thereon and from the order denying the defendant a new trial.

It is insisted by the appellant that there is no evidence upon which the verdict and judgment can be sustained.

The facts leading up to the transaction, briefly stated, are these: In February, 1906, the defendant purchased ten shares of the capital stock of the Central Trust Company for the sum of $1,100. One month thereafter he received a semiannual dividend of $25 from profits earned by the stock prior to his purchase, the rate of dividend being approximately 5 per cent. per annum. Shortly thereafter the fire of 1906 occurred in the city and county of San Francisco, causing a suspension of the dividends upon the stock. On January 3, 1907, ten months after defendant had received the dividends referred to, he sold said ten shares of stock to the plaintiff herein for the sum of $1,100; said sum being the exact amount that defendant had paid for the stock eleven months previously. The following day plaintiff resold the stock to his sister-in-law, a Mrs. Schweitzer. No dividends were declared on said stock during the succeeding years of 1907 or 1908, or until July 1, 1909, when a dividend of $3 per share was paid, followed semiannually by similar dividends up to the time of the trial in March, 1914. In February, 1911, at a point of time four years and over subsequent to the date of the sale and transfer of the stock to Mrs. Schweitzer, the Central Trust Company and the Anglo-California Trust Company became merged. At the time of the merger Mrs. Schweitzer delivered up her shares, and received in exchange therefor six shares of Anglo-California Trust Company stock, and the sum of $80, which sum was the equivalent of a fractional two-thirds share of said stock. On February 1, 1913, six years after the sale of the stock to the plaintiff, he was informed that his sister-in-law, Mrs. Schweitzer, felt bitter towards him on account of his having sold her the stock; and upon interviewing her upon the subject she informed him that she had not received any dividends on the stock until July, 1909, and also that he had misrepresented the value of the stock to her, and that it was not worth the sum of $110 per share at the time of her purchase. Thereafter plaintiff claims he paid to Mrs. Schweitzer the sum of $420. This sum, it appears, was the difference between $800, which was the value that the plaintiff and Mrs. Schweitzer determined the stock to be worth, and the sum of $1,100, the price paid to plaintiff by Mrs. Schweitzer for the stock; and it seems this sum was sufficient to include interest from the date of the investment. On May 16, 1913, six years and four months after the sale by defendant to the plaintiff of the stock, and four years subsequent to the resumption of the payment of regular dividends thereon, plaintiff filed his complaint herein alleging fraud in the procurement of the sale.

[1] Plaintiff alleged in his complaint, as a basis for his cause of action, that, at the time of the sale by defendant to plaintiff, the defendant represented to him that said stock was worth the sum of $1,100, being $110 per share, and was bearing interest at the rate of 6 per cent. per annum. The evidence in support of this allegation shows that defendant informed plaintiff that he had paid the sum of $110 per share for the stock. With reference to the alleged representations of defendant concerning the interest, the evidence is not clear upon the point as to whether or not the defendant represented that the stock was paying 5 or 6 per cent. at the time of its transfer from the defendant to plaintiff. However that may be, the judgment cannot stand for the reason that there is absolutely no evidence in the record of the value of the stock either at the time of its transfer from the defendant, or at the time of its transfer from the plaintiff to Mrs. Schweitzer. The only evidence relating in any way to that phase of the case consisted of the testimony of Mr. Ouer, a witness for the plaintiff, who is the cashier of the Anglo-California Trust Company, and who was the assistant cashier of the Central Trust Company during the years 1906 and 1907. His testimony was to the effect that the nonpayment of dividends would not necessarily indicate a decrease in the actual value of the stock, and that the stock would really be worth more by the nonpayment of dividends, providing the company was doing a profitable business. He also testified that the stock was not a listed one; that he could not give its actual value in January, 1907; and that its value depended entirely upon supply and demand. From this testimony counsel for plaintiff argues that it follows that the stock was worthless at the date of both sales, and only became valuable at the time of the merger of the Central and Anglo-California Trust Companies, four years thereafter, at which time the damages became crystallized and fixed, and that therefore the date of the merger is the only date possible at which damages could be assessed in view of the plaintiff's alleged excusable delay in the discovery of the alleged fraud.

[2, 3] While the payment of dividends and the amount thereof are elements affecting the value of corporate stock, it by no means follows that such stock has no value because of the failure to pay dividends thereon. Wegerer v. Jordan, 10 Cal. App. 362, 365, 101

Pac. 1066. In cases of this character the measure of damages is the difference between the value of the stock at the time of the transaction if the alleged representations had been true, and what it was then actually worth. However, the amount of the verdict was undoubtedly based upon the compromise agreement made between plaintiff and his sister-in-law six years after the transaction took place; and that this is so is evident from the fact that the verdict is for the exact amount claimed to have been paid to her by the plaintiff. Conceding that this sum represented the difference in value of the stock between the time of sale and the date when the merger of the companies took place, it by no means affords a criterion of the value of the stock at the time of the sale. We conclude therefore that, there being no evidence of the value of the stock at the time of the transfer, there is absolutely no basis upon which a verdict could be predicated.

[4] Defendant also invokes the statute of limitations as a shield to the action. As before stated, the complaint was filed six years and four months after the alleged fraud. No facts are pleaded showing why the alleged fraud was not sooner discovered. The complaint contains the mere statement that the fraud was not known or discovered by the plaintiff until about the 1st day of February, 1913. Such an allegation is insufficient to excuse the delay in bringing the action. People v. San Joaquin, etc., Ass'n, 151 Cal. 797, 91 Pac. 740; Truett v. Onderdonk, 120 Cal. 581, 589, 53 Pac. 26.

The judgment and order denying a new trial are reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(29 Cal. A. 68)

PERKINS v. PERKINS. (Civ. 1773.)

(District Court of Appeal, Second District, California. Nov. 29, 1915.)

1. DIVORCE ⇐150 — TRIAL — FINDINGS OF FACT.

Finding in a divorce suit, that the evidence does not prove extreme cruelty and is insufficient to warrant a divorce, is insufficient as a finding of facts.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 499–508; Dec. Dig. ⇐150.]

2. DIVORCE ⇐150 — FINDINGS OF FACT — NECESSITY—"AS IN OTHER CASES."

The words "as in other cases," in Civ. Code, § 131, providing that in actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted final judgment must thereupon be entered accordingly, refer to the form of the findings, and do not relieve the court of the necessity of making findings of facts, where defendant defaults, though divorce be denied.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 499–508; Dec. Dig. ⇐150.

For other definitions, see Words and Phrases, Second Series, As In Other Cases.]

3. DIVORCE ⇐27 — GROUNDS — EXTREME CRUELTY.

A continual course of conduct of a husband, consisting of acts calculated to irritate and humiliate her and produce the exceedingly high state of nervous tension and distraction to which she is thereby finally driven, is enough to constitute extreme cruelty as ground for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 62–83; Dec. Dig. ⇐27.

For other definitions, see Words and Phrases, First and Second Series, Extreme Cruelty.]

4. DIVORCE ⇐116—EVIDENCE.

Plaintiff in divorce may testify as to specific acts of cruelty, though there can be no corroboration thereof.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 379–385; Dec. Dig. ⇐116.]

5. DIVORCE ⇐127 — EVIDENCE — CORROBORATION.

The physicians of plaintiff in divorce for extreme cruelty may, as corroboration, testify generally to the subject to which she ascribed her condition when she consulted them.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403–407; Dec. Dig. ⇐127.]

6. DIVORCE ⇐127 — EVIDENCE — CORROBORATION.

Under Civ. Code § 130, providing that no divorce can be granted on the uncorroborated testimony of the parties, the main purpose of which is to prevent collusion, all the matters testified to by plaintiff need not be corroborated, but the cruelty alleged consisting of successive acts of cruelty, it is enough that a considerable number of them are testified to by others, or that there is other evidence strongly tending to strengthen and confirm her statements.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403–407; Dec. Dig. ⇐127.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Emily S. Perkins against Gregory Perkins, Jr. Judgment for defendant, and plaintiff appeals. Reversed.

Hutton & Williams, Edwin A. Meserve, and Shirly E. Meserve, all of Los Angeles, for appellant.

JAMES, J. This is an appeal taken from a judgment denying the plaintiff a decree of divorce. The defendant suffered default, and the court heard testimony at great length, all of which is presented here by transcript of the reporter. The ground alleged was extreme cruelty. As described in the complaint, the facts relied upon were those which it is asserted established a course of cruel conduct practiced by the defendant against the plaintiff, and which commenced within a few weeks after their marriage in June, 1911, and continued almost uninterruptedly for a year and a half, or until the plaintiff left the defendant. At the conclusion of the testimony the court orally summed up the case as being one of incompatibility of temperament for which no divorce could be granted, and declared that the proof did not show extreme cruelty. No findings of fact were made.

[1, 2] The only purported finding of any kind is the recitation found in the judgment as follows:

"The court finds the evidence did not prove extreme cruelty, and is insufficient to warrant a decree of divorce."

This finding, if it was intended as a finding of fact, and if written findings are required to be made in divorce actions, was wholly insufficient. Franklin v. Franklin, 140 Cal. 607, 74 Pac. 155. One of the claims of appellant is that the judgment should be reversed, because it is unsupported by findings which it is argued are required to be made under the provisions of section 131, Civil Code. This contention presents for consideration the question as to whether in actions for divorce, where the adverse party has made default, the court is required to express its decision in the form of findings of fact. Section 632, Code of Civil Procedure, requires the court generally, where a trial of a question of fact is had, to give its decision in writing. In the case of Foley v. Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147, it was held that in a divorce case where no answer was filed there was presented no issue of fact, strictly speaking, to be determined by the court. And in Waller v. Weston, 125 Cal. 201, 57 Pac. 892, considering the requirement of section 632, Code of Civil Procedure, it was said:

"It is contemplated by our law that findings of fact shall be made only upon issues joined by the pleadings under section 590 of the Code of Civil Procedure. * * *"

At the time these decisions were rendered section 131 of the Civil Code did not contain the provision requiring the court to make its decision in divorce cases on the questions of fact in form as in other cases. That section in its first provision is as follows:

"In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. * * *"

In construing that portion of this section which declares that in divorce actions the decision and conclusions of law shall be filed "as in other cases," we are inclined to the view proposed by the appellant, which is that the words "as in other cases" refer to the form of the findings, and should not be taken as intended to relieve the trial judge, in cases where default has been entered in a divorce case against one of the parties, from making his decision in writing. This section coming as new legislation, following the decision in the Foley Case, we may, we think, properly indulge the presumption that the Legislature intended to correct what it deemed to be a deficiency in the law. Moreover, it seems to us not to be correct to say that there are no issues to be tried in divorce actions, when the law requires strict proof to be made of a plaintiff's cause of action. Section 130, Civ. Code. In this view we are in strict accord with the reasoning of the court in the case of Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099, where the court, by Justice Burnett, said:

"Ordinarily, there would be no 'trial of a question of fact' where the fact is admitted by the failure to deny it, but where the asserted fact is the ground upon which a party relies for divorce, it must be established as though denied, since 'no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties.'"

The court in that decision takes notice of the provisions of section 131, Civil Code, and concludes that where a cross-complaint stands in an action for divorce without answer, the trial judge is not excused from making his decision in writing upon the issues of fact proposed therein. It is only fair that a party who has suffered an adverse decision at the hands of the court, based upon alleged insufficient proof, should have the benefit of a written declaration as to the particular conclusions arrived at by the court. This case most aptly illustrates the sound reason for such a requirement. For aught that appears from the judgment made by the court in this case, the trial judge may have considered that all of the facts alleged had been sufficiently proven and corroborated, but had determined from those facts that as a legal conclusion the acts complained of did not amount to extreme cruelty.

[3] If such was his conclusion, it may be unhesitatingly said, upon the complete record of the testimony as it is presented, that such a determination is not borne out by the proof. The plaintiff here relied upon a course of conduct practiced by the defendant habitually, regularly, and almost continuously from a date a few weeks after the marriage, down to the day that she finally left him. This conduct, as alleged and testified to by her, consisted in acts which were calculated to irritate and humiliate the plaintiff and produce the exceedingly high state of nervous tension and distraction to which it was shown she had finally been driven. It will serve no useful purpose to recite the evidence with great detail. In the main, the facts were: The plaintiff, at the time of her marriage to the defendant, was a widow, having two sons by a former marriage to whom she was much attached, and who were members of her household at the times they were not away at school and college; that defendant prior to his marriage represented that he had a business by which he earned about $300 per month; that plaintiff was possessed of a considerable amount of property and an income large enough to supply all the needs of herself and family; that knowing defendant had habitually supported an invalid mother, immediately upon her marriage with him and in order to provide for the support of this mother during the time that plaintiff and her husband would be away on their wedding trip, she gave the defendant $6,000 for the use of his mother; that thereafter she proposed and was willing to allow him several hundred dollars per month for his personal use out of her own

estate in return for very nominal services to be performed by him in connection with the management of her property; that she desired to and did retain direct charge of large property interests, and that from the beginning this attitude on her part to manage her own affairs seemed to exasperate the defendant; that he became moody, and upon many occasions shown in the testimony would become sullen and cry and refuse to mingle with the household, although he persisted in remaining in the presence of the plaintiff practically all the time, both day and night; that so persistent was he in his personal attentions that plaintiff could not even visit her bathroom without his accompanying her; that upon one occasion he removed the lock from the bathroom door in order to prevent the plaintiff from denying him access to that room while she was making use of it; that he would not allow her to telephone to her lady friends without being present and standing near the telephone and at times, if anything was said which did not particularly please him, he would take the telephone away from the plaintiff and hang it up; that in the presence of her lady friends and generally in the presence of guests he would act in a moody, sullen, and insulting manner toward her; that upon one or more occasions he insisted upon her leaving the house at a very early hour in the morning to attend communion service when she was in a sick condition, and when she desired to have a cup of coffee before starting and when the servant offered her the coffee, he rudely seized her by the arm, forced her through the door, and compelled her to go with him in her weak condition without nourishment; that when he became displeased at anything, which was a frequent and constant occurrence, he would sulk and cry and stare at plaintiff, and when plaintiff would beg him to tell her what was the matter would make no response, and would sometimes continue in that attitude for three or four days, not once speaking to the plaintiff; that the defendant on various occasions accused the plaintiff of being untruthful and treated her in an uncivil and contemptuous manner, both in the presence of her friends and strangers and privately.

This course of conduct was shown to have been quite the regular thing with the defendant. The evidence showed that plaintiff was naturally a nervous woman; that she had always dwelt in a peaceful and harmonious atmosphere and had been very happy in her family relations; that the conduct of the defendant so preyed upon her nervous organism that she became restless and sleepless, and when examined by her family physicians after having lived with the defendant for some time, was found to be in such a condition of nervous unrest as to threaten her complete prostration. These physicians had known the plaintiff prior to her marriage, and were able to testify that she had always been normal, and, as one of them said, organically she was without disease. That the general course of conduct was as has been described, the plaintiff testified to fully, and in a general way all of the facts stated by her were corroborated by independent witnesses. While we think that the judgment in this case must necessarily be reversed for lack of any findings of fact, we have deemed it advisable to consider the evidence as though the law did not require such findings in default divorce cases. We do this more particularly because the question of the sufficiency of the evidence is argued in the very able brief presented by counsel for appellant, as well as certain alleged errors which the court committed in the course of the trial. To a proper end, too, this discussion may be of benefit to the trial court upon a rehearing of this matter in the event that any such is had. We may fairly surmise from the oral remarks made by the trial judge, which of course have no formal potency as indicating what his findings of fact might have been, that he did not consider that the evidence, assuming the whole truth of it and assuming sufficient corroboration, as there was, showed a case of extreme cruelty within the meaning of the definition given by the Civil Code.

In the earlier decisions of our Supreme Court, in consonance with the ancient rule, it was in effect announced that there could be no extreme cruelty as a result of mental irritation until a perceptible effect had been produced upon the body or health of the complaining party. In the case of Waldron v. Waldron, 85 Cal. 251, 24 Pac. 649, 9 L. R. A. 487, the court, in a majority opinion, said:

"Although the character of the ill treatment, whether it operates directly upon the body or primarily upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of its sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party."

This was what might be called "the rule of the Puritans," and it is a cause for gratification to know that our law as it has since been established proposes no such extreme and harsh definition for extreme cruelty as it may furnish ground entitling a party to a divorce. In the Waldron Case, Justice McFarland, dissenting, sounded the note which resulted in a later modification of the rule announced in that decision. His words of protest may well be remembered, when he said:

"This doctrine makes legal cruelty depend, not on the misconduct of the husband, but on the endurance of the wife; not on the guilt of the wrongdoer, but on the vitality of the victim. The anguish of the mind must have eaten through the flesh and exhibited itself in bodily disease before there can be any legal evidence of cruelty. But some women, like some men, have inherited from sturdy ancestors physical constitutions so robust, with bone and blood, and

muscle and nerve, and heart and lungs, so charged with vitality, that the woes of a Lear would not wear out the machinery or obstruct the currents of healthy physical life. Must such a woman suffer on forever, and only the weak who faint at a gentle reproach be relieved?"

Our Supreme Court receded from the conclusions of the rule asserted in the Waldron Case when it considered the case of Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660. In the opinion there it was said:

"The common judgment of mankind recognizes the fact that there may be unfounded charges and cruel imputations which are not more easily borne than physical bruises, and the necessary effect of which is to cause great mental distress to the person against whom they are made. Whether in any given case there has been inflicted this 'grievous mental suffering' is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party."

We cannot imagine from the proof made in this case that the trial judge was impressed with the view that the plaintiff was not a woman of great refinement of sensibility, intelligent and cultured, for the evidence tends to show nothing else. Even where the judge, prompted evidently by personal acquaintance with the parties, sought to show that the plaintiff had always been of a nervous temperament, the answers given in the affirmative would tend to add to, rather than detract from, the strength of the plaintiff's proof, in that they assisted to show that she was of such a temperament as would be more easily and deeply affected by the reprehensible conduct of the husband. In fact, upon all of the material issues presented by the complaint, there is nothing in the record which suggests a case which might be termed one of conflicting evidence.

[4] During the progress of the trial, counsel for the plaintiff, apparently to prove with exactness the disagreeable conduct of the defendant, asked the plaintiff while on the witness stand to describe exactly the acts of the defendant at the times when he would intrude himself upon her privacy, and the court interrupted and told counsel that he ought not to embarrass the witness in regard to matters that could not be corroborated, saying: "I don't pay any attention to those things." Counsel suggested, and very correctly, that all of the matters offered in proof in a divorce action did not need corroboration, but the court did not recede from the attitude expressed in the statement referred to, and counsel then desisted from further examination along that line. We think that the action of the court in this regard placed an improper restriction upon the plaintiff in the conduct of her case. As a litigant before the court she was entitled to offer and have received all competent legal testimony, and it was not for the court to prejudge the effect of this testimony and to announce or suggest in advance that that testimony, taken in connection with all of the proof made in the case, would be of no value and would be disregarded by him. The plaintiff as a witness was being examined by her own counsel. She was "in the hands of her friends"; hence, why this extreme solicitude on the part of the court lest her own attorney should embarrass her by requiring intimate disclosures to be made? She was there under the necessity of making such intimate disclosures in order to apprise the court fully of the discomfort of the position she had occupied with the defendant and of the degree to which her mental sensibilities had been preyed upon. We agree very completely with the statement made in the brief of counsel that trial judges have not the duty in divorce cases to do anything except to see that the law is strictly and fairly complied with. A suitor in a divorce action must, as a litigant, stand in as favorable a light before the law as the plaintiff in a suit on a promissory note. Our Legislature has declared the policy of the law as it shall affect actions for divorce, and has provided that relief shall be granted to parties when certain grounds have been established. In the establishment of these grounds the complaining party has the same right as any other litigant in any other class of actions, not only to the opportunity to present fully his or her case, but to every reasonable assistance of the court to be lent in that direction. We think that the attitude of the trial judge in restricting counsel in his examination of the plaintiff as to the matter adverted to was error of a prejudicial kind. The case of Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742, is in point.

[5] We think, too, that the court might properly have allowed the physicians of the plaintiff to testify generally as to the subject to which plaintiff ascribed her disturbance of mind and health when she consulted them. Not that it would have been proper to have admitted her statement in detail as to any acts committed by the defendant, but merely as tending to show that her disturbed condition was due to marital difficulties. Such evidence is admitted as corroborative in its tendency, just as in criminal actions where the charge may be rape, it is allowed to be shown that the prosecutrix made complaint of the fact that she had been raped at a time reasonably near to that of the alleged occurrence. Such testimony may, in a general though perhaps not in a strict sense, be classed as part of the res gestæ.

[6] It was not necessary that all of the matters alleged and testified to by the plaintiff should be supported by corroborative evidence.

"Where the cruelty consists of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff; it is sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the state-

ments of the plaintiff. The main purpose of section 130 is to prevent collusion." Andrews v. Andrews, 120 Cal. 186, 52 Pac. 298; Avery v. Avery, 148 Cal. 242, 82 Pac. 967.

Our conclusion is, not only that the judgment lacks the support of sufficient findings of fact, but that the evidence does not sustain the judgment denying a divorce, and that the court committed error as to its rulings on the admission of testimony which was prejudicial to the rights of the plaintiff.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

29 Cal. App. 78

JOHNSON v. HINKEL et al. (Civ. 1542.)

(District Court of Appeal, First District, California. Nov. 30, 1915. Rehearing Denied by Supreme Court Jan. 28, 1916.)

1. CORPORATIONS ⟸264—STOCKHOLDERS' LIABILITY — LIMITATIONS — ACCRUAL OF ACTION.

Under Code Civ. Proc. § 359, providing that the title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, but that such actions must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created, an action against corporate stockholders to enforce their liability for its breach of a lease agreement must be brought within three years from the breach, since the section makes the discovery the starting point of the period of limitation only in cases of actions to recover a penalty or forfeiture, and in actions to enforce a liability created by law the period of limitation is three years from the creation of the liability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1084–1098, 2274; Dec. Dig. ⟸264.]

2. CORPORATIONS ⟸264—STOCKHOLDERS' LIABILITY—INITIATION OF STATUTORY PERIOD.

For the purpose of the statute of limitations, the liability of an oil company, upon a lease agreement not to remove the casing from oil wells upon abandonment, was created, not by the execution of the agreement, but by the removal of the casing from a well. Such a liability is created by the act or omission by which it is incurred.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1084–1098, 2274; Dec. Dig. ⟸264.]

3. MINES AND MINERALS ⟸80—OIL LEASE—BREACH OF AGREEMENT—DAMAGES.

Under Civ. Code, § 3300, providing that for a breach of contract a party may recover an amount which will compensate him for all the detriment proximately caused by the breach, or which, in the ordinary course of events, would be likely to result therefrom, the lessor of desert lands, which proved to contain no oil, the agreement providing that, if oil was found in certain quantities, the lessee at his option might purchase for $20,000, could not, for breach of the lessee's agreement not to remove casing from a well on abandonment, recover the full damages prayed for of $22,500, irrespective of whether there was oil in the land or not, whether the well was of any value at the time of the removal of the casing, whether it would have been of any value if restored, or whether, as left, the well could have been made useful at a less cost, since, except where exemplary damages are allowable, a party cannot recover for breach of contract more than he would have received by its due performance.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 208; Dec. Dig. ⟸80.]

4. DAMAGES ⟸120—BREACH OF CONTRACT.

Except where exemplary damages are given, courts will not allow a party to a contract to recover upon its breach more than he would have received by its due performance.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291–305; Dec. Dig. ⟸120.]

5. MINES AND MINERALS ⟸80—OIL LEASE—BREACH—DAMAGES.

Where an oil well was sunk in barren and desert land, valueless except for its oil contents, and such land contained no oil, the only damage suffered by the lessor through the lessee's breach of agreement not to remove casing from a well upon abandonment was the value of the casing when removed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 208; Dec. Dig. ⟸80.]

6. MINES AND MINERALS ⟸80 — DAMAGES—OIL LEASE—BREACH.

Where land leased for the purpose of sinking oil wells contained oil, and it was necessary that the casing of a well should be left in it for its further and proper operation, the damage sustained by the lessor by the lessee's breach of its agreement to leave the casing in a well upon abandonment was an amount which would compensate him for all injury or detriment caused by its removal, or which might result therefrom.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 208; Dec. Dig. ⟸80.]

7. MINES AND MINERALS ⟸80—OIL LEASE—VALIDITY—STATUTE.

A lease of supposed oil lands providing that the lessee should not remove the casing from wells or plug them without the written consent of the owner upon abandonment was not void under St. 1903, p. 399, requiring that upon abandonment of any oil well the owner shall withdraw the casing therefrom and fill up the well, as the statute was not designed to affect the matter, while the lessor had the right to reserve to himself the right to further prosecute the development of the land, though the lessee might conclude to abandon.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 208; Dec. Dig. ⟸80.]

8. MINES AND MINERALS ⟸80—OIL LEASE—RIGHTS OF PARTIES.

A proclamation of the President of the United States withdrawing mineral lands from entry, issued after an oil company entered upon part of such lands as lessee of the occupant and removed the casing from a well, in contravention of the lease, did not affect the right of the lessor to recover.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 208; Dec. Dig. ⟸80.]

9. LANDLORD AND TENANT ⟸61—ESTOPPEL TO DENY TITLE.

Where the lessor of oil lands was in possession thereof as a locator under the mining laws of the United States when his lessee broke its lease agreement not to remove casing from a well on abandonment, in the lessor's suit for damages the lessee could not question the lessor's title on account of a proclamation of the President withdrawing the lands from entry, the lessor's right to the land as against everybody, except the United States, being the same as though he held in fee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 151, 152, 187–196; Dec. Dig. ⟸61.]

10. Mines and Minerals ⇐80—Oil Lease—Action for Breach of Covenant—Question not to be Litigated.

The validity of a proclamation of the President withdrawing mineral lands from entry could not be litigated in an action by the lessor of part of such lands for breach of the lessee's agreement not to remove casing from an oil well upon abandonment.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 208; Dec. Dig. ⇐80.]

11. Courts ⇐121—Superior Court—Jurisdiction.

The superior court, in an action to enforce the liability of corporate stockholders for its breach of contract, had no jurisdiction as to defendants against each of whom damages for less than $300 were prayed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 410, 413–426, 428, 437, 450, 452, 458, 459, 466; Dec. Dig. ⇐121.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by James B. Johnson against John Hinkel and others. From a judgment for plaintiff and an order denying defendants a new trial, they appeal. Judgment and order reversed with directions to dismiss the action as to two defendants.

A. L. Weil, of San Francisco, and Everts & Ewing, of Fresno, for appellants. Barbour & Cashin, and Short & Sutherland, all of Fresno, for respondent.

KERRIGAN, J. This action was brought to recover damages in the sum of $22,500 upon a stockholder's liability against defendants, who were stockholders in the Lorene Oil Company, a corporation.

The damage claimed arose from the removal of a quantity of casing from a certain oil well which had been drilled by the Lorene Oil Company upon the plaintiff's land in the Coalinga oil fields upon the abandonment by that company of said lands and of its operations thereon under a certain lease. The action was based upon a breach of the terms of the lease, which had been entered into by the parties thereto under the following circumstances: On the 16th day of March, 1907, the plaintiff entered into a lease with one Wilcox with the object in view that the former's land should be explored for oil and developed. The agreement required Wilcox to drill a well to a depth of at least 3,000 feet, unless oil should be discovered in quantities of 25 barrels of oil per day at a less depth. If oil was discovered, the lessee was to pay to the lessor one-eighth royalty, and he was also given an option to purchase the property for the sum of $20,000. Shortly thereafter, and during the same year, Wilcox assigned his interest in this agreement to the Lorene Oil Company, which assumed all his obligations thereunder. The company drilled a well to a depth of 3,660 feet, being 660 feet deeper than was required by the contract, and, not having made a discovery of oil, abandoned the property. The lease contained the following provision with reference to abandonment:

"In the event oil is not found in paying quantities by the lessee on the land so leased after the compliance with the terms herein, and said lessee desires to abandon the enterprise and to be released from the terms hereof, he shall have the privilege of removing all engines, tanks, and fixtures above ground which he may have placed on said land, but shall not remove the casing from any well or plug any wells thereon without the written consent of said lessor."

Upon the abandonment of the property the company, contrary to this last-mentioned provision, removed over 10,000 feet of casing without the written consent of the lessor, and the breach of the agreement in this respect gave rise to the present controversy.

Plaintiff recovered judgment against the defendants in the sum of $22,500, and this is an appeal from such judgment and from an order denying defendants a new trial.

The defendants make the following points for a reversal of the judgment: (1) That the action was barred by the statute of limitations; (2) errors in the instructions and in the admission of testimony concerning the measure of damages; (3) that the contract was illegal and consequently no recovery could be had thereon; and (4) that the court had no jurisdiction as to two of the defendants.

In support of the first contention it is the claim of the defendants that the action is barred by virtue of the provisions of section 359 of the Code of Civil Procedure. The action was commenced as to certain of the defendants on October 23, 1912, and additional defendants were added by an amended complaint filed March 27, 1913. It is argued that, as it appears on the face of the complaint that the damages were sustained on November 1, 1909, the demurrer should have been sustained as to the parties joined as defendants under the amended complaint; and as to the other defendants, there being a conflict of testimony, that the question should have been left to the jury as to whether the damage was done on October 6, 1909, as testified to by defendants' witnesses, or on November 10th, as stated by the witnesses produced on behalf of the plaintiff. The amended complaint upon which the case went to trial alleged that the fact upon which liability was asserted was not discovered by plaintiff until November, 1910. If the right of action accrued at this date, the statute does not operate as a shield to any of the defendants, except as hereinafter stated. It is insisted by defendants that an action against stockholders in this state is barred within three years from the time the liability is created, and the fact that discovery is not made of the liability within that time is of no consequence, the element of discovery not being a factor for consideration under the section. The trial court instructed the jury as follows:

"I instruct you that, if you find that the plaintiff commenced this action against defendants within three years after the discovery by him that the Lorene Oil Company had committed the acts complained of, and that plaintiff used reasonable diligence in the discovery of the fact that the acts complained of had been committed, and if you further find that the said acts of the Lorene Oil Company resulted in an injury for which plaintiff is entitled to damages, then each of the defendants is individually and personally liable. * * *"

It is conceded that, if counsel for the appellants is correct in his construction of section 359 of the Code of Civil Procedure, the trial court was in error in so instructing the jury, and that such error is sufficiently important to justify a reversal of the case.

[1] Section 359 reads as follows:

"This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

In support of his contention that the proper construction of the statute is that such action must be brought within three years after the liability is created, and that it does not extend to three years after the discovery of the fact creating such liability, it is argued that neither grammatically nor logically does the section warrant the construction placed upon it by the trial court, and that the appellate courts of this state have never considered this doctrine of the discovery of facts applicable to stockholders' liability, and that the phrase "discovery by the aggrieved party" refers to the facts upon which a "penalty or forfeiture attached," and does not refer to the "liability created by law"; that it refers to illegal acts of directors for which they are liable to either a penalty or forfeiture, and does not apply to the ordinary civil obligation created by law against the stockholders.

The element of discovery in actions of this character was recognized in Moore v. Boyd, 74 Cal. 167, 15 Pac. 670, but in the later case of Royal Trust Co. v. MacBean, 168 Cal. 642, 144 Pac. 139, it would seem that this doctrine has been rejected; for it is there said that a fair reading of the section makes the discovery the starting point of the period of limitation only in cases of actions to recover a penalty or forfeiture, and that in actions to enforce "a liability created by law" the period of limitation is three years from the creation of the liability. We conclude, therefore, that the court erred in giving the instruction complained of.

[2] It is further contended with reference to the statute of limitations that the liability was created at the time of the execution of the lease and prior to the breach thereof by the Lorene Oil Company. In this behalf it is the claim of the defendants that this is the only logical construction to be drawn from the decisions of the Supreme Court; and it is argued that, the Lorene Oil Company having assumed all obligations under the lease in 1907, the liability of the stockholders became fixed at that time, and the statute of limitations was immediately set in motion. In Hunt v. Ward, 99 Cal. 614, 34 Pac. 335, 37 Am. St. Rep. 87, it was held that, whatever the character of liability might be, "it is created by the consummation of the contract, act, or omission by which the liability is incurred." The liability here claimed was not created at the time the lease was assigned to the corporation in 1907, but was so created by the act of the corporation in removing the casing from the well. Upon this question involving the statute of limitations, therefore, we conclude that the objection of the defendants is not well taken.

[3-6] As stated by counsel for both parties, the important question to be determined in the case is the correct measure of damages for the breach of the contract in removing the casing from the well. Plaintiff and defendant have quite different theories upon this subject. It is the claim of plaintiff that, the lessee not being permitted under the terms of the lease to remove any casing from the well without the written consent of the lessor, upon proof of such removal the only question of fact to be determined by the jury was the amount which it would cost to replace the well in the same condition it was in at the time the Lorene Oil Company abandoned the premises and removed the casing. The theory of the defendants was and is that the land where the well was situated was barren, desert land, and valuable only if it contained oil; that the well itself was of value only in so far as it could be used to produce oil; that no attempt had been made by plaintiff to produce oil from the property since its abandonment and up to the time of the trial, a lapse of time of some four years; that there was no oil in the well; that the Lorene Oil Company had abandoned it after having expended from $40,000 to $60,000 in development work; that neither the plaintiff nor any one else had any wish, desire, or intent to produce any oil from the land or to use the well for that purpose, and that consequently the well was valueless, and the plaintiff suffered no damage, no matter what was done to it. It is admitted that the Lorene Oil Company had removed some 10,000 feet of inner casing from the well, but left the well cased from top to bottom. It is also conceded that it was a practical impossibility to take the casing that had been removed from the well and put it back so as to restore the well to its former condition, and that it was less costly and far more certain in results to drill an entirely new well than to attempt to replace the casing in the old one, and that a new well would cost anywhere from $40,000 to $60,000. The amount of damages claimed by plaintiff was $22,500, a sum much less than the minimum amount which, according to the evidence, it would

take to put the well in the same condition that it was in before the casing was removed from it.

The trial court adopted the plaintiff's theory that the cost of replacement was the proper measure of damages, and instructed the jury to find an amount sufficient to put the well in the condition it was before the removal of the casing. The instruction given upon this point was as follows:

"I instruct you that under the terms of the lease involved in this action the plaintiff, as lessor, was entitled to have any well drilled by the Lorene Oil Company on the premises described in the lease left in the condition as to the casing therein in which said well was at the time said Lorene Oil Company ceased drilling said well with the intention of abandoning the same; and in this connection I charge you that the plaintiff's right to have said well so left was irrespective of the question whether oil had been discovered on said land, or whether there was reasonable ground to believe that oil would be discovered thereon. If, therefore, you find that the Lorene Oil Company did not leave the well drilled by it in the condition above described, then your verdict must be for the plaintiff in an amount sufficient to place said well in such condition, not exceeding, however, the sum of $22,500."

Under this instruction the jury was practically told to find for the full amount of damages prayed for, regardless of whether there was oil in the land or not, or whether the well was of any value at the time of the removal of the casing, and regardless of whether the well would have been of any value if restored, or whether the well as left could have been made thoroughly useful at a less cost. We are of the opinion that the instruction was erroneous.

The instruction was based on the theory of plaintiff that he was entitled to have the casing remain in the well, for the reason that the lease so provided, and that this right was not dependent or based upon the use to which the lessor might thereafter put such well, or whether thereafter he ever used it at all; that it was enough for the corporation to know that it was "so nominated in the bond." It is a fundamental rule of law that courts will not, except where exemplary damages are given, allow a party to a contract to recover upon its breach more than he would have received by its due performance. The Civil Code, in providing for the measure of damages in the case of a breach of contract lays down the rule that a party is entitled to recover an amount which will compensate him for all the detriment proximately caused by the breach or which in the ordinary course of events would be likely to result therefrom. Civ. Code, § 3300. In the early case of De Costa v. Massachusetts Min. Co., 17 Cal. 613, where the plaintiff had brought an action for damages for the digging of a ditch across a piece of land, the court below awarded sufficient damages to pay the expense of filling and restoring the land to its original condition; and the Supreme Court, in reversing the judgment, said:

"In assessing the damages the court proceeded on an incorrect basis, and, of course, arrived at an erroneous result. The plaintiff could not recover beyond the injury sustained, and it was improper to award compensation for an expense which might never have been incurred. It is possible that the cost of filling up the ditch may far exceed any injury resulting from its present condition, and in that case, it is not probable that the amount would ever be used for that purpose."

See, also, Harvey v. Sides Silver Min. Co., 1 Nev. 541, 90 Am. Dec. 510.

So here defendants sought to ascertain from plaintiff whether or not he ever intended to pursue development work for oil, but upon objection by his counsel his intention was kept from the jury. Under the instruction here given, irrespective of the testimony of defendants' witnesses that the land in question was not oil land, and that therefore the leaving of the casing in the well according to the agreement would have availed plaintiff nothing, the jury was obliged to find the amount of damages claimed, based on the cost of the well, although convinced that plaintiff would have gained nothing by a full performance of the contract except the value of the casing when removed from the well. Again, by reason of the instruction the value of the casing was ignored, and by it the first cost was made the criterion, irrespective of the fact that the well was useless. Defendants introduced evidence, upon which there was a conflict, to show that in order to make the well a producing one it would be less troublesome and expensive to accomplish this purpose with the casing taken out of the well than if left in. By this instruction the latter question was eliminated from the consideration of the jury. This was a proper matter to be considered in the assessment of the damages suffered; as plaintiff is entitled, and only entitled, to recover his pecuniary loss. In our opinion, these and kindred questions are proper ones for consideration by court or jury in determining damages in cases of this kind. If the land upon which the well was situated was barren and desert land, and its only value was for its oil contents, and it could be proved that it contained no oil, then the only damage suffered by plaintiff would be the value of the casing when removed from the well. If, on the other hand, the land contained oil, and it was necessary that the casing should be left in the well for its further and proper operation, then the damage sustained would be an amount which would compensate plaintiff for all the injury or detriment caused by its removal or which might result therefrom, and no more. Here if oil had been discovered the plaintiff would have been entitled to receive the sum of $20,000 as the purchase price of the land had the Lorene Oil Company exercised the option given it. No oil was discovered; and under the theory of the measure of damages adopted by the trial court the plaintiff by the verdict obtains a judgment

for $22,500, even conceding the fact to be that the land contained no oil and was otherwise worthless. The law affords no such remedy.

Certain rulings of the court on the admission of testimony are claimed to be erroneous. These rulings in the main were based upon the court's theory of the measure of damages, and it is unnecessary to discuss them in view of what we have already stated upon that subject.

[7] Defendants further contend that, by reason of the fact that the complaint contains an allegation that the land in question is oil land, the provision in the contract that the lessee should not remove the casing therefrom or plug any wells without the written consent of the lessor, makes the contract void upon its face, and that the demurrer to the complaint should have been sustained upon that ground. The basis of this contention is that such provision is violative of the act to prevent injury to oil or petroleum-bearing strata by the infiltration or intrusion of water therein (St. 1903, p. 399), and which requires that upon the abandonment of any oil well it shall be the duty of the owner to withdraw the casing therefrom and fill up such well. The statute was not designed to affect a case of this character. The lessor had the undoubted right too reserve unto himself the right to further prosecute the development of the land, irrespective of the fact that the lessee might conclude to abandon the lease for the reason that he was of the opinion that it was useless to further prosecute the work of exploration.

[8-10] And, finally, defendants call the attention of the court to the proclamation of the President of the United States withdrawing from entry certain mineral lands, including the land here in question; and they claim that by reason thereof the plaintiff had no title to this land, and therefore has no cause of action. The proclamation referred to was issued July 2, 1910. The time of the entry of the Lorene Oil Company upon the land as lessee and the time of the removal of the casing were both prior to such proclamation. Whatever rights had accrued as between the parties were not affected by it. Moreover, it is a rule of law that a tenant is not permitted to deny the title of his landlord. At the time of the breach of the covenant in the lease the plaintiff was in lawful possession of the land as a locator under the mining laws of the United States, and his right to the land as against everybody except the United States government was the same as though he held the land in fee. Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240. Then, too, the validity or invalidity of the proclamation is not a matter that could be litigated in this proceeding.

[11] As to the defendants Katharine Brennan and E. H. Pauson the prayer for damages against each of them is for less than $300; and it is conceded that, under the authority of Myers v. Sierra Valley, etc., 122 Cal. 669, 55 Pac. 689, the superior court had no jurisdiction as to them, and a dismissal of the case as far as they are concerned is consented to.

For the reasons given, the judgment and order are reversed, with directions to dismiss the action as to Katharine Brennan and E. H. Pauson.

We concur: LENNON, P. J.; RICHARDS, J.

29 Cal. App. 115

COATS v. HORD. (Civ. 1729.)

(District Court of Appeal, First District, California. Dec. 4, 1915.)

1. SALES ⊂⊃261—"WARRANTY"—WHAT CONSTITUTES.

In a contract of sale of personalty, it is not necessary, to create an express warranty, that the word "warrant" or any formal words be used, but any affirmation as to the quality or condition of the goods, if so intended, and so relied upon, is a "warranty."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727–735; Dec. Dig. ⊂⊃261.

For other definitions, see Words and Phrases, First and Second Series, Warranty.]

2. EXCHANGE OF PROPERTY ⊂⊃13—CONTRACTS—RESCISSION—DAMAGES.

Where plaintiff, who exchanged a horse for a jack, sued to rescind because of breach of warranty of the jack, the judgment for plaintiff for the full value of the horse should have provided for the return of the jack on satisfaction of the money judgment.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 25–29; Dec. Dig. ⊂⊃13.]

3. APPEAL AND ERROR ⊂⊃1153—JUDGMENT—MODIFICATION.

In such case, the failure of the judgment to provide for the return could be corrected by judgment rendered on the appeal, without remand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4507–4512; Dec. Dig. ⊂⊃1153.]

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by Lee B. Coats against Warren H. Hord. From a judgment for plaintiff, defendant appeals. Judgment modified.

E. A. Bridgford and William A. Nunlist, both of San Francisco, for appellant. Walter H. Linforth and Linforth & Herrington, all of San Francisco, for respondent.

RICHARDS, J. [1-3] This is an action brought for the rescission of a contract for the exchange of a stallion for a jack mule, the plaintiff averring that the latter animal proved worthless for the purpose for which he acquired it. The cause was tried upon the issues presented by the pleadings. The court found that the exchange had been brought about through certain statements made by the defendant which amounted to

an express warranty of the foal-producing qualities of the mule and which had proven untrue. It further found that the stallion was of the value of $500, and the court thereupon rendered a judgment in plaintiff's favor for the sum of $500, but made no provision in such judgment for the return of the defendant's mule.

The respondent argues in support of such judgment that the finding of the court to the effect that the defendant's mule "was useless and worthless for any purpose and of no value" made it unnecessary to order its return; but we think that this finding must be read in connection with the pleadings and proofs in the case, and, so read, must be limited to the valuelessness of the animal for the uses which induced the exchange.

The appellant contends that the findings of the court with reference to the express warranty of the mule by the defendant are not supported by the evidence in the case; but in this we think he is in error, and that there is sufficient evidence in the record to sustain the findings of the court in that regard. It is not necessary, in order to create an express warranty of an article of personal property, that the word "warrant" should be employed, or that any particular or formal words of warranty should be used. Any affirmation, made at the time of the sale or exchange, as to the quality or condition of the thing sold, will be treated as a warranty if it was so intended, and if the other party acquired the property on the faith of such affirmation. McLennan v. Ohmen, 75 Cal. 558, 17 Pac. 687; Luitweiler, etc., Co. v. Ukiah, etc., Co., 16 Cal. App. 198–207, 116 Pac. 707, 712. In this case we think the plaintiff acted in making the exchange upon the defendant's representations as to the foal-getting qualities of his mule, and that he was entitled to rescind, and that he did in fact rescind with sufficient promptitude to satisfy the rule as to rescission.

The appellant's next contention, however, is a more serious one. The judgment of the court, while giving to the plaintiff in the form of damages all that the evidence showed the stallion to be worth, made no provision in the judgment for the return of the defendant's property. We think the court in this respect was in error, but that it is an error which can be cured by a modification of the judgment without the necessity of another trial of the cause.

It is therefore ordered that the judgment of the trial court be so modified as to provide that the plaintiff shall return to the defendant his property upon satisfaction of the money judgment in the plaintiff's favor, and that each of the parties shall pay his own costs upon appeal.

We concur: LENNON, P. J.; KERRIGAN, J.

171 Cal. 664

FILM PRODUCERS, Inc., et al. v. JORDAN, Secretary of State. (L. A. 4360.)

(Supreme Court of California. Jan. 8, 1916.)

CORPORATIONS ⟸62 — CORPORATE STOCK — COMMON AND PREFERRED STOCK—"SHARE."

Civ. Code, § 290, subd. 6, permitting the issuance of preferred stock, declares that no preference shall be granted or any distinction made between the classes of stock, either as to voting power or the liability of the holders to corporate creditors. Section 307 gives to stockholders the right to vote to the extent of the number of shares held by each, while section 322 declares that each stockholder shall be personally liable for such proportion of the corporate debts as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock. The capital stock of a corporation was $1,000,000, divided into 50,000 shares of common stock of the par value of $1 each, and 47,500 shares of preferred stock of the par value of $20 each. *Held*, that the articles of incorporation, providing for such a division of corporate stock, were contrary to the law, for if the shareholders were each allowed to vote according to shares the holders of the common stock would control the corporation, though their capital invested was much less than that of the holders of the preferred stock, "shares" of stock being but representatives of value, while if the shareholders were liable for such proportion of the corporate debts as the amount of their shares should bear to the whole of the capital shares the holders of the common stock would be liable in an excessive amount.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 164; Dec. Dig. ⟸62.

For other definitions, see Words and Phrases, First and Second Series, Share.]

In Bank. Petition by the Film Producers, Incorporated, for a writ of mandate against Frank C. Jordan, as Secretary of State. Writ denied.

Frank C. Hill, Lynden Bowring, and Geo. S. Hupp, all of Los Angeles, for petitioners. U. S. Webb, Atty. Gen., for respondent.

HENSHAW, J. Mandate to the secretary of state, who has refused to file petitioners' articles of incorporation, seeking a judgment compelling him to do so.

The secretary's refusal is based upon his conviction that the articles of incorporation do violence to the laws of the state in the following particulars: The capital stock of this corporation is $1,000,000, divided into 50,000 shares of common stock of the par value of $1 each, and 47,500 shares of preferred stock of the par value of $20 each. Our law (Civ. Code, § 290, subd. 6) permits the issuance of preferred capital stock, "provided, however, that no preference shall be granted nor shall any distinction be made between the classes of stock either as to voting power or as to the statutory or constitutional liability of the holders thereof to the creditors of the corporation." Touching the stockholder's liability, section 322 of the Civil Code declares that each stockholder shall be personally liable for such proportion of the corporation debts "as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation."

The preferences, which in terms the articles of incorporation give to the preferred stock or stockholders, are not in and of themselves in violation of our law. If our law is violated it is because by virtue of the differing par values between the common and the preferred stock, of necessity preference is given as to voting power to the common stock, while as to the stockholder's liability preference is given to the preferred stock. Section 307 of the Civil Code gives to stockholders the right to vote to the extent of the "number of shares" held by each. These sections of the Code thus given embody the law controlling the decision of the question.

Petitioners first contend that no violation is done to the law forbidding distinctions between the voting power of common and preferred stock, in that the law simply declares that each share of stock shall be entitled to its vote, and that under these articles of incorporation each share is so given its right to vote. This is unquestionably true. Touching the second position taken by the secretary of state it is argued that when section 322 of the Civil Code uses the words "stock" or "shares," it uses the words interchangeably as meaning the same thing, with the result that each stockholder's liability would be proportioned to the number of shares which he owned, regardless of the par value of the shares. Or, if this be not true, and the words above quoted, used as they are in the alternative, are to be construed as meaning different things, it would then follow that the owner of one share of common stock, who thus owned $1 of the capital stock of the corporation, would be subjected to one-twentieth of the liability that would attach to the owner of one share of preferred stock, who thus owned $20 of the capital stock of the corporation. This position would appear to be equally sound.

The difficulty with both of these positions, however, is that they take no account of the intimate relation necessarily existing under our law between the right to vote stock upon the one hand and the stockholder's liability upon the other. A brief discussion will show what is meant. "Shares" of stock are but representatives of value. They are but paper evidence of ownership of the capital stock of the corporation, and that ownership is precisely such as the share itself declares it to be. Where a corporation such as this has a capital stock of $1,000,000, every owner of one preferred share of stock owns twenty-millionths of the capital stock of the corporation. Every owner of one share of common stock owns but one-millionth of the capital stock of the corporation. To say that each of these is a share and that each is given equal representation under the law because each stockholder is permitted to vote each share is but skimming the surface of the question. Each shareholder is entitled to vote in accordance with his ownership of the capital stock. Throughout the whole history of our law all shares of stock in any given corporation have been of identical par value, and no such questions as are here presented, therefore, have arisen or could arise. Every share represented an equal ownership in the capital stock, and it mattered not whether the law spoke of the right to vote or of the stockholder's liability as being based on and proportioned to "the amount of stock" or to "the number of shares."

Reaching into the vitals of the question, therefore, there is a plain distinction in these articles of incorporation made between the classes of stock in that in one class of stock a single share, representing but one-millionth of the capital stock, is entitled to the same vote that another share representing twenty-millionths of the capital stock is given. Or, to epitomize the consideration, if all of the stock of this corporation is subscribed for at par, stockholders owning the common stock and having but $50,000 of investment will control a corporation with a capital stock of $1,000,000, leaving the owners of $950,000 stock in a hopeless minority. Again we have said that there is an intimate correlation between the voting right and the stockholder's liability. It becomes conspicuous when consideration is paid to the latter question. If it shall be said that in this corporation a stockholder's liability is governed by the proportionate number of shares which he owns, then it must result that one who owns a single share of common stock is subjected to the same liability as one who owns a single share of preferred stock, although his investment and ownership in the corporation will be but one-twentieth of that of the man who, with a larger holding, incurs a less liability. Upon the other hand, if it be said that section 322 is to be construed as imposing liability in proportion to the ownership of the subscribed capital stock, then we still encounter the difficulty that the owner of $20 of the capital stock has a voting power only one-twentieth as great as that of the man who owns but a single dollar's worth of capital stock.

The truth of the matter is that our statutes were framed, and our decisions under them based, upon a capitalization represented by shares of a single par value. The market trading in and the market value of these shares can have no bearing upon the construction of the statutes. It was the clear design of our law that liability should be imposed in proportion to the ownership of the capital stock, and where the shares of capital stock had the same par value it was a matter of indifference whether the law declared that the liability should be in proportion to the owned shares or in proportion to the owned capital stock. The law, however, uses both phrases. When it comes to a stockholder's voting power in a corporation it may not be questioned for a moment but that that fundamental right to vote is based upon ownership of the capital stock as distinguished from shares and not merely upon shares, which are but representatives of value. And as little can it be questioned but that the voting power should be given to the stockholders in proportion to their interest in the capital stock of the corporation.

For these reasons mandate is denied, and the writ discharged.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; LAWLOR, J.

29 Cal. App. 117

SLYE et al. v. HUNT, Judge of Superior Court. (Civ. 1773.)

(District Court of Appeal, First District, California. Dec. 7, 1915. Rehearing Denied by Supreme Court Feb. 3, 1916.)

1. EXCEPTIONS, BILL OF ⇐42—DELAY IN SETTLEMENT—WAIVER.

Where plaintiff obtained a verdict in December, 1913, on which judgment was entered, and defendant moved for a new trial and perfected an appeal, and, within the time allowed by law, prepared and served a proposed bill of exceptions, to which plaintiff in September, 1914, served proposed amendments not accepted by defendants, and defendants delivered them, together with their proposed bill of exceptions, to the clerk of the court for the judge, the taking up of the settlement in March, 1915, when counsel for both parties were present and participating, without objection to its settlement, was a waiver of any prior delay in the preparation or amendment of the bill, whichever party was responsible therefor.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72; Dec. Dig. ⇐42.]

2. EXCEPTIONS, BILL OF ⇐41—SETTLEMENT —LACHES.

In such case, where the court then suggested that counsel try to agree upon the amendments to be incorporated in the bill, and report as to matters on which they could not agree, and counsel for plaintiffs took and retained the original bill with the proposed amendments during the succeeding four months, for part of which time the court was in vacation, and where defendant put the matter of further proceedings for settlement of the bill on the calendar, there was no such laches on the part of defendant as would justify the court in refusing to settle the bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 65–71; Dec. Dig. ⇐41.]

3. EXCEPTIONS, BILL OF ⇐41—SETTLEMENT —BURDEN.

Ordinarily the burden is on the proponent of a bill of exceptions to bring the matter of its settlement to hearing and determination, even after he has left it, with its amendments, with the clerk for the judge.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 65–71; Dec. Dig. ⇐41.]

4. APPEAL AND ERROR ⇐2—PENDING MOTION—STATUTE.

Where defendants took no appeal from an order denying their motion for new trial after verdict, although they appealed from the judgment and attempted to settle their bill of exceptions, a statutory amendment pending such appeal taking away the right of an independent appeal from an order denying a motion for a new trial and substituting a provision for a review thereof on the appeal from the judgment applied so as to entitle defendants to the benefit thereof; as laws affecting procedure apply to pending cases where no substantial remedies are impaired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3–7, 1882, 2421; Dec. Dig. ⇐2.]

Petition by Joseph Slye and others for a writ of mandate against John Hunt, Judge of the Superior Court of the City and County of San Francisco. Writ to issue.

Louis H. Ward and Robert W. Harrison, both of San Francisco, for petitioners. Harold I. Cruzan, of San Francisco, for respondent.

PER CURIAM. This is an application for a writ of mandate, directed to the judge of the superior court of the city and county of San Francisco, requiring him to proceed to settle the bill of exceptions and statement in the case of Julia A. Roberts et al. v. Joseph Slye et al. (No. 52138), now pending in said court.

The facts of the case as they appear from the petition are briefly these: The said action of Roberts et al. v. Slye et al. was commenced in said court at some time during the year 1913, and came on for trial in the month of December of that year, at which trial a verdict was rendered in plaintiffs' favor on December 18, 1913, for the sum of $4,500, upon which verdict judgment was entered in due course; that notice of intention to move for a new trial was duly given, and that within 60 days after said judgment an appeal therefrom was perfected to the Supreme Court. Thereafter, within the time allowed by law and the stipulations of counsel, defendants prepared and served a proposed bill of exceptions, embracing a statement of the case, consisting of 172 typewritten pages, to which the plaintiffs in due course prepared and served their proposed amendments, numbering 143, and containing some 87 pages of typewriting. Thereupon and in due time the defendants notified the plaintiffs of their nonacceptance of said amendments, and on September 21, 1914, delivered the same, together with their proposed bill of exceptions, to the clerk of the court for the judge thereof, accompanied by a number of affidavits upon which the motion for a new trial was to be made. Thereafter from various causes the settlement of the bill of exceptions, and consequently the motion for a new trial, were delayed for several months, but finally the former came up for hearing on March 24, 1915, and was then taken up by the court, counsel for both parties being present, and no objection to the settlement of the bill of exceptions being made. After the matter of the settlement had proceeded for some time the judge of the court requested counsel for both sides to confer and attempt to agree on certain of the amendments thereto, and report to him as to what could not be agreed upon, and the further hearing of the matter was continued until such report.

It appears that thereafter four months or thereabouts elapsed, during which some ineffectual efforts were made by respective counsel to come to an agreement, and, these having failed, counsel for the defendants caused the matter of the settlement of the bill to be again placed upon the calendar of the court. Thereafter the plaintiffs moved the court to dismiss the motion for new trial on the ground of defendants' laches in prosecuting the same. The matters of the settlement of the bill of exceptions and of the motion to dismiss were upon the law and mo-

tion calendar for August 20, 1915. The court granted the motion to dismiss the motion for a new trial solely upon the ground of defendants' laches in procuring the settlement of their bill of exceptions, and a few days later refused to settle the bill of exceptions and caused the same to be dropped from its calendar.

[1] We think the judge of the trial court should have settled the defendants' bill of exceptions. Whatever delays there may have been in the course of the preparation, proposal, or amendment of the bill prior to the 24th day of March, 1915, or whoever may have been responsible for such delays, the fact that on said last-named day the judge of the court took up and proceeded with the settlement of the bill, counsel for both parties being present and participating in such settlement without objection, constitutes a waiver and cure of previous delays. Hicks v. Masten, 101 Cal. 651, 653, 36 Pac. 130; Horton v. Jacks, 115 Cal. 29, 35, 46 Pac. 920; O'Brien v. O'Brien, 124 Cal. 422, 425, 57 Pac. 225.

[2, 3] On said March 24, 1915, and after the judge and counsel had made some progress toward the settlement of the bill, it appears that the judge suggested to respective counsel that they confer in an attempt to agree upon the amendments to be incorporated in the bill, and that they should at some time thereafter report as to such matters as they might not be able to agree upon. This suggestion was adopted; counsel for the plaintiffs taking, and since retaining, the original bill with its proposed amendments. There is some dispute as to who was responsible for whatever delay there was thereafter and during the succeeding four months; but it appears that during a portion of that time the court was in vacation. It is true, as suggested by plaintiffs' counsel, that the cases hold that ordinarily the burden is cast upon the proponents of a bill of exceptions to bring the matter of its settlement to hearing and determination even after the proponents of the bill have left it, with its amendments, with the clerk for the judge. Miller v. Queen Ins. Co., 2 Cal. App. 267, 83 Pac. 287, and cases cited. The present case, however, presents a somewhat different situation. Here the judge, after proceeding some distance in the performance of his duty in the way of settling the bill, referred the matter to both counsel to confer, agree, if possible, and report back such matters as they could not agree upon to the judge. He thus constituted counsel for both parties in a sense his aids in the duty which was primarily his own, and by so doing invested each with the responsibility of reporting back to him their failure, if any, to agree upon the bill; and this, we think, would be peculiarly true when, as is admitted, plaintiffs' counsel took possession of the partly settled bill with its amendments and retained the same until after his motion to dismiss the motion for a new trial had been made. It appears, in addition, that it was the defendants' counsel who caused the matter of further proceedings for the settlement of the bill to be placed upon the calendar prior to notice of the plaintiffs' motion to dismiss.

We think these admitted facts make it clear that there was no such laches on the part of the defendants in these later proceedings subsequent to March 24, 1915, as would suffice to justify the judge of the court in refusing to settle the bill of exceptions.

[4] It is, however, contended by plaintiffs' counsel that, the defendants having taken no appeal from the order dismissing (which was equivalent to an order denying) their motion for a new trial, no useful purpose can be subserved by the issuance of this writ, to which the defendants respond: First, that they are entitled to use the bill of exceptions upon their appeal from the judgment; and, second, that at the last session of the Legislature the law governing new trials and appeals was so amended as to take away the right of an independent appeal from an order denying a motion for a new trial, but substituting a provision which permits the appellants upon their appeal from the judgment to have reviewed the errors, if any, of the trial court in denying their motion for a new trial. The plaintiff, however, argues that these amendments are not to be construed as affecting pending, but undetermined, motions for a new trial at the time the law took effect. No authority is cited in support of this contention; and we are satisfied that the rule is well settled that such changes in the law affecting procedure apply to cases pending and conditions existing at the time the statutes take effect where no substantial remedies are impaired. This being so, the defendants are entitled to have their bill of exceptions settled and to whatever benefits they may derive therefrom upon appeal from the judgment.

It is therefore ordered that the writ issue as prayed for in petitioners' petition.

29 Cal. App. 111

SWEET v. RICHVALE LAND CO. et al.

(Civ. 1401.)

(District Court of Appeal, Third District, California. Dec. 3, 1915.)

1. VENDOR AND PURCHASER ⟸299—REMEDIES OF VENDOR — RECOVERY OF LAND — RIGHT OF ACTION.

Where a contract for the sale of realty provided that the buyer should forfeit all rights upon his failure to comply with its terms, and that the owner should be released from all obligation at law or in equity to convey, and a payment of $600 due under the contract was not made by the assignee of the buyer in possession, whereupon the owner demanded payment or possession of the premises, both of which were refused, and possession unlawfully withheld from the owner, who had complied and was

ready and willing to comply with all the terms of the contract, such owner had a cause of action in ejectment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 837–842; Dec. Dig. ⟸299.]

2. Pleading ⟸208—Demurrer—Specification of Objections.

Where defendants demurred to the complaint on the ground that it did not "state sufficient facts to constitute a cause of action" against them, and that the complaint joined "several causes of action," the demurrer was insufficient as failing to specifically point out the misjoinder of causes of action or of parties.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 513–519; Dec. Dig. ⟸208.]

3. Pleading ⟸208—Demurrer—Specification of Objections.

Defendants' demurrer to the complaint that it was "uncertain and ambiguous" was defective, in that it did not specifically point out the uncertainty and ambiguity.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 513–519; Dec. Dig. ⟸208.]

4. Appeal and Error ⟸1039—Harmless Error—Misjoinder of Causes.

Any error of the vendor of realty, suing the assignee of the buyer and others in ejectment, in joining a claim for a money judgment for the balance due on the contract of sale, was harmless, where he waived any claim for such money judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075–4088; Dec. Dig. ⟸1039.]

5. Pleading ⟸248 — Amendment after Submission—Propriety.

In an action of ejectment by the vendor of realty against the assignee of the buyer and others to recover possession upon a default in payment, the allowance, after submission of the cause, of an amendment to the complaint, which originally showed that by failure of defendants to comply with its terms they had forfeited the right to possession of the land, which alleged that the contract provided that, in the event of a failure to comply with its terms, the buyer should forfeit all right to the property, and the vendor be released from all obligation in law or equity to convey, was not improper, since the amendment did not change the cause of action of the complaint, while the court may allow an amended complaint to be filed to conform with the proof even after submission of the case, though under such permission plaintiff may not file an amended complaint stating new causes of action distinct from those contained in the original complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689–706, 708½, 709; Dec. Dig. ⟸248.]

6. Pleading ⟸238—Amendment after Submission—Notice to Adverse Party.

The fact that defendants had but one day's notice of the allowance of a formal amendment to the complaint after submission of the cause, which amendment was otherwise proper, was of no consequence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 602, 620–625; Dec. Dig. ⟸238.]

7. Vendor and Purchaser ⟸299 — Remedies of Vendor—Action for Possession—Judgment.

In ejectment by the vendor of realty against the assignee of the buyer and others upon default in payment, where the contract provided that a default in any of the terms should work a forfeiture, judgment for the plaintiff for possession of the property necessarily involved judgment of forfeiture by defendants, since the defendants' failure to make a payment, forfeiting their right to possession, was such a default as forfeited all their rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 837–842; Dec. Dig. ⟸299.]

8. Costs ⟸47—Person Liable.

In ejectment by the vendor of realty against the assignee of the buyer and others upon default in payment, where the complaint stated no cause of action against a defendant which had and claimed no interest in the property, judgment for costs against such defendant was improper.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 185–191; Dec. Dig. ⟸47.]

9. Appeal and Error ⟸417—Notice of Appeal—Sufficiency.

In ejectment by the vendor of realty against the assignee of the buyer and others upon default in payment, though the notice of appeal was not several in form, under the prevailing liberal practice as to such matters, it was sufficient as an appeal by a defendant, against whom the plaintiff stated no cause of action, and who claimed no interest in the property, from the portion of the judgment awarding costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140–2143; Dec. Dig. ⟸417.]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Lucy A. Sweet against the Richvale Land Company and others. From a judgment for plaintiff, defendants appeal. Judgment affirmed, except as to costs against the named defendant.

J. Oscar Goldstein, of Chico, for appellants. J. R. King, of Gridley, for respondent.

BURNETT, J. The action is in ejectment. The basis of the controversy is an executory contract of sale, the parties thereto being plaintiff and one E. A. Rhinesmith, the latter's interest therein having passed by regular assignment to one John S. Hastings. The complaint alleges ownership and the right of possession of the property in plaintiff; that on the 1st day of October, 1912, said Rhinesmith and plaintiff entered into a contract of sale and purchase of said land (setting out said contract); "that under said contract said defendant took possession of said premises; that said contract provides that, in event of a failure to comply with the terms of said contract, defendants forfeit all right to said property, and said plaintiff is released from all obligation in law or equity to convey said property." Then follow allegations of the various assignments of Rhinesmith's interest terminating in said defendant John S. Hastings, "who is now in possession of said premises." It further appears that a payment of $600 due under said contract on October 1, 1914, together with interest on deferred payments, was not made; that demand was made for said payment or possession of the premises, but that both

were refused and defendant "unlawfully withholds possession of said premises from plaintiff; that plaintiff has complied and is ready and willing to comply with all the terms of said contract."

[1] That a cause of action in ejectment is thus stated is entirely clear, and the proposition needs no elaboration. It is sufficient to refer to Haile v. Smith, 128 Cal. 415, 60 Pac. 1032; Gervaise v. Brookins, 156 Cal. 103, 103 Pac. 329; Empire Investment Co. v. Mort (Sup.) 153 Pac. 236. The general demurrer of defendants was therefore properly overruled.

[2, 3] Defendants also contend that there was a misjoinder of two causes of action, that is, for the recovery of the possession of the realty, and also of the amount of money due under the contract; furthermore, that defendant Richvale Land Company was improperly made a party defendant to the action. The demurrer, however, was as follows:

"The defendants Richvale Land Company and John S. Hastings, appearing herein by their attorney, J. Oscar Goldstein, demur to the complaint herein upon the grounds: First, that the complaint does not state sufficient facts to constitute a cause of action against the defendants herein; second, that the complaint joins several causes of action in one complaint and is uncertain and ambiguous."

Of course, if said defendants intended to rely upon a misjoinder of causes of action or of parties, it should have been specifically pointed out by the demurrer. Their effort in that regard was equally defective as their assignment of uncertainty and ambiguity. It may be said also that, if a demurrer had been interposed on behalf of said company alone, it probably would have been sustained. It is apparently true that no cause of action was stated against it, but the demurrer was a joint one on the part of said company and Hastings. So also in the subsequent proceedings they were treated by their attorney as sustaining the same relation to plaintiff and to the cause of action, and that the complaint and the evidence were sufficient as against Hastings there can be no kind of doubt.

[4] Another thing to be stated is that plaintiff waived any claim for a money judgment, in fact eliminating that feature altogether from the case. So that, if we concede that there was error in misjoining the said two causes of action, it is quite apparent that it was entirely without prejudice.

[5, 6] One or two other considerations remain to be noticed briefly. After the cause was submitted the court allowed an amended complaint to be filed to conform to the proof, and it is contended by appellants that thereby the cause of action was changed. But in this they are entirely mistaken. It is admitted by appellants that:

"The court had the right and power to allow an amended complaint to be filed to conform with the proof, even after submission of the case."

This practice has, indeed, been approved many times by the appellate courts. It has, however, been held that under such permission:

Plaintiff "is not entitled to file an amended complaint containing statements of new and distinct causes of action not contained in the original complaint." Bowman v. Wohlke, 166 Cal. 121, 135 Pac. 37, Ann. Cas. 1915B, 1011.

But a comparison of the original with the amended complaint here shows conclusively that no new cause of action was introduced by the latter. The only change of any moment was in adding the allegation:

"That said contract provides that in event of a failure to comply with the terms of said contract that defendants forfeit all right to said property and said plaintiff is released from all obligations in law or equity to convey said property."

This did not change nor affect the cause of action. The original complaint showed that this contract had been executed, and that by failure of appellants to comply with its terms they had forfeited the right to the possession of the land. Indeed, the cause of action was grounded upon this failure to pay the installments as required by said contract, and all that could be said is that the amended complaint stated the cause of action somewhat more fully than the original. The truth is, as we conceive it, that there was no necessity for filing the amended complaint, but it did no harm; neither was it of any consequence that appellants had only one day's notice of it. Indeed, appellants seem to have relied upon said contract, as they introduced it in evidence, and, of course, they were not prejudiced by an amendment to the complaint which simply added a formal allegation of one of the terms of said contract.

[7] As to the judgment of forfeiture by appellants of all rights under the contract, it may be said that it was necessarily involved in the judgment for possession. The right of possession depended upon the question whether appellants had complied with or violated the terms of said contract. And having found that the payments had not been made as provided, it necessarily followed, under the agreement itself, that the contract was forfeited, and therefore the right of possession of the land destroyed. The two considerations were inseparably connected and the determination of one necessarily involved the other, although the essential purpose of the action was to secure the possession of the land.

[8, 9] The only part of the judgment, it may be said, of which the Richvale Land Company can complain is that awarding costs to the extent of $24.20. This seems to be unwarranted, since the complaint really states no cause of action against said defendant, and the evidence shows that said company had and claimed no interest in or to said property. The notice of appeal is somewhat defective, not being several in

form, but, under the liberal practice prevailing now, we think it should be held sufficient as an appeal by said company from said portion of the judgment.

The judgment for costs against said Richvale Land Company is therefore reversed, and in other respects the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 92

ULM v. PRATHER et al. (Civ. 1416.)

(District Court of Appeal, Third District, California. Dec. 1, 1915.)

1. APPEAL AND ERROR ⟸544—RECORD ON APPEAL—SUFFICIENCY.

In an action for a partnership accounting, the court appointed a receiver upon plaintiff's prayer therefor. The transcript on appeal from the order of appointment contained only the complaint, the order, and the notice of appeal, but no bill of exceptions. The order of appointment recited that it appeared from the complaint that plaintiff had a cause of action and that the property was in danger unless a receiver should be appointed. *Held* that, even if it were conceded that the complaint was insufficient to warrant the appointment of a receiver, the record, in the absence of a bill of exceptions or other showing as to the proceeding had, was insufficient to present on appeal the question of the propriety of the appointment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412–2415, 2417–2420, 2422–2426, 2428, 2478, 2479; Dec. Dig. ⟸ 544.]

2. APPEAL AND ERROR ⟸920—SCOPE OF REVIEW—DISCRETION OF TRIAL COURT—PRESUMPTIONS.

In the absence of an affirmative showing that the court abused its discretion in appointing a receiver pendente lite in an action for a partnership accounting, it will be presumed that the court's action was regular, and that the order was made on a sufficient showing of facts, though the facts alleged, taken alone, might not warrant the appointment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714–3721; Dec. Dig. ⟸ 920.]

3. APPEAL AND ERROR ⟸634—SCOPE OF REVIEW—MOTION TO DISMISS—AFFIRMANCE.

Where the court acquires jurisdiction of a cause on appeal by the filing of the notice of appeal, and the record brought up fails to show on a mere inspection that the appellant is entitled to relief, the cause must on motion to dismiss be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2775, 2829; Dec. Dig. ⟸ 634.]

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by John W. Ulm against Clarence M. Prather and another. From an order appointing a receiver, defendants appeal. Affirmed.

Taylor & Tebbe, of Yreka, for appellants. B. K. Collier and Tapscott & Tapscott, all of Yreka, for respondent.

HART, J. The plaintiff brought this action for an accounting and thereby a determination and adjudication of the amount to which the parties to this action are, respectively, entitled, by reason of an agreement of copartnership entered into by and between said parties on the 1st day of June, 1909. Besides praying for an accounting, the complaint asks that a receiver to act pendente lite be appointed by the court to take charge of the partnership property and assets, "to properly protect and care for the same, and, as soon as practicable and for the best interests of all concerned, market the aforesaid property, and the whole thereof, under the directions of the court, accounting to this court herein for the proceeds thereof." The court, accordingly, made an order appointing a receiver, naming one Parshall as such, said receiver immediately qualifying as such by taking the oath of office and entering into and filing an undertaking, with approved sureties, in the sum of $6,000, the amount fixed by the court. This appeal is brought here by the defendants from the order appointing the receiver.

The complaint discloses that the plaintiff, a resident of Chicago, was the owner of a 2,000-acre tract of land in Siskiyou county, this state, and also owned farming implements and other personal property, which were, at the time the copartnership agreement was entered into, situated on said land; that defendants were also the owners of certain farming implements and other personal property suitable for farming purposes; that, by the agreement referred to, the defendants were to take possession of said land, together with the personal property belonging to both parties, and were to operate, farm, and manage said ranch for the mutual interest and benefit of the parties for the period beginning with the 1st day of June, 1909, and ending on the 30th day of September, 1913; that the returns to come from the operation of the ranch by the defendants as a stock and hay ranch should, after the payment of all necessary expenses in conducting the business of the ranch and of the money used in buying additional stock, tools, implements, etc., and the payment of the principal and interest of any borrowed money or capital used in the business, be divided equally between the parties, either in money or property. It was further agreed that the parties of the second part (defendants) "shall have the right and privilege of using not to exceed seventy-five dollars per month, during each month, of funds produced hereunder, toward defraying their family expenses, which shall be charged against them and against their interest herein," etc.

The complaint alleges that it was mutually stipulated and agreed by the parties to said agreement that the certain personal property heretofore referred to and separately owned by the parties was, as soon as the

agreement was signed, to become the joint property of the first and second parties to said agreement and be equally owned by them half and half, and that any amount due or furnished by the one party over the amount furnished by the other should be considered as money loaned by such party to the coparties, and should draw interest at the rate of 6 per cent. per annum and should be a first lien against such joint property and payable, principal and interest, from the joint sales of such property, or of the proceeds of the ranch, "and that, among the terms of said agreement, any party thereto contributing any amount in excess of the amount furnished by the other party should be considered as having loaned the coparties such amount, and same should be treated as above specified." The complaint further alleges that the plaintiff, under the provisions of the said agreement, has received the total sum of $1,520, only, and that, excepting a lot of alfalfa seed of the value of $73.80, he has never received any other or additional amount as his share of the proceeds of the said agreement or the profits derived from the operation of said ranch; that the amount of the advances made by the plaintiff under the said agreement during the life thereof, including interest thereon at the rate of 6 per cent. per annum, is the sum of $3,289.70; that the amount received by the defendants under the provision of the agreement allowing them the privilege of using the sum of $75 per month during each month out of the funds produced on the ranch is the sum of $3,850, and that no portion of said sum has been paid by the defendants or either of them to said coparties, "or at all"; that the said agreement and the term of the life thereof expired on the 30th day of September, 1913, and prior to the filing of the complaint herein; that the plaintiff, prior to that date, notified the defendants that he desired a full and complete settlement at the expiration of the term of said agreement of all transactions had thereunder, "and at the expiration of said term of said agreement said plaintiff personally requested said defendants and each of them to comply therewith, but said defendants then refused, and ever since said last-mentioned date have refused so to do." It is alleged that the defendants have removed from the aforesaid ranch a large portion of the joint property of said parties to the aforesaid agreement, without the consent of the plaintiff, "and said plaintiff is, at this time, without definite knowledge as to the status, on September 30, 1913, or at any time since said last-mentioned date, of the business transacted under and in pursuance to the aforesaid agreement; * * * that by reason of the failure, neglect, and refusal of said defendants and of each of them to render to said plaintiff the statements and reports contemplated by the aforesaid agreement, said plaintiff is unable to ascertain the true condition of affairs of the respective parties to said agreement on September 30, 1913, or since said date."

[1] It is contended by the defendants that the case made by the complaint, a substantially correct statement of whose averments is above given, is not sufficient to have authorized the court, under the terms of section 564 of the Code of Civil Procedure, to appoint a receiver to take charge of the property involved in this controversy and to dispose of the same as specified in the order under the directions of the court. This contention assumes, of course, that the order appointing the receiver was wholly predicated on the ex parte showing made by the complaint; but we cannot say, from the record before us, that such was the case, or that there were not other facts presented to the court in the proceeding than those appearing in the complaint.

There is no bill of exceptions in the transcript on appeal. Embodied in the transcript are the following papers and proceedings only: The complaint; the order appointing a receiver; the oath of the receiver; the bonds of that officer; the notice of appeal from the order appointing a receiver; and a stipulation by the attorneys of the respective parties allowing the defendants additional time over that prescribed by law for preparing and serving the transcript on appeal. Embodied in the transcript is also the certificate of the clerk of the court in which he declares that "the foregoing transcript contains full, true, and correct copies" of the above-enumerated documents, papers, proceedings, notice of appeal, stipulation, etc. It does not appear from the clerk's certificate or otherwise from the transcript that the court, in the appointment of the receiver, acted solely upon or at all considered the disclosures made by the complaint relative to the joint property of the parties or its situation, except in so far as the complaint disclosed that a cause of action existed in favor of the plaintiff and the nature of such action; nor is it made to appear by the transcript whether the court did or did not take oral testimony or receive affidavits or depositions in support of the application. In brief, there is, as stated, no bill of exceptions in the transcript and no record in any other form authorizing a review of the action of the court in appointing a receiver. The order appointing a receiver itself contains the only information furnished by the transcript of the proceedings directly culminating in the making thereof, and it cannot be determined therefrom upon what evidence or considerations the court founded its order. The preamble of the order recites that "it appearing to the court from the complaint that there exists a cause of action in favor of said John W. Ulm against said defendants, Clarence M. Prather and Mary L. Prather, and that there is in existence certain property referred to in

said complaint and hereinafter referred to, which is owned jointly by said plaintiff and said defendants, and it further appearing that the aforesaid property is in danger of being removed and the rights of said plaintiff therein jeopardized, * * *" and here follows the order appointing one W. R. Parshall as receiver. Thus it will be noted that, as stated, the order itself does not disclose the nature and extent of the proceedings leading to the making of the order, or what constituted the basis of the court's action in making it.

[2] In the absence of an affirmative showing that the court abused its authority in appointing the receiver, the due regularity of the court's action in that regard will be presumed. In other words, there being no bill of exceptions or other record showing upon what evidence the court based its order, the presumption must be indulged, in support of the order, that the court had before it facts sufficient to justify it in making the order, notwithstanding that the facts which are disclosed by the complaint might not themselves, taken alone, be enough to warrant the appointment of a receiver under section 564 of the Code of Civil Procedure.

[3] But what was said by Chief Justice Sullivan, in the very recent case of Borges v. Dunham (Sup.) 145 Pac. 1011, is peculiarly pertinent to the record before us and is decisive of this case:

"If we consider the appeal as taken under the old method, it is ineffectual for the purposes of review, because it contains no bill of exceptions showing what papers were used or what evidence was introduced on the motion. If we consider the appeal as taken under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, the appeal is abortive, because appellant, after filing notice of appeal, took no further steps under those Code sections to procure a record to be used on appeal. For the reasons stated, it is impossible with the record before us to review the order appointing the receiver. As the filing of the notice of appeal in the court below, treating the appeal as taken under the new method, conferred jurisdiction upon this court, and as a mere inspection of the record shows that appellant is entitled to no relief, the proper order for this court to make in response to the motion to dismiss is to affirm the order appointing a receiver. Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118 [118 Pac. 526]."

It follows from the foregoing that the order appointing the receiver must be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

29 Cal. App. 97

WILLS v. E. K. WOOD LUMBER & MILL CO. (Civ. 1431.)

(District Court of Appeal, Third District, California. Dec. 2, 1915.)

1. FRAUDULENT CONVEYANCES ⟸299—SUFFICIENCY OF EVIDENCE—TITLE OF CREDITOR.

Evidence in a wife's suit to quiet title to property alleged to have been purchased with her money, though the deed was made to her husband, defended on the ground that defendant purchased the property at execution sale on a judgment against the husband, and that, as the husband was insolvent when he conveyed to plaintiff, the conveyance was fraudulent as to existing creditors, *held* to warrant a finding that prior to the conveyance to plaintiff the husband had the legal title unaffected, so far as his creditors were concerned, by any equity of his wife in the property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 876–890; Dec. Dig. ⟸299.]

2. FRAUDULENT CONVEYANCES ⟸297—SUFFICIENCY OF EVIDENCE — INSOLVENCY OF CREDITOR.

In such suit, evidence *held* to sustain a finding that on the date of the conveyance to plaintiff by her husband he was insolvent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 891; Dec. Dig. ⟸297.]

3. JUDGMENT ⟸781 — JUDGMENT LIEN AGAINST GRANTOR AS ATTACHING TO LAND —HOMESTEAD.

Land conveyed by a husband to his wife, without consideration and in fraud of creditors, was subject to the lien of a subsequent judgment against the husband obtained by a creditor, though the wife has filed a declaration of homestead in the land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1350; Dec. Dig. ⟸781.]

4. BANKRUPTCY ⟸207—TRUSTEE'S SUBROGATION TO LIEN—ACTION BY LIENOR—EFFECT.

Bankr. Act July 1, 1898, c. 541, § 67b, 30 Stat. 564 (U. S. Comp. St. 1913, § 9651), provides that, when a creditor is prevented from enforcing his rights as against a bankrupt debtor, the trustee shall be subrogated to the creditor's rights for the benefit of the estate; section 67c dissolves judgments entered within four months prior to the filing of the petition in bankruptcy, with the proviso that if the dissolution of such lien would militate against the best interests of the estate it shall not be dissolved, but the trustee shall be subrogated and empowered to perfect and enforce it as the holder might have done had not bankruptcy intervened; and section 67f provides that all judgments against an insolvent within four months prior to the filing of a petition in bankruptcy shall be void in case he is adjudged bankrupt, and that the property affected thereby shall pass to the trustee as part of the estate, unless the court orders the right under such judgment preserved for the benefit of the estate, whereupon it shall pass to the trustee. A judgment creditor, whose lien was dissolved by the debtor's petition in bankruptcy, consented to the trustee's subrogation, and on the trustee's petition for subrogation for the benefit of the estate was authorized to prosecute an action to enforce judgment in the name of the trustee and for the benefit of the estate. *Held*, that the judgment as a preferential lien in favor of the creditor was dissolved, but recognized as a lien for the benefit of all the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸207.]

5. BANKRUPTCY ⟸207—JUDGMENT—SUBROGATION OF TRUSTEE—SUIT.

Although the order in such proceeding in terms authorized the judgment creditor to proceed in the name of the trustee and for the benefit of the estate to annul the bankrupt's voluntary conveyance to plaintiff, his wife, it authorized the judgment creditor to proceed as it might deem best, or to proceed in the name of the trustee, though the method was immaterial,

as any favorable result would inure to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃207.]

6. BANKRUPTCY ⊂⊃433—DISCHARGE—LIENS.
A bankrupt's discharge releases him from personal liability only, and not from the liens existing against his property, which may be enforced after his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 808–823; Dec. Dig. ⊂⊃433.]

7. FRAUDULENT CONVEYANCES ⊂⊃277—FRAUD—PROOF—STATUTE.
Under Civ. Code, § 3442, making a transfer fraudulent and void as to existing creditors as matter of law, where it is voluntary or without a valuable consideration by one insolvent or in contemplation of insolvency, proof of actual fraud is not necessary.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809–814; Dec. Dig. ⊂⊃277.]

8. APPEAL AND ERROR ⊂⊃926—PRESUMPTIONS—CONSIDERATION OF IMPROPER EVIDENCE.
In a suit to quiet title as against defendant, claiming under a judgment against plaintiff's husband obtained on the ground that his prior conveyance to plaintiff had been in fraud of creditors, where the court allowed the husband to testify as to his declarations affecting his insolvency on the date of his conveyance to plaintiff, and, on objection, stated that his declarations subsequent to such conveyance would not be considered, it would be presumed on appeal that the court did as it said it would do.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1279, 2899, 3729, 3730, 3735–3747; Dec. Dig. ⊂⊃926.]

9. HUSBAND AND WIFE ⊂⊃69½ — MARRIED WOMAN—SEPARATE ESTATE.
A married woman, not living separate and apart from her husband, and having no claim in her own right to lands, cannot acquire title to it as her separate estate by adverse possession.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 294, 300; Dec. Dig. ⊂⊃69½.]

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action to quiet title by Emily Wills against the E. K. Wood Lumber & Mill Company. Judgment for defendant, motion for new trial denied, and plaintiff appeals. Judgment and order affirmed.

Martin Stevens, of San Francisco, for appellant. Martinelli & Greer, of San Rafael, for respondent.

CHIPMAN, P. J. Plaintiff commenced the action to quiet her title to a certain lot situated in San Anselmo, Marin county, as against the claims which, it is alleged, defendant makes to the property. Defendant answered, denying plaintiff's ownership, and denying that defendant's claim to the property is without right. Further answering, it alleges: That defendant is the owner and entitled to possession of the property; that on October 8, 1906, and long prior thereto, plaintiff and one Hamilton Wills were and ever since have been and now are husband and wife, and on said day said Hamilton Wills was the owner, seised in fee and in possession of the whole of said real property; that on said day he was indebted to defendant in the sum of $4,432.72 for goods, wares, and merchandise theretofore sold and delivered by defendant to Hamilton Wills, and in addition to said indebtedness, the said Hamilton was also indebted to divers other persons in large sums of money, the amount of which defendant is unable to state; that on said date, and for a long time prior thereto, the said Hamilton Wills was unable to pay his debts in full from his own means as the same became due in the ordinary course of business, and was insolvent, all of which was well known to plaintiff; that on said day said Hamilton Wills, while so indebted and so insolvent, "and with full purpose and intent to hinder, delay, and defraud his creditors, and particularly this defendant, and designing to cheat his creditors, and particularly this defendant, did voluntarily and without valuable consideration make, execute, and deliver to plaintiff a conveyance transferring to plaintiff all of said real property"; that on February 12, 1908, there was still due from said Hamilton Wills to defendant on account of said indebtedness of $4,432.72 a balance of $2,680.82, and that thereupon, upon said last-named day, defendant commenced an action against said Hamilton Wills, in the superior court of said county, to recover said balance; that on June 25, 1908, a judgment was duly given, made, and entered in said action in favor of defendant and against said Hamilton Wills for said balance, together with $15.50 costs of suit, which said judgment was duly docketed in the office of the county clerk of said county; that on the 31st day of October, 1910, a writ of execution was duly issued out of said court in said action, directed to the sheriff of said county, who did, after due proceedings had according to law, duly sell all of said premises to the defendant, and that a certificate of sale was duly issued by said sheriff to this defendant, and thereafter, on January 12, 1912, said sheriff duly executed and delivered to this defendant a deed conveying all of said property, which said deed was duly recorded on January 19, 1912, and ever since said 12th day of January, 1912, this defendant has been and now is the owner of all said property and entitled to possession thereof.

The court found the facts substantially as alleged in the answer, and as conclusions of law found that the transfer of said property by said Hamilton Wills to plaintiff on October 8, 1906, "was fraudulent and void as to this defendant," that plaintiff take nothing by her complaint, and "that defendant is entitled to the judgment and decree of this court that it is the owner of and entitled to the possession of all of said real property," etc. Judgment was accordingly entered for defendant, from which, and from the order de-

nying her motion for a new trial, plaintiff appeals.

Plaintiff testified:

"I am the owner of the property described in the complaint herein. I acquired said property in 1905, and went into possession thereof in September, 1905, and went to live upon the property at that time. At that time I had upon the property a little shack that cost about $200. Ever since September, 1905, I have been living upon that property with my husband. Nobody but myself has been in possession of that property since September, 1905. I have paid all of the taxes which have been levied upon the property since September, 1905, and during all that time I have been in the exclusive possession of that property. I paid $400 for the lot."

There was received in evidence on the part of plaintiff a declaration of homestead by plaintiff, in due form, of date July 7, 1908, duly acknowledged and recorded on that day, "for the joint benefit for myself and husband." The value of the property was "estimated to be $5,000." On cross-examination she testified:

"I acquired the property in June or July, 1905, from Mr. Croker. My husband bought the property from my money. My husband did business for me. I had about $1,500 at that time. I put my money in the First National Safe Deposit, and the next time my husband bought a safe I put it in his safe, in a little tin box, at San Francisco. * * * I came to California in 1888 or 1889. I came here in February, and married Mr. Wills in the following November. I had over $1,000 when I married Mr. Wills. I do not know exactly how much over. I did not have any talk with Mr. Croker. (Mr. Croker conveyed the property to her husband.) I was very sick at the time. I earned money after I was married; I earn it still; I keep boarders. My husband went on the road. I kept boarders, and raised chickens, and made more money than he did. I loaned him money. In the sale and purchase of this property my husband was the agent for me on account of I was not acquainted with this language only a little. I was green to this country. Besides I was very sick. * * * Physically or mentally I was in no condition to transact business in 1905. My husband negotiated with and made the contract with Mr. Croker. Q. Do you know to whom Mr. Croker gave the deed to the property? A. Well, my husband done the business. I was in no condition to transact business. I don't know what they done. My husband took the money out of the safe deposit and paid cash for the property. He took it out of his safe. My husband kept the property in his name for quite a while and the papers were burned up; then I wanted the property recorded in my name; it belonged to me. * * * After the earthquake, when my husband went to the city, he said the whole thing is destroyed, safe and everything in his office, and after that he said, 'All my papers were destroyed.' He said, 'That is destroyed too.' I said, 'You had better go to Mr. Croker, and have a new deed, and have it recorded who it belongs to, in my name.' * * * About this deed I said [to her husband], 'How can we settle it, then? We have no deed. I want to have this property. I am well now, and I want to have it, make it my home, so if anything, business or like such things, I could always make a living on it.' I think he went to Mr. Croker a couple of months after that, when things were getting quiet."

At this point in plaintiff's testimony defendant introduced a grant, bargain, and sale deed, dated October 6, 1906, made by Frederick Croker and his wife to Hamilton Wills, recorded on the same day; also, deed of gift, dated October 8, 1906, from Hamilton Wills to his wife (plaintiff), recorded on the same day. On further cross-examination, she testified:

"In 1905 a little shack was built on that lot. I bought it. My husband paid for it—the lumber. I gave him the bills. Not much lumber was bought from E. K. Wood Lumber & Mill Company. It only amounted to about $300. My husband had the $400 to buy the lot in his safe. I told him to take it when I was in the hospital. I gave my husband all the money I had just for this property. I wanted to have a home. The doctors told me I must go into the country if I wanted to live. My husband was then a contractor, building houses over in Marin county. I gave him that money to buy a home. * * * After I got out of the hospital, I came over to San Anselmo to live, and the property was bought in June or July, 1905. When I first came to San Anselmo I was just camping; lying on a cot in a tent. In May, 1905, when I was in hospital, I said to my husband, 'Take all you need to get a home—buy a home,' and he took all of the money. I saved all my life for it; that money was over a thousand dollars."

On re-examination she testified:

"Q. Was anything said by either of you as to whose name the property was to be taken in at that time? A. At that time I just say to my husband, 'Buy a property; buy a home.' At the time I just left everything to him as my agent; but I want to have it as my home. Q. You wanted him to buy a home for you with your money? A. Yes, sir; from my money. Q. Did he understand that from you? A. I guess he did. Q. Did you so tell him? A. Yes, sir."

On re-cross she testified:

"My husband handed me the deed, when he put the property in my name in 1906, and said, 'There is your property;' and I say, 'Now, for you to take the deed and put it in the safe deposit.' When he put it in my name, he showed it to me, and he went up to the city. I had no talk with him about the deed at all. I was glad; I had my property; that is all; I saw my name in the deed. * * * When he showed it to me, it had been recorded. I paid a dollar for recording it. * * * When he showed me the deed with my name, he came from San Rafael; it was already recorded; he showed it to me after it was recorded."

Plaintiff rested at this point of the evidence. Concerning the execution of the deed to her husband, witness Croker, Wills' grantor, testified:

"I know Hamilton Wills; known him since 1905. I sold to Mr. Wills a lot in Ross Valley Park, lot 137, being the lot described in plaintiff's complaint, for $400, terms cash; he made a deposit of half the cost and within 30 days, I think, paid the balance; am not sure, though; within the 30 days I made the deed transferring the property to him.

"The Court: Q. What did he say in reference to the purchase, if anything to you? A. I don't remember. Q. Did he say he was purchasing it for anybody? A. No. Q. Other than himself? A. I think not."

Here was introduced a receipt, signed by Mr. Croker, dated June 21, 1905, acknowledging the receipt from Wills of $200 deposit on account of $400, the purchase price of the property. Balance was to be paid in 30 days. He testified that he afterwards made a deed to Wills.

"I made a second deed to him (above referred to, of date October 6, 1906). At the time I made this second deed to Hamilton Wills I do not know whether he asked me to execute the deed to his wife. I don't remember much about what was said by either of us at that time. I know he made some excuse for wanting the second deed. He did not at any time ask me to make a deed to his wife; he gave me some reason for wanting a second deed; it was satisfactory to me."

Witness Studley, before whom the deed was acknowledged by Croker, testified that he knew of the deed formerly given Wills by Croker and asked Wills why he had not recorded it.

"I had been collecting taxes, but I noticed the property was still assessed to Mr. Croker, and I asked him (Wills) why he hadn't recorded the deed. I do not remember his answer at all. Q. Did he at any time say to you the property was the property of his wife, Emily Wills? A. No, sir."

Witness Pitcher, manager of defendant corporation, testified that he knew the land involved and that his company—

"sold to Mr. Wills the materials for improvements or building on that land. He told me he bought the lot and wanted to build a house on it. That was in the fore part of 1905; that was the first business we did with him—to furnish material on this property in question. When we were furnishing lumber to him, he put up one house at first; then I think he put up another house afterwards, and the stable; he did not state to me that was his wife's property. Q. His statement to you was he had bought the property? A. He told me it was his property."

This occurred before Wills conveyed the property to his wife and after Croker had conveyed it to him.

The foregoing is the evidence bearing upon the question of plaintiff's ownership of the land on October 8, 1906, the date of the deed of gift to her by her husband. The court found:

That on that date "Hamilton Wills was the owner, seised in fee and in the possession, of the whole of the real property mentioned in plaintiff's complaint."

Mr. Wills was called as a witness by defendant and testified at some length, mainly concerning his condition as to solvency, which we shall have occasion to notice later. But he said nothing and was asked no question by either party as to what occurred when he made the purchase of the land in question.

The claim of plaintiff is that the property in question was purchased with her money and became her separate estate, though the deed originally was made to her husband, and that when he conveyed the property to her on October 8, 1906, her title was unassailable by the then creditors of her husband. The position of defendant is that on October 8, 1906, her husband was insolvent, and that the conveyance made by him to his wife was voluntary and without consideration, and, under section 3442 of the Civil Code, was fraudulent and void as to existing creditors, "and appellant has no right, title, interest, or claim in or to said property."

[1] It is not shown that defendant or any of the creditors of Wills knew that his wife claimed the property prior to October 8, 1906. Except as appears from her testimony, it was not shown that her husband understood that he was to make the purchase for her. His acts, unexplained, would seem to leave a strong inference that there was no such understanding. Without entering upon an analysis of plaintiff's testimony, we think the facts and circumstances thus far disclosed warranted the court in finding that on October 8, 1906, Hamilton Wills had the legal title unaffected, so far as his creditors were concerned, by any equity of his wife in the property.

[2] The question we are next to determine is: Was Mr. Wills insolvent at that time, and were the subsequent proceedings, as they appear in the record, sufficient to justify the finding that defendant, ever since the 12th day of January, 1912, "has been and now is the owner of all said property." There was evidence that on October 8, 1906, Wills was indebted to defendant in the sum of $4,432.72, on which some payments were afterwards made, leaving due, in February, 1908, $2,680.82, for which defendant brought suit, and on June 26, 1908, obtained judgment against Wills, "which was never vacated, modified, or set aside or appealed from, and duly became a final judgment in said action." It appeared that, on October 16, 1906, Wills made an assignment to E. B. Martinelli of his interest in certain building contracts for the construction of two two-story residences in Ross Valley—

"in trust to be applied by the said Martinelli to the payments of said amounts as may hereafter become due to any person, firm, or corporation on account of materials furnished or labor performed in completing said contracts. Any balance remaining of said moneys after full payment of all amounts which may hereafter become due after completing said contracts as aforesaid shall be paid by said E. B. Martinelli pro rata to the following named persons, who now have claims against the said contracts, to wit: E. K. Wood Lumber & Mill Company. Fox (electrician). Pearson (plasterer)."

It appeared that this assignment was made because Wills was financially unable to purchase the necessary materials to complete the buildings; that, prior to October 8, 1906, he had been pressed by defendant for payment but was unable to respond; that he paid some installments, and had reduced the debt, as above stated, when defendant brought suit against him. Wills was called as a witness by defendant, and testified that he was solvent at the above date; that he had $1,000 or $1,200 in bank and owned certain personal property the value of which he stated at about $300, besides his interest in the said assigned contracts. His statement that he was solvent was disputed by uncontroverted evidence. He filed a voluntary petition in insolvency on July 10, 1908, on July 17, 1908, was adjudged an insolvent, and on October 31, 1908, he was duly discharged in

bankruptcy. In his petition he showed liabilities amounting to $4,241.02 and assets amounting to $3,416.35, of which $658 was claimed as exempt. Among the liabilities was stated $2,680 due defendant "1906-1907." On the schedule were the names of 19 other creditors in various amounts, some of which were of date 1905 and 1906 and some in 1907. Witness Pitcher, manager of defendant corporation, testified that his company continued to do business with Wills after October 8, 1906, and "sold him roughly $9,000 worth of stuff, after October 8, 1906; the last date was February 12, 1909"; and plaintiff contends that this is inconsistent with the claim that Wills was insolvent October 8, 1906. Pitcher testified that of the $4,432.72 due on that date Wills paid all but $2,680.82; "that was part of the indebtedness due to defendant on October 8, 1906; no part of that $2,680.82 has ever been paid to defendant," and this was the amount for which defendant obtained judgment, June 26, 1908, as stated above, and is the amount mentioned as due defendant in Wills' schedule of debts filed in the bankruptcy proceeding. There is no explanation as to the payments made on purchases from defendant after October 8, 1906. Presumably they were met at the time as the claims accrued.

It is urged as unlikely that defendant would continue doing business with Wills, if defendant knew him to be insolvent and unable to pay debts then due defendant. It is not unusual for creditors to give extensions or make advances to debtors to tide them over conditions of financial stress, in the hope that they may find relief from their embarrassments. Indulgences of this character may continue over a considerable space of time, but without favorable results, as appears to have been the case here. If Wills had paid his debts existing on October 8, 1906, and the liabilities which forced him into bankruptcy had arisen after the date named, there might be merit in the contention that he was not insolvent when he conveyed the property to his wife. But the evidence is that he was not then able to pay his debts out of his own means, nor was he so able at any later date. His insolvency existed on October 8, 1906, and continued to the date when he was declared an insolvent; his schedule of debts showing dates prior to 1906. The court found that on that day and for a long time prior thereto Hamilton Wills was indebted to defendant in the amount stated, "and was also indebted to divers and other persons in large and sundry sums of money, and that on said 8th day of October, 1906, Hamilton Wills was unable to pay his debts in full from his own means as the same became due in the ordinary course of business and was insolvent." We think there was evidence sufficient to support this finding.

[3, 4] It remains to notice by what means defendant obtained title to the land. Defendant's judgment was entered June 26, 1908, and Wills was adjudged a bankrupt on July 17, 1908. The judgment having been entered within four months prior to the filing of the petition in bankruptcy, it was dissolved by the adjudication of Wills' bankruptcy (subsection "c" § 67, Bankr. Act), and the trustee of the estate of such bankrupt "shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate" (Bankr. Act, § 67b). The consent of E. K. Wood Lumber & Mill Company to such subrogation was duly filed. On June 6, 1910, by the trustee of the estate of Wills, a bankrupt, a petition was filed for an order that "the trustee be subrogated to the rights of the said E. K. Wood Lumber & Mill Company, and that the rights under said judgment pass to and be preserved for the benefit of the estate of the said bankrupt, and for such other and further order as to this court may seem meet and proper." Section 67c, supra, further provides:

"Or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee * * * shall be subrogated * * * and empowered to perfect and enforce the same * * * as such holder might have done had not bankruptcy proceedings intervened."

In his petition the trustee alleged that Wills was the owner of the land in question on October 8, 1906; that on that day he conveyed the property to his wife without consideration; that he was then insolvent, and that said transfer was made with intent to delay and defraud the creditors of said Hamilton Wills; set forth also the facts as to the indebtedness of Wills to E. K. Wood Lumber & Mill Company and as to its obtaining judgment as hereinabove shown; that Emily Wills had executed a declaration of homestead on said property, as already shown; that Wills had filed his petition in bankruptcy and had been adjudicated a bankrupt, etc.

On June 6, 1910, Milton J. Green, referee in bankruptcy, made his order in which all the foregoing proceedings are recited as set forth in said petition of the trustee; also that said E. K. Wood Lumber & Mill Company had appeared in open court and agreed with the trustee herein that said company—

"should prosecute, in the name of said trustee and for the benefit of the estate of said bankrupt, an action to set aside the conveyance of October 8, 1906, hereinbefore referred to, from said Hamilton Wills, Jr., said bankrupt, to Emily Wills, his wife, and * * * having further agreed in open court to indemnify the said trustee for all costs, that might be incurred in the said action. It is hereby ordered: [Then follows the order subrogating the trustee to all the rights of said company.] It is further ordered that said E. K. Wood Lumber & Mill Company * * * be and they are hereby authorized to commence and prosecute such action and to pursue such legal remedies as they may deem proper in order to enforce the rights arising out of the judgment hereinbefore referred to, and to set aside and annul that certain conveyance made by the said bankrupt to Emily Wills, his wife, on the 8th day of October, 1906, * * * and said E. K. Wood Lumber & Mill

Company is hereby authorized to prosecute such action in the name of the trustee herein and for the benefit of the estate of said bankrupt."

Section 67f of the Bankrupt Act provides as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. * * *"

It will be recalled that the judgment was recovered June 25, 1908, by defendant against Wills, and on July 8, 1908, plaintiff filed her declaration of homestead upon the property. On July 16, 1908, Wills filed his petition in bankruptcy, and on the 17th was adjudged a bankrupt. The transfer by Wills to his wife being void as to creditors, defendant, but for the bankruptcy proceedings, would have been entitled to execution on its judgment and sale thereunder, notwithstanding the homestead declaration, for the latter was subject to the lien of the judgment. First National Bank of Los Angeles v. Maxwell, 123 Cal. 360, 371, 55 Pac. 980, 69 Am. St. Rep. 64; Bekins v. Dieterle, 5 Cal. App. 690, 694, 91 Pac. 173. The bankruptcy proceedings rendered it impossible for defendant to avail itself of this right. The trustee in bankruptcy became subrogated to defendant's rights, and had it not been for the saving clauses in the bankrupt act the provision of section 67c, under which the lien was dissolved, would have given vitality to the declaration of homestead and the bankrupt would have had the right under the act to have his homestead exempted. But here interposed the provision above quoted that:

"If the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved," etc.

The effect of the statute was to dissolve the judgment as a preferential lien in favor of the creditor, but recognized the lien and preserved it for the benefit of all the creditors. First National Bank v. Staake, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967.

[5] It was under these provisions of the law that the proceedings above set forth were had, empowering defendant to act in the premises, and it thereupon on October 31, 1910, caused execution to issue on its said judgment and the property to be sold by the sheriff. On December 3, 1910, the sheriff issued his certificate of sale in due form, reciting that he had sold the property to said E. K. Wood Lumber & Mill Company, and on January 12, 1912, he duly executed and delivered his deed to said property as sheriff to said company, in which the usual recitals in sheriff's deeds are set forth and said deed was duly recorded on the 19th of January, 1912.

Appellant calls attention in her brief to the order of the bankrupt court, authorizing defendant to commence proceedings to annul the conveyance to plaintiff, and now claims that the authority given was to proceed in the name of the trustee and for the benefit of the bankrupt estate, whereas defendant proceeded in its own name for its own benefit, and now holds the sheriff's deed in its own name. There was no demurrer to the answer, and no objection was made to the introduction of the proceedings in bankruptcy, except the general objection of immateriality and irrelevancy. The order is susceptible of the construction that the authority was given to the defendant to proceed as it might deem best or to proceed in the name of the trustee. It is clear, however, that in either case the result should, if favorable, inure to the benefit of the bankrupt estate, and we must presume that the trustee will see to it that the estate gets the benefit.

[6] Appellant is in error in assuming that the discharge of Wills from his liabilities had any effect upon the liens existing against his property. He is released from personal liability only. He has no concern with the property which passed to the trustee. Valid liens may be enforced after the bankrupt is discharged. Loveland on Bankruptcy (3d Ed.) § 385.

[7] Appellant is also in error in her contention that proof of actual fraud was necessary. Section 3442 of the Civil Code makes a transfer fraudulent and void as to existing creditors, as a matter of law, when the transfer is voluntary or without a valuable consideration, by one while insolvent, or in contemplation of insolvency. Cook v. Cockins, 117 Cal. 148, 48 Pac. 1025. The claim that the premises in question were always the homestead of plaintiff since 1905 is true only in the sense that they constituted her home. As a homestead in contemplation of the statute, free from the claims of her husband's creditors, it is not true. It was subject to the lien of defendant's judgment, as we have seen, and the lien thus created ripened into complete title adverse to plaintiff.

[8] Error is assigned in permitting the defendant, over plaintiff's objection, to make plaintiff's husband a witness against her without her consent. The court allowed questions to be answered as to declarations and acts of Wills affecting the question of his solvency or insolvency on October 8, 1906. The court, however, finally, on motion to strike out all of Wills' testimony "as to declarations made subsequent to the execution and delivery of deed of gift of October 6, 1906, to his wife," said:

"The Court: They will not be considered. I will simply make a general rule. I will not consider them in deciding the case. You cannot direct me to the particular things at this time. The motion will be granted, if there are any declarations subsequent."

We must assume that the court did as it promised to do. The insolvency of Wills was shown, irrespective of any testimony given by him which the ruling of the court excluded.

[9] Plaintiff claims that she established title by prescription; that her possession after October 6, 1906, was adverse, open, and notorious under claim of separate ownership and continued for more than five years prior to the commencement of this action; and that she paid all taxes which have been levied and assessed upon the premises. Defendant ignores this claim in its brief and has not given the court any aid in solving the question. The undisputed evidence was that plaintiff and her husband were in possession of the lot in 1905 under the deed from Croker to Wills; that on October 8, 1906, Wills conveyed the lot to plaintiff and the deed was recorded on that day; that plaintiff and her husband have ever since had possession of the lot, and plaintiff has paid all the taxes levied and assessed against the property since said date.

We held, in Madden v. Hall, 21 Cal. App. 541, 132 Pac. 291, that a married woman not living separate and apart from her husband and having no claim in her own right to land cannot acquire title to it as her separate estate by adverse possession. The deed to her by her husband we have held was null and void and conveyed no title. She therefore had no claim in her own right, and the rule just stated would seem to apply. If it should be said that her declaration of homestead imported color of title, five years had not elapsed from its date, July 8, 1908, before this action was commenced, to wit, September 23, 1912. It may be doubted, also, whether the adverse claim continued to run after the proceedings in bankruptcy were commenced, and the subrogation of the trustee to the rights of the E. K. Wood Lumber & Mill Company in the judgment which was a lien on the property. These proceedings were had in 1910, under which the property was in that year sold to satisfy the judgment, and the sale culminated in the deed the source of defendant's title.

We have thus endeavored to dispose of the somewhat complicated questions in the case so far as plaintiff has presented them in her brief. Our conclusion is that the evidence supports the findings and the findings support the judgment.

The judgment and order are therefore affirmed.

We concur: BURNETT, J.; HART, J.

In re EMMONS. (Cr. 431.)

(District Court of Appeal, Second District. California. Dec. 7, 1915.)

ATTORNEY AND CLIENT ⊂⊃39—DISBARMENT —CONVICTION AND PARDON.

An attorney cannot be disbarred solely on a record of conviction, where he has been pardoned.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 52; Dec. Dig. ⊂⊃39.]

Disbarment proceeding against E. J. Emmons. Proceeding dismissed.

W. H. Anderson, Loeb, Walker & Loeb, Anderson & Anderson, and E. G. Kuster, all of Los Angeles, and Rowen Irwin, H. E. Johnstone, and J. R. Dorsey, all of Bakersfield, for respondent. James F. Farraher, Deputy Dist. Atty., and Barclay McCowan, Dist. Atty., both of Bakersfield, amici curiæ.

CONREY, P. J. At all times mentioned in the record of this proceeding respondent was, and he now is, an attorney at law admitted to practice in the courts of California. On the 6th day of August, 1915, a petition for his disbarment was filed in the Supreme Court by a bar association of Kern county, and the matter was thereafter transferred to this court. The petition is based upon a judgment of conviction whereby the respondent was convicted of a felony for asking and receiving a bribe, and a duly certified copy of the judgment of conviction is attached to the petition and is a part thereof. That judgment was rendered on October 31, 1905, and on the 12th day of March, 1908, was affirmed by the District Court of Appeal for the Third District. The sentence was for five years' imprisonment, the remittitur was filed on May 18, 1908, and the term of actual imprisonment began a few days later.

The petition for disbarment is based solely on the judgment of conviction. Apart from that judgment no charge is made that the respondent has committed any act involving moral turpitude, dishonesty, or corruption, or any other act which would be a cause of disbarment. Code Civ. Proc. § 287. Separate and direct charges would require separate and direct proof, and would open the case to examination by means of other evidence which might be produced by those prosecuting the charge, or by the respondent. Even if (which we do not decide) the judgment of conviction would be receivable as evidence upon such separate charges, it would not be the sole and conclusive evidence provided in a proceeding based solely upon a judgment of conviction of a felony. Code Civ. Proc., sec. 287, subd. 1. The petitioners having relied upon such judgment of conviction as the sole foundation for this proceeding, that judgment is conclusive against the respondent if it is admissible in evidence. If it is not admissible, the case against respondent must fall, because no other evidence can be received in this proceeding.

The respondent has filed herein certain objections which are in the nature both of a demurrer and an answer. We shall not find it necessary to discuss the demurrer. The answer sets forth that the conviction shown by the certified copy of the record of conviction annexed to the petition herein has been annulled and set aside in this, that on the 29th day of June, 1910, respondent received from the Governor of California a pardon for the offense set forth in the judgment of conviction. The respondent submitted to the court with his answer a copy, duly certified by the secretary of state, of the above-mentioned pardon. This document sets forth by way of recital the fact that the defendant had been released upon parole, and since such release had "proven himself to be an industrious, sober, and upright man," and that the state board of prison directors by resolution recommended to the Governor of the state that he do extend executive clemency to the defendant. Thereupon the document concludes that the Governor does, by virtue of the authority vested in him by law, "hereby pardon the said E. J. Emmons and order that he be restored to citizenship." It has been held that a pardon "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. This is nevertheless subject to the limitation that an attorney may be disbarred for acts of a felonious nature where a pardon has followed the conviction of a crime, since evidence of the criminal acts may constitute proof of the charge that the respondent is unfit to be an attorney at law. This is so for the reason that the pardon does not restore his good moral character. Thornton on Attorneys, § 863.

Among the cases to which we are referred is that of People v. George, 186 Ill. 122, 57 N. E. 804, which counsel (amici curiæ) assure us is "practically on all fours with the case at bar." From that decision we learn that Mr. George was disbarred, not only upon proof of charges showing that he had been convicted of a felony and thereafter pardoned, but also because after the pardon he had committed other acts of a criminal nature, convincing the court that, notwithstanding the pardon, the accused did not possess a good moral character, and that he was not a proper person to retain his license to practice law. The question as to whether or not a record of conviction could be made the sole basis of such a charge, and accepted as constituting the sole and conclusive ground for disbarment after the pardon had been granted, did not arise in that case. If that question had been presented, the decision very probably might have been in favor of the respondent. This is indicated by the fact that the court quoted with approval the decision of the Supreme Court of Maine in Penobscot Bar v. Kimball, 64 Me. 146. There the charge was that the respondent was found guilty of dishonesty and bad faith toward clients in several instances, and there was a separate specification that the respondent "does not possess a good moral character," in that at a certain term of court he was convicted of the crime of forgery. As to this particular specification the respondent proved that he had received a pardon for the offense of which he had been convicted. The crime for which he was convicted and sentenced was the forgery of a deposition and caption thereto annexed. Relying upon Ex parte Garland, supra, the court held that the effect of the pardon was not only to release the respondent from punishment—

"but also to blot out the guilt thus incurred, so that in the eye of the law he is as innocent of that offense as if he had never committed it."

But it was pointed out that the respondent in his capacity as attorney had done more than commit the forgery of which he was convicted, in that afterwards he had offered the forged document as evidence in court.

"The executive pardon affords the respondent no protection from the consequences which the law attaches to this offense. Pardon for one crime does not release a party from the penalties and disabilities consequent upon the commission of another. A pardon for forgery does not prevent a party from suffering the consequences attached to a conviction for adultery or larceny, nor blot out the guilt inseparable from such crimes and give their perpetrator a new character for chastity and honesty. The indictment upon which the respondent was convicted contains no count for a violation of his official oath or for a fraud upon the court. The respondent's pardon for forgery can no more obliterate the stain of guilt for those offenses than the judgment in that case would be a bar to an indictment for their commission."

It seems clear that if, as in the case at bar, the Kimball Case had been one where it was sought to disbar the respondent solely upon the ground that he had been convicted of a felony, the subsequent pardon would have been recognized as a sufficient defense.

In Scott v. State, 6 Tex. Civ. App. 343, 25 S. W. 337, it was sought to obtain a judgment of disbarment founded upon article 226, Revised Statutes of Texas, reading thus:

"No person convicted of a felony shall receive license as an attorney at law; or if licensed, any court of record in which such person may practice shall, on proof of a conviction of any felony, supersede his license and strike his name from the roll of attorneys."

The plaintiff in error had been convicted of a felony but immediately thereafter pardoned by the Governor, several years before this proceeding was instituted against him. The court said:

"We are of opinion that after he received an unconditional pardon, the record of the felony conviction could no longer be used as a basis for the proceeding provided for in article 226. This record, when offered in evidence, was met with an unconditional pardon, and could not therefore properly be said to afford 'proof of a conviction of any felony.' Having been thus canceled, all its force as a felony conviction was

taken away. A pardon falling short of this would not be a pardon, according to the judicial construction which that act of executive grace has received. Ex parte Garland, 4 Wall. 344 [18 L. Ed. 366]; Knote v. United States, 95 U. S. 149 [24 L. Ed. 442], and cases there cited; Young v. Young, 61 Tex. 191. Cases may be found holding that a pardon does not operate as a bar against a proceeding to strike an attorney from the rolls on account of the professional misconduct involved in the transaction which culminated in the conviction. Penobscot Bar v. Kimball, 64 Me. 140; In re ——, an Attorney, 86 N. Y. 563. In these cases the proceedings to disbar were not founded on statutes like ours, declaring the effect of a felony conviction, but upon facts showing professional misconduct. Where the proceeding, as in this case, depends alone upon the felony conviction, and that is wiped out by a pardon, the whole case falls."

In legal effect the case at bar comes within the rule, which we think is correctly stated in the Texas case. Notwithstanding that the respondent at one time stood convicted of a felony and that the record of conviction might have been used as the foundation for this proceeding while the judgment of conviction was in force, it is no longer possible, after the pardon, to disbar him by this statutory proceeding wherein, if it is maintainable at all, judgment must go against him without any opportunity to defend against any present imputation against his moral character. If those responsible for this prosecution believe, or have grounds for believing, that the respondent is not now a person of good moral character, or that he has committed any acts which should move the court in its discretion to disbar him at this time, those charges should be framed in such manner as will fairly test the respondent's rights by giving him a full opportunity to defend upon the merits.

The objections made by respondent are (as to the points discussed herein) sustained, and the proceeding is dismissed.

We concur: JAMES, J.; SHAW, J.

171 Cal. 741

NEWLANDS v. SUPERIOR COURT OF LOS ANGELES COUNTY. (L. A. 4240.)

(Supreme Court of California. Jan. 19, 1916.)

1. DIVORCE ⟸286—REVIEW—DISCRETION OF COURT.

Only a clear abuse of discretion of the trial court in granting or refusing temporary alimony given by Civ. Code, § 137, will be reviewed by the Supreme Court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. ⟸286.]

2. MANDAMUS ⟸32—SCOPE OF WRIT—SUBJECTS OF PROTECTION.

Where the discretion of the trial court in granting, under Civ. Code, § 137, temporary alimony to enable wife to support herself or to prosecute a pending action of divorce, could be exercised in only one way, mandamus to enforce such discretion will issue.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 73, 78; Dec. Dig. ⟸32.]

3. DIVORCE ⟸182—ALIMONY—DISCRETION OF COURT.

Where the evidence showed that the wife had deserted her husband, that her action for divorce was not instituted until after the husband had inherited large estate, and that the husband was the aggrieved party and entitled to a decree, the court may refuse to award alimony under Civ. Code, § 137, pending an appeal from the decree for husband, the fact that the wife was afflicted with a disease incapacitating her for work not rendering her husband liable for her support.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 568, 587, 588, 625, 638, 641, 657; Dec. Dig. ⟸182.]

4. DIVORCE ⟸182 — ALIMONY — ATTORNEY'S FEES.

Where the husband consented that the fees of attorneys for his wife should be determined at the conclusion of her appeal from a divorce decree in his favor, the court may properly deny fees pending appeal, it being no hardship to require the attorneys to wait the determination

of the action, as the payment of the fees was not jeopardized by the delay.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 568, 587, 588, 625, 638, 641, 657; Dec. Dig. ⟸182.]

In Bank. Application by Viola Newlands for writ of mandate against the Superior Court of the County of Los Angeles. Mandate denied, and writ discharged.

R. A. Dunnigan, of Los Angeles, for petitioner. George Beebe, of Los Angeles, for respondent.

HENSHAW, J. This is an original petition for mandate to compel the superior court of Los Angeles county and Hon. Charles Monroe, judge thereof, to grant the petitioner alimony pendente lite, attorneys' fees and costs, growing out of the matter of her proposed appeal from the judgment and decree of divorce awarded against her.

By his answer respondent shows that petitioner, Viola Newlands, brought her action against her husband, Joseph R. Newlands, on the 24th day of August, 1914. She charged that the defendant abandoned her in the city of New Orleans on the 3d day of April, 1911, and ever since has without cause failed to provide for her. She also charged him with the infliction of extreme cruelty upon her. The defendant answered and likewise filed a cross-complaint in which he sought a divorce from plaintiff upon the twofold grounds of her desertion and her cruelty. Pending the trial of this action plaintiff, under order not made by respondent, was in receipt of alimony pendente lite. The trial had before respondent resulted in his finding, upon ample legal evidence, that defendant had not deserted plaintiff and had not treated her with cruelty, had not applied to her violent and offensive names, and had never struck or beaten her; that defendant was not, as charged, at the time he contracted marriage afflicted with a loathsome venereal disease; that plaintiff upon the trial introduced evidence to show that she was and had been suffering from a venereal disease called gonorrhea, but neither this nor any other disease had been communicated to plaintiff by defendant; that during their married life together defendant provided for plaintiff according to his circumstances; that they were married in the city of New Orleans in 1909, and came to California in 1910; that on the 3d day of April, 1911, plaintiff, against the protest of her husband, insisted upon returning to New Orleans and did return, deserting and abandoning her husband and her child about one year of age; that defendant protested against this desertion and abandonment of himself and their child, and that plaintiff with profanity declared her intention of returning to New Orleans, and demanded money of defendant to enable her to do so, threatening to commit suicide and to kill herself and child if the money was not forthcoming. Defendant's pleadings were unavailing, and on April 3, 1911, plaintiff took the train and went to New Orleans, where she remained until about the 4th of August, 1914. During the first year of her absence plaintiff wrote several letters to her husband asking him to send her money to enable her to return. The court found that defendant did not send her money directly, but did send money in payment of debts which she had contracted in New Orleans. The court further found that her offers to return and her demand for money were not made in good faith, and that plaintiff was at the time carrying on a correspondence of an improper character with another man in the city of Los Angeles. For about three years before her return to Los Angeles she had no manner of communication with her husband, and made no offer nor effort to return to him and to her child.

Defendant's mother died in 1914, and upon her death he inherited property to the value of at least $100,000. Thereupon a woman, an enemy of defendant, caused advertisements to be published in New Orleans newspapers seeking to locate plaintiff and petitioner. She was thus located, and this woman then wrote to petitioner, telling of her husband's inheritance, and advising her to come to Los Angeles and bring suit and obtain some of the money. As a result of these efforts petitioner returned to Los Angeles in 1914 and began her action for separate maintenance. Upon the trial the respondent found and determined that plaintiff's case was without merit, and found and determined that there was an abundance of competent evidence justifying and demanding of the court the findings of fact, conclusions of law, and decree of divorce, which were given. In view of all these facts and circumstances and of the conclusion of the court embodied in its judgment that plaintiff's cause of action against her husband was without merit and the defendant was entitled to a divorce from plaintiff and petitioner, the respondent, in the exercise of the discretion vested in him by law, denied petitioner's motion for alimony pendente lite, under the conviction that she was no longer entitled to look to her husband for any support, and that her husband was neither morally nor legally bound to contribute to that support. In the matter of the appeal the respondent declares further his conviction that the appeal is not taken in good faith, but that to the end that petitioner may not be deprived of the power to present such matters upon appeal as may be thought to be meritorious, provision has already been made for the payment of the cost of preparing the transcript on appeal, which cost it has been arranged will be met by defendant. In the matter of attorneys' fees, expressing the same conviction that the proposed appeal is without merit and is not taken in good faith, respondent further declares that his discretion in the matter of the fixing of the fee can be the more wisely exercised upon the

coming down of the remittitur following the determination of the appeal to this court, and that he is prepared at the present time, upon suggestion or mandate from this court, to fix a minimum fee in the sum of $50, with the understanding that full compensation will be awarded for the services of petitioner's attorney upon the termination of the litigation, when respondent's discretion can be the more wisely exercised to this end.

[1, 2] It must be conceded and indeed is not questioned but that a discretion is vested in the trial court in the matter here under consideration (Civ. Code, § 137), and that only a plain abuse of discretion is subject to correction at our hands (Smith v. Smith, 147 Cal. 143, 81 Pac. 411; Gay v. Gay, 146 Cal. 240, 79 Pac. 885). Nor does it require the citation of authority to the proposition that even where discretion is vested, if that discretion under the facts can be legally exercised in but one way, mandate will lie to compel the inferior tribunal so to exercise it.

[3] The simple question left for consideration, therefore, is one of fact. Can it be said that under respondent's showing of fact the position which he has taken evinces a plain abuse of discretion? He was the judge who tried the cause. Before him appeared all of the witnesses and he heard all of the evidence. It was his right to take into consideration all of these matters in exercising his discretion in the decision of the motion subsequently made before him. Harron v. Harron, 128 Cal. 305, 60 Pac. 932; Gay v. Gay, 146 Cal. 238, 79 Pac. 885. His conclusion upon the main case that plaintiff's action for separate maintenance was without merit and that defendant was entitled to a divorce, necessarily contained in it his conviction that the husband was no longer legally or equitably charged with the support of the wife. The affidavits of the wife filed in support of her motion that the venereal disease from which she suffered had impaired her health and rendered her incapable of performing manual labor as a domestic, which, it is said, was the only kind of labor at which she could support herself, would, if petitioner were destitute, make her an object of charity, but did not impose upon the divorced husband the duty of maintenance. The second phase of the matter, namely the costs upon appeal, is sufficiently covered by respondent's answer that costs upon appeal have actually been provided for and the appeal has been taken.

[4] In the matter of attorneys' fees we can perceive no objection to the attitude which the trial court took and has maintained. In all other cases an attorney's compensation is estimated when his services have been performed. It is not even open to question but that the value of those services can be better arrived at after they are performed than before. No more hardship is imposed upon the attorney in such a case than is imposed upon the attorney for an executor or other trustee who must first perform the services and await the settlement of the executor's or trustee's account before receiving his award. Upon the determination of this appeal and the going down of the remittitur, the trial court will still have the parties litigant before it and the respondent can then, as he suggests, the more wisely exercise his discretion in the matter of the allowance of attorneys' fees.

The objection that an allowance of such attorneys' fees cannot be made after the services have actually been rendered, which objection is based upon the declarations in Mudd v. Mudd, 98 Cal. 322, 33 Pac. 114, Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87, and Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056, is entirely obviated by force of the circumstance that in this case the husband did not object, but stipulated in writing his consent that this might be done. As the husband is the only person whose rights could be injuriously affected by such an order, his consent thereto removes any possible difficulty in the way of its legality and enforcement. And, finally, it may here be said that the same showing which we hold is sufficient to sustain the court's order refusing alimony pendente lite will equally sustain its order refusing any attorneys' fees whatsoever. Therefore it is unnecessary that mandate should issue. A suggestion to the trial court that it proceed to do what it has declared its willingness to do is sufficient in the premises.

Mandate is denied, and the writ discharged.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

171 Cal. 691

HOLABIRD v. RAILROAD COMMISSION OF STATE OF CALIFORNIA.

(L. A. 3986–3988.)

(Supreme Court of California. Jan. 17, 1916.)

CERTIORARI ⊂⊃24—DECISIONS REVIEWABLE—FINALITY—PRELIMINARY ORDER.

Code Civ. Proc. § 1068, authorizes a writ of review when an inferior court, etc., exercising judicial functions, has exceeded its jurisdiction, and there is no appeal nor any adequate and speedy remedy, and section 1074 declares that review shall not extend further than the determination whether such inferior tribunal has regularly pursued its authority. Public Utilities Acts (St. Sp. Sess. 1911, p. 55; St. 1915, p. 161) § 67, provides that one aggrieved by any order of the Railroad Commission may apply to the Supreme Court for a writ of review to determine whether the commission has regularly pursued its authority, and section 60, giving the commission certain powers, does not authorize a proceeding to determine whether a particular person, etc., is carrying on a public utility or a private enterprise. The commission, on complaints of several parties that petitioner, a corporation organized to sell, rent, and distribute water to the public for irrigation purposes, had refused to deliver water to complainants, and

seeking an order requiring it to deliver water, over its demurrer to the complaints, on the ground that the commission had no jurisdiction, heard evidence, found it to be a public utility water system, and overruled the demurrer, leaving the case still pending for final determination. *Held*, that a petition for writ of review of the commission's rulings preliminary to the final determination was premature, and would be dismissed without prejudice.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 37; Dec. Dig. ⟹24.]

In Bank. Petition for writ of review by W. H. Holabird, receiver of the property of the California Development Company, against the Railroad Commission of the state of California. Petition dismissed, without prejudice.

W. B. Mathews and S. B. Robinson, both of Los Angeles, for petitioner. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for respondent. Haines & Haines, of San Diego, and John M. Eshleman, of El Centro, amici curiæ.

SHAW, J. In each of the aforesaid cases the petitioner seeks to review and annul an alleged decision and order of the Railroad Commission. The order in No. 3986 was made upon the complaint of Louis J. Ivey to the commission; that in 3987 upon the complaint of Adolph Becker; and that in No. 3988 upon the complaint of F. W. Weeks, as president of the Holtville city council. The nature of the proceedings may best be shown by a brief statement of the facts alleged in the complaint of Becker and of the order made in that case.

Becker complained to the commission, alleging that the California Development Company was a corporation organized under the laws of New Jersey to carry on the business of selling, renting, and distributing water for irrigation purposes for compensation and hire; that it was operating an irrigation system in the county of Imperial, and thereby distributing, selling, and renting water generally to the public in that county, for the irrigation of the land of the Imperial valley, including a tract of land of Becker containing some 240 acres; that, in an action pending in the superior court, W. H. Holabird had been duly appointed receiver of said company, and in that capacity was carrying on the business of the company; that Becker needed water with which to irrigate his land, and had demanded the delivery thereof from said receiver, offering to pay the usual rate fixed therefor, but that the receiver thereupon refused, and still refuses, to deliver any water to said Becker. The prayer was that the commission make an order requiring the receiver to deliver water to Becker for the irrigation of said land at the same price and terms upon which it delivered water to other persons owning lands under the system. The receiver appeared and filed a paper, denominated a demurrer to the complaint of Becker, on the ground that the commission had no jurisdiction of the proceeding. The particular point stated in the demurrer was that it did not appear that the water supply in charge of the defendant as receiver is, or ever has been, dedicated to public use, or that the system controlled by him is a public utility. The commission did not see fit to rest its determination as to its jurisdiction upon the allegations of the complaint of Becker to which the demurrer of Holabird was addressed, but took evidence on the subject of the character of the company and made findings of fact upon the evidence. Thereupon it made the following order:

"A public consolidated hearing having been held in the above-entitled cases on the question whether the Railroad Commission has jurisdiction over the defendants, and this question being now ready for decision, the Railroad Commission, in reliance on each statement or finding of fact contained in the opinion which precedes this order, hereby finds that the water system of California Development Company is a public utility water system, and that W. H. Holabird, as receiver thereof, is a public utility, subject to the jurisdiction of the Railroad Commission. It is accordingly ordered that the demurrers in each of the above-entitled cases be, and the same are hereby, overruled, and the defendant in each of said cases is hereby given twenty (20) days from service of a certified copy of this opinion and order in which to satisfy the respective complainants or to answer."

It is this order which the petitioner here seeks to review. In regard to the complaints of Ivey and Weeks like proceedings were had, resulting in orders the same in form as that above given. At the close of its opinion, referred to in the above order, the commission says:

"It will be understood, of course, that the present decision deals only with the question of this commission's jurisdiction. If this decision stands, it by no means necessarily follows that complainants in any or all of these cases will ultimately secure the relief for which they ask."

Each case is still pending before the commission for final determination. The orders asked for have not been made and may yet be denied. No final determination of either case has been made. It may be that the receiver will not be injured or the system he controls at all be affected by the final orders. We think this proceeding is premature.

The writ of review lies only when the final determination of an inferior court, tribunal, or board is in excess of its jurisdiction. Code Civ. Proc. § 1068. The language of the section limits it to cases where the tribunal "has exceeded" its jurisdiction. It does not lie to determine the correctness, in point of law, of rulings or decisions made by such court, tribunal, or board, upon objections made or questions arising in the course of the proceeding or cause preliminary and prior to the final determination regarding the action which it is asked to take in the matter. Wilson v. Sacramento County, 3 Cal. 386; People v. County Judge, 40 Cal. 479; Aberding v. Macham, 40 Cal. 656; Lamb v. Schottler, 54 Cal. 320; Sayers v. Superior Court,

84 Cal. 642, 24 Pac. 296; Gauld v. Board, 122 Cal. 18, 54 Pac. 272. In Wilson v. Sacramento County the board of supervisors had overruled an objection that it had no jurisdiction over an application for a ferry license, but had not granted or refused such license. In People v. County Judge the judge had entertained an application of certain street commissioners asking him to fix the compensation which they should receive, and had set the application for hearing, but had not otherwise acted upon it. In Lamb v. Schottler one of the points involved was the right to a review of the action of the board of supervisors upon a proposed resolution, which was still pending before it and had not been adopted. In Sayers v. Superior Court the petitioner had been cited to show cause why he should not be punished in contempt for disobeying an order of the superior court, but he had not been adjudged guilty or tried on the charge. In Gauld v. Board an application had been made to the board of supervisors for a telephone franchise and certain proceedings had been taken under the statute toward the granting of such franchise, but none had been granted.

In all these cases it was held that the application for a writ of review was premature, and in each case the proceeding was accordingly dismissed or denied. In People v. County Judge, the court said:

"The writ of certiorari is a writ of review. Its office is to bring up for review final determinations and adjudications of inferior tribunals, boards, or officers exercising judicial functions, when there is no appeal, nor any plain, speedy, and adequate remedy. The writ is necessarily founded on a final determination."

It was further said that, if such writ might issue at any step in the proceedings of the inferior tribunal to annul its rulings:

"This would be the exercise of original jurisdiction by the court issuing the writ, and not a review of the determination of the inferior tribunal. The matter complained of would be, not that the tribunal had exceeded, but that it was about to exceed, its jurisdiction."

In Sayers v. Superior Court, the court said:

"The function of a writ of review is not to restrain the proceedings of an inferior tribunal, but to annul proceedings which have been taken without jurisdiction. It cannot be employed to prevent a threatened excess of jurisdiction. It is issued only when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer."

The present case cannot be distinguished from those above cited. There has been no final adjudication. The order merely overrules a demurrer. It does not decide the case. The decision of the commission that the California Development Company, through the receiver, is conducting a public utility, is preliminary only. Before proceeding to regulate, the commission must always ascertain that the person or corporation to be regulated is one over whom it is given authority, else it must refuse to act further. As it is a question affecting the jurisdiction of the commission to act at all, it may revoke its ruling thereon at any time before the action invoked by the complainant has been taken or refused, or at any time before the authority to grant a rehearing has expired. A lack of jurisdiction of the subject-matter is sufficient cause for arresting a proceeding at any stage, whenever it appears or is called to the attention of the tribunal, and it is not bound by a preliminary decision thereon.

There is nothing in the Public Utilities Act, under which the commission proceeds, which changes the general rule concerning writs of review in this respect. Section 67 of that act provides that a person claiming to be aggrieved by any order or decision of the commission may apply to the Supreme Court for a writ of review for the purpose of having the lawfulness of the order or decision inquired into and determined, and that:

"The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or the state of California." Stats. Spec. Sess. 1911, 55; Stats. 1915, 161.

Except for the reference to constitutional questions, which is perhaps unnecessary, the language quoted is similar to that of section 1074 of the Code of Civil Procedure, which declares that the writ of review "cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer." There is nothing in section 67 or in any other part of the Public Utilities Act which in any way indicates an intention by the Legislature to enlarge the writ so as to authorize this court to intervene in the course of a proceeding before the Railroad Commission, stop the proceedings, and determine whether or not its intermediate rulings are within its powers. Neither does the act empower the commission to make general adjudications regarding the character of the several water corporations or persons using or disposing of water, or conducting other business enterprises, within the state, for the purpose of ascertaining whether or not they, or any of them, are public utilities, within the meaning of the Public Utilities Act, and therefore subject to the jurisdiction of the commission. No proceeding is authorized for the mere purpose of determining this question with respect to any person or corporation. Section 60 authorizes the commission, of its own motion, or upon the complaint of any person, to inquire into any act or thing done by any public utility, and to make such order therein as may be necessary to compel such public utility to comply with the law or with the orders or rules of the commission, but it does not authorize a proceeding for the sole purpose of inquiring and determining whether a particular person or corporation is carrying on a public utility, or is engaged in a private enter-

prise. It follows that the decision of the commission, in the cases here involved, that the California Development Company is a public service corporation carrying on a public service, is not an adjudication of that question which is made final by any provision of the Public Utilities Act, and it remains in fieri, as in any other similar proceeding before a court or tribunal. This being the case, it is not an order or decision which is subject to review by this court. If the final order of the commission in any of the cases is adverse to the interests of the company in charge of the receiver, the decision that it is a public utility, if it then stands unrevoked, may be attacked and reviewed upon an application for the review of such final order.

The petitions are dismissed without prejudice to any subsequent proceeding.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

171 Cal. 728

FIDELITY & DEPOSIT CO. OF MARYLAND v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 7424.)

(Supreme Court of California. Jan. 18, 1916.)

1. MASTER AND SERVANT ⇐250¾, New, vol. 16 Key-No. Series—COMPENSATION FOR INJURIES—INDUSTRIAL COMMISSION—REVIEW OF DECISIONS.

Under Workmen's Compensation Act (St. 1913, p. 283) § 12a, subd. 3, as amended by St. 1915, p. 1081, imposing liability on employers without regard to negligence for any personal injury sustained by employés arising out of and in the course of the employment and for the death of any such employé where the injury is proximately caused by the employment with or without negligence, and is not so caused by the intoxication or the willful misconduct of the injured employé, the question whether an employé for whose death the Industrial Accident Commission awarded compensation was guilty of willful misconduct when he met his death is a jurisdictional question and subject to review by the Supreme Court.

2. MASTER AND SERVANT ⇐87½, New, vol. 16 Key-No. Series—WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT AS DEFENSE.

Under Motor Vehicle Act (St. 1913, p. 649) § 22 requiring every person operating a motor vehicle on the public highways of the state to do so in a careful and prudent manner, etc., and providing that it shall be unlawful to drive at a rate of speed in excess of 30 miles an hour, and making a violation thereof a misdemeanor punishable by fine or imprisonment or both, an employé killed while driving an automobile at a speed of from 35 to 45 miles an hour was guilty of willful misconduct within Workmen's Compensation Act, § 12a, subd. 3, especially where such speed was wholly unnecessary, and it was immaterial that, as found by the Industrial Accident Commission, this speed was not unusual according to the usual custom of drivers of automobiles in the vicinity, and was not so excessive as to amount to speed mania or to foolhardiness or dare-deviltry, or that it was not in violation of any instructions, rules, or orders of the employer.

In Bank. Original application by the Fidelity & Deposit Company of Maryland for a writ of review directed to the Industrial Accident Commission of the State of California and others. Award of the Commission annulled.

Guy Le Roy Stevick, A. C. Skaife, L. A. Redman, and Jewel Alexander, all of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. By this review petitioner seeks to have an award given under section 84 of the Workmen's Compensation Act of 1913, as that act was amended in 1915, declared invalid. W. D. Head, president and superintendent of the Head Drilling Company, a corporation, was killed. The award was made to his widow. There is thus within this case the question of the power of the commission to make any award in case of death. But, as that question is not necessary to the decision of this case, and as it is now under the consideration of this court in another case, it is here passed over without determination.

[1, 2] The question presented is whether or not Head was guilty of willful misconduct when he met his death. Workmen's Compensation Act, § 12a, subd. 3. This question is a jurisdictional one, and therefore subject to review by this court. Great Western Power Co. v. Pillsbury, 149 Pac. 35. Over the facts there is no dispute. In the course of his employment Head, who was at Taft, was directed to go to Los Angeles on the work of his company. He hired an automobile, with a driver, to take him from Taft to Bakersfield, at which point he proposed to embark on a train for Los Angeles. The distance between Taft and Bakersfield is about 40 miles, and he had four hours of time to make the run and catch his train. Leaving Taft, he displaced the driver, and took the wheel himself. It was in the night time. The commission finds the following:

"That at said time he was driving the automobile at a rate of speed from 35 to 45 miles per hour. That said rate of speed was not entirely safe in view of the condition of the road at the place of the accident, but that the evidence is insufficient to establish that such speed was unusual according to the usual custom of drivers of automobiles in that vicinity, or that it was so in excess of customary rates of speed as to amount to speed mania, or that said excessive speed amounted to more than ordinary negligence or amounted to foolhardiness or dare-deviltry; that the act of the deceased in driving at said rate of speed was not in violation of any instructions, rules, or orders made by the said employer, the W. D. Head Drilling Company, for the safety of its employés or any of them."

While so driving the car it ran into a sandy piece of road and overturned. Head was killed, and the driver injured.

The law of this state in the Motor Vehicle Act (Stats. 1913, p. 649) declares:

"Every person operating * * * a motor * * * vehicle on the public highways of this state shall operate * * * the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive" an automobile "or other vehicle on the public highway * * * as to endanger the life or limb of any person or the safety of any property: Provided, that it shall be unlawful to drive at a rate of speed in excess of 30 miles an hour." Section 22.

A violation of this provision is declared a misdemeanor, punishable by fine or imprisonment or both. Admittedly, therefore, under the very findings of the commission, Head was violating the express mandate of the law designed for his own protection, for the protection of the other occupants of the car, and for the protection of the general public. His act in so doing was criminal. Much of the finding of the commission which we have quoted at length is quite beside the question and without the slightest persuasive force. It matters not, for example, that the evidence is insufficient to establish that such speed was "unusual according to the usual custom of drivers of automobiles in that vicinity." That 40 men violate the law and commit crimes is neither justification nor excuse for the forty-first man who does the same thing. Nor yet does it matter that Head was not afflicted with "speed mania," nor that his excessive speed did not "amount to foolhardiness or dare-deviltry." Nor is it of the slightest consequence that Head was not violating any rule or order made by his company. Indeed, it would be as remarkable as it would be unnecessary for an employer to give a specific instruction upon a matter completely covered by a penal statute. The plain and unescapable fact is that Head was criminally violating a law designed for his own protection and for that of the general public. The statute itself forbade him from endangering "the life or limb of any person," himself as well as others, and fixed the danger point of speed at 30 miles an hour. The finding is that his rate of speed "was not entirely safe." But even without such a finding, or if the finding declared it to be a safe rate of speed, the fact still remains that the deceased willfully and deliberately misconducted himself and violated the plain mandate of the law. Says Willis (Workmen's Compensation, p. 58):

"Where there is a deliberate and unmistakable act of disobedience to an express order, or where there is a deliberate breach of a law or rule, which is framed in the interests of the workingman, it will be held that such a breach or such disobedience amounts to serious misconduct."

There is no finding and indeed nothing in the record extenuating or excusing the conduct of the deceased. He was not even impelled by the desire to make the train connection. He had four hours in which to travel 40 miles. The conclusion is unavoidable that he was guilty of the willful misconduct contemplated by the law.

For this reason, without consideration paid to any of the other propositions urged upon our attention, the award of the commission must be and hereby is annulled.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; SHAW, J.; LAWLOR, J.

(171 Cal. 702)

TUCKER et al. v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 6279.)

(Supreme Court of California. Jan. 17, 1916.)

1. STREET RAILROADS ⇐103 — INJURIES TO PERSONS ON TRACKS — LAST CLEAR CHANCE DOCTRINE.

The last clear chance doctrine as to injuries on street car tracks applies in California.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. ⇐103.]

2. TRIAL ⇐397—FINDINGS—NECESSITY.

In an action for the killing of one on defendant's street car tracks, where the pleadings raised the question whether deceased was guilty of contributory negligence proximately causing death, the failure of the court, the action being tried without a jury, to make a finding responsive to this issue, was error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. ⇐397.]

3. STREET RAILROADS ⇐102 — INJURIES TO PERSONS ON TRACKS—LAST CLEAR CHANCE DOCTRINE.

In view of Civ. Code, § 1714, declaring that every one is responsible, not only for the result of his willful acts, but for an injury caused by his negligence, no conduct of a street railway company, however willful or wanton, will release a person from using ordinary care in preserving himself from danger and injury; consequently, where deceased's contributory negligence was the proximate cause of the accident, the fact that the street railway company's servants were guilty of wanton negligence will not warrant recovery on the last clear chance doctrine.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 186, 194, 200, 203; Dec. Dig. ⇐102.]

4. APPEAL AND ERROR ⇐1011 — REVIEW — QUESTION OF FACT.

Where the evidence as to whether the car could have been stopped after deceased's presence was discovered conflicted, and plaintiff relied on the last clear chance doctrine, *held*, on the evidence, that the question whether her contributory negligence barred recovery is a fact to be determined as such by the trial court, which sat without a jury, and cannot be decided on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. ⇐1011.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. E. Prewett, Judge.

Action by Theodore N. Tucker and another, heirs of Eva May Tucker, deceased, against the United Railroads of San Francisco, a corporation. From a judgment for plaintiffs and an order denying new trial, defendant appeals. Reversed and remanded.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for appellant. A. M. De Vall and Barclay Henley, both of San Francisco, for respondents.

MELVIN, J. Plaintiffs were successful in an action against the defendant for damages for the death of Eva May Tucker, which, it was alleged, was due to the negligence of defendant's servants in the operation of an electric street car. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The accident took place at about 8 o'clock in the evening. The car had just traversed the curve from Clement street to Thirty-Third avenue, in San Francisco, and was proceeding in a southerly direction on the last-named thoroughfare, which at that place is unpaved. The car almost stopped at the curve, but on signal from the conductor the motorman applied the current, and the car moved into Thirty-Third avenue with increasing speed. The night was dark and somewhat foggy. There were no street lights, but the headlight was shining brightly, rendering objects on the track clearly visible for a distance of 40 feet from the motorman's position. The car was brilliantly illuminated within, and its lights could have been seen by a person having normal vision for a much greater distance than 40 feet. The car was a heavy one, and it made considerable noise while in motion, particularly in taking the curve into Thirty-Third avenue. When it began its journey along the avenue, the conductor went forward to the front platform. There was testimony tending to show that thereupon he engaged in some sort of a scuffle with the motorman, and that, putting on the motorman's cap, he took hold of the controller bar. This testimony is disputed, however, as we will have occasion to note in the further discussion of this case. The employés of defendant saw Eva May Tucker when the car had reached a point near the middle of the block about 300 feet from the curve. It was then moving quite rapidly. She was a few feet in front of the car, and was standing or walking on the track with her back partly turned toward the car. The motorman attempted to stop the car, but could not do so until the woman had been struck and killed. The trial was before the court without a jury, and judgment was given in favor of the plaintiffs for $2,500. The court failed to find upon the alleged contributory negligence of the deceased. This is specified as error, and the appellant also asserts that upon the uncontradicted evidence the deceased was guilty of contributory negligence proximately causing her death.

[1] The respondents do not seriously question that the failure of the deceased to take note of the approach of the brilliantly illuminated car and to remain in a place of safety until after it had passed would have amounted ordinarily to negligence, but they insist that her negligence was not the proximate cause of death, because the conduct of the servants of the defendant was gross negligence against which (they say) the defense of contributory negligence is of no avail. They cite numerous authorities from other states upholding the rule that gross negligence, amounting to a reckless disregard of public safety, when the death of another is directly due to such gross negligence, precludes a plea of contributory negligence on the part of the decedent to defeat the action. We will not pause to analyze these authorities, because the doctrine of "last clear chance" is, and for many years has been, a part of the law of California, and that of "comparative negligence" has never held a place in our jurisprudence.

[2] The pleadings clearly raised the issue, and the court was bound to find upon the question whether or not deceased was guilty of contributory negligence proximately causing her death. The failure of the court to make a finding responsive to this issue was error.

[3] We are urged to declare that the scuffle between the car men and the unlawful rate of speed of the car were facts established without controversy, and that therefore gross contributory negligence of the defendant's servants, continuing to the very instant of the impact of the car with the body of the pedestrian, makes the matter of her contributory negligence one of no moment. But the record reveals the fact that there was a conflict of testimony upon the subjects of the car's rate of speed and the conduct of the motorman and the conductor. Some of the witnesses testified that there was a scuffle in which the men exchanged hats, but they denied this, and each of them testified that the conductor removed the motorman's cap for the purpose of consulting the time table pasted inside. There was other testimony that the car was not exceeding the lawful rate of eight miles an hour when it hit the woman.

But really it makes no difference in the analysis of a defense based upon the contributory negligence of a person injured or killed whether the negligence of the defendant was gross, ordinary, or slight:

"Contributory negligence is as good a defense to a claim founded upon gross negligence as to any other." 1 Shearman & Redfield on Negligence (6th Ed.) 159.

The rule is thus stated in the opinion of this court in Sego v. Southern Pacific Co., 137 Cal. 407, 70 Pac. 279:

"No conduct on the part of the company, no matter how willful and wanton, will release a person from using ordinary care in preserving himself from danger and consequent injury. As said in the case cited, under such circumstances both of the parties are equally at fault, and there can be no recovery. Even conceding the negligence of the company to be the greater negligence, still in this state the courts do not recognize the principle of law relating to comparative negligence which obtains in some of our sister states."

This quotation merely restates the principle embodied in section 1714 of the Civil Code, which is, in part, as follows:

"Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

In Bennichsen v. Market Street Ry. Co., 149 Cal. 20, 84 Pac. 420, the evidence tended to show that the motorman, at the moment of the accident, was looking into the car, instead of fixing his attention upon the track ahead. It was held that such a case can be taken out of the doctrine of contributory negligence only where defendant had actual knowledge of plaintiff's perilous situation. The court cites Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85, and Herbert v. Southern Pacific Co., 121 Cal. 232, 53 Pac. 651, in support of the rule. This rule has been announced many times. For example, in Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 754, 134 Pac. 709, it was again held that the doctrine of "last clear chance" is based upon the fact that the defendant actually did know of the danger, and not upon the proposition that by the exercise of common prudence he should have been aware of it. Clearly in the case at bar the court erred in failing to find upon this subject.

[4] The only evidence regarding the position of the woman when she first appeared upon the track comes from the two servants of the defendant. The conductor testified that she was six or eight feet in front of the car when he first observed her. At the same moment the motorman "threw off the motor and applied the air." The car moved twelve or fifteen feet between the time witness saw the woman and the moment it stopped. He did not give any estimate of the speed of the car. The motorman testified that the car was running at a rate of speed between eight and ten miles an hour at the time of the accident. According to his estimate the woman was from six to eight feet in front of the car when he first saw her. Witness McCausland, who was a passenger, said that the speed was from six to eight miles an hour. Formerly he had been in the employ of the defendant as a motorman. He said that a car in the position of the one in question, just coming out of a curve on such a grade as existed at that place, could and should have been stopped within five feet. Witness Tucker, another experienced man who had worked as a motorman, testified that a car could be stopped on that grade in five feet. In this state of the evidence, we cannot say that, as matter of law, the defendant was entitled to a judgment based upon the contributory negligence of Mrs. Tucker. The question of "last clear chance" was, under the circumstances, one which the court should have determined (there was no jury) upon the facts presented by the testimony.

It follows that the judgment and order should be, and accordingly they are, reversed.

We concur: ANGELLOTTI, C. J.; HEN SHAW, J.; SLOSS, J.; SHAW, J.

(171 Cal. 746)

FLYNN v. FLYNN. (S. F. 6564.)

(Supreme Court of California. Jan. 19, 1916.)

1. DIVORCE ⇐⇒91—RESIDENCE—ALLEGATIONS—SUFFICIENCY.

The allegation in plaintiff's complaint for divorce that "plaintiff resides in the city and county of San Francisco, state of California, and has resided in said city and county for more than four years next immediately preceding the commencement of this action," was a sufficient allegation of the residence required by Civ. Code, § 128, without alleging that the residence was bona fide, since such allegation necessarily implied residence in good faith.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 287–289; Dec. Dig. ⇐⇒91.]

2. DIVORCE ⇐⇒125—RESIDENCE—ADMISSION—PROOF REQUIRED.

Where, in an action for divorce, defendant admitted plaintiff's residence in her answer and the court granted plaintiff a divorce without further proof of residence, the judgment must be reversed on defendant's appeal asserting such ruling as error, since plaintiff's residence is an essential fact to jurisdiction in divorce requiring proof independent of the admissions or statements of the parties under Civ. Code, § 130.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 399–402; Dec. Dig. ⇐⇒125.]

3. DIVORCE ⇐⇒168—COLLATERAL ATTACK—EXPRESS FINDINGS—DECREE—VALIDITY.

It is not essential to the validity of a decree of divorce as against collateral attack that there should be express findings of fact on the question of the essential residence or of other essential facts in the absence of a statute making such findings jurisdictional.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 549, 550; Dec. Dig. ⇐⇒168.]

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by John Flynn against Ellen Flynn for divorce. Judgment for plaintiff was reversed by the District Court of Appeal of the Third District. Decision of the District Court of Appeal vacated, and case ordered transferred to the Supreme Court for determination. Judgment reversed.

Breen & Kelly, of San Francisco, for appellant. Charles F. Hanlon and Louis H. Brownstone, both of San Francisco, for respondent.

ANGELLOTTI, C. J. This is an action for divorce. Plaintiff was awarded an interlocutory decree, from which defendant appeals. The judgment was reversed by the District Court of Appeal of the Third District, solely on the ground that there was no express

finding that plaintiff had resided in the state or in the county in which the action was brought for the periods specified in section 128, Civil Code, that section providing that "a divorce must not be granted unless the plaintiff has been a resident of the state one year, and of the county in which the action is brought three months, next preceding the commencement of the action," and also that there was no evidence adduced on the trial to show such residence. The decision of the District Court of Appeal was vacated and the case ordered transferred to this court for determination because we were not satisfied as to the correctness of certain views expressed by that court in its opinion.

[1] Plaintiff's complaint contains a sufficient allegation of residence in accord with the provisions of said section 128, Civil Code, it being alleged that:

"Said plaintiff resides in the city and county of San Francisco, state of California, and has resided in said city and county for more than four years next immediately preceding the commencement of this action."

Any suggestion that such allegation is defective for the reason that it is not in so many words alleged that such residence was "bona fide" is unwarranted by anything contained in the statute, and if anything to the contrary is intimated by language used in Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362, it must be considered as disapproved. Of course, the residence must be bona fide as a matter of fact, or it is not residence at all. The allegation of residence here necessarily implies residence in good faith, and entirely measures up to the requirement of the statute.

[2] The allegation of residence was not denied by the answer. In fact, in her cross-complaint, stating a cause of action for permanent support and maintenance under section 137, Civil Code, defendant alleged that both parties were and for more than one year next preceding the commencement of the action had been, residents of the city and county of San Francisco. The bill of exceptions, which affirmatively states that it "contains all of the testimony introduced and all of the proceedings had on the trial of said action," shows that no actual proof of residence was required, and that the court accepted the admission of the parties on that proposition, it being stated simply that "it was admitted that * * * the plaintiff had resided in San Francisco, as set forth in the complaint." The court made no express finding as to residence.

In the ordinary case, of course, it would be a complete answer to any suggestion of error warranting reversal under these circumstances, that the allegation of residence was admitted by the pleadings, and also expressly admitted by the parties on the trial. This would obviate the necessity of either proof or finding. But under our law an action for divorce is sui generis. The well-settled policy of the law is to protect the marriage relation and to prevent its dissolution in any case, even where the parties consent to or desire its dissolution, unless cause recognized by the law as warranting the same exists. Section 130, Civil Code, provides, as it has ever since the year 1874, that:

"No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, * * * require proof of the facts alleged."

The object of this provision is, of course, to prevent the obtaining of a divorce by collusion between the parties, where no lawful ground for a divorce exists. Its effect necessarily is to make it erroneous for a court to grant a divorce in the absence of some proof, independent of the admissions and statements of the parties, of the facts warranting such action. That a party appealing from a judgment of divorce may successfully urge such error as a ground for reversal, even though the essential fact was admitted by the pleadings, appears to follow, and was decided in Bennett v. Bennett, 28 Cal. 599.

It must be taken as settled by the decisions that the residence prescribed by section 128, Civil Code, is essential to the jurisdiction of a court to grant a divorce, and also that the complaint must allege such residence. The question whether the residence essential to jurisdiction exists as matter of fact is, of course, one to be determined by the trial court, but obviously, in its determination, the trial court is controlled by the provisions of section 130, Civil Code, and cannot act upon the uncorroborated statement, admission or testimony of the parties. This we think is clearly the effect of the decision in Bennett v. Bennett, supra, which further, as already stated, sustains the right of a party to complain of error in the conclusions of the trial court in this regard, although in such court he had admitted the allegation of residence. In the case at bar the bill of exceptions affirmatively shows that the trial court failed to require the essential proof of residence, and that it acted entirely, so far as that question was concerned, on the uncorroborated admissions and statements of the parties. We are satisfied that under such circumstances the judgment cannot be upheld.

[3] In view of certain language of the opinion in Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362, as well as certain language in the District Court of Appeal opinion in the case at bar, we deem it proper to add that it is not essential to the validity of a divorce decree as against collateral attack that there should be an express finding of fact on the question of the essential residence, or, indeed, express findings of fact on any question. A conclusion to the contrary would be opposed to the well-settled presumption in favor of the validity of judgments of courts of general jurisdiction, and would not be warranted in the absence of some statutory provision substantially making such express findings essential

to the jurisdiction of a court to grant a divorce. There is no such statutory provision. The only possible effect of a mere failure to make express findings in such a case is that the judgment may be reversed on an appeal taken by one of the parties. Whether a judgment should even be reversed on an appeal for mere failure on the part of the court to make an express finding on some matter essential to the granting of a divorce, where the fact is admitted by the pleadings, and there is no showing that sufficient proof of the fact was not made on the trial, is a question it is unnecessary here to determine. Here we have the showing that proper and sufficient proof of the essential fact was not made on the trial.

It is urged that if the judgment be reversed, we should order, in the exercise of our discretion, that a new trial be limited to the single issue of residence. We have examined the record with this suggestion in view, and are of the opinion that no such limitation should be made.

The judgment is reversed.

We concur: HENSHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

SHAW, J. I dissent. I think the case comes within the rule of section 4½ of article 6 of the Constitution. Furthermore, the case was hotly contested in the lower court. There was no collusion. The lack of corroborative evidence was not urged below. The objection should not be allowed to prevail on appeal. It is clearly the result of an afterthought.

171 Cal. 697

In re MURPHY'S ESTATE. (L. A. 4323.)

(Supreme Court of California. Jan. 17, 1916.)

1. EXECUTORS AND ADMINISTRATORS ⊂=111—"ORDINARY PROBATE PROCEEDING"—ATTORNEY'S FEES—STATUTE.

Under Code Civ. Proc. § 1619, allowing attorneys for administrators a fee out of the estate for conducting the ordinary probate proceedings, an attorney's services in filing a brief in opposition to the petition for revocation of letters of administration granted to the public administrator and in preparing an order therein was not an ordinary probate proceeding, so that there was no basis for the allowance of an attorney's fee.

[Ed. Note.—For other case, see Executors and Administrators, Cent. Dig. §§ 448–462; Dec. Dig. ⊂=111.

For other definitions, see Words and Phrases, Second Series, Ordinary Probate Proceedings.]

2. EXECUTORS AND ADMINISTRATORS ⊂=111—PUBLIC ADMINISTRATOR — ACT—ATTORNEY'S FEE—STATUTE.

Under Code Civ. Proc. § 1619, allowing attorneys for administrator's fees out of the estate for conducting the ordinary probate proceedings, with a further allowance for extraordinary services, and the county charter of Los Angeles County, by article 6, § 14, creating the office of county counsel, and by article 6, § 21, requiring such counsel to act as attorney for the public administrator, and in every matter to collect the attorney's fee allowed therein by law, and to pay it into the county treasury, the county counsel, who gave no advice and rendered no service to the estate or to the public administrator administering it, except permitting the administrator to sign his name to the petition for letters of administration and other documents prepared by the administrator, and to which his signature would have the same legal effect as the signature of the counsel, was not entitled to an attorney's fee, and hence no sum was allowable to the public administrator administering an estate for services of an attorney in the matter.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 448–462; Dec. Dig. ⊂=111.]

In Bank. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Louise M. Murphy, deceased. From an order refusing to allow an item for attorney's fees set out in his final account, Frank Bryson, administrator, appeals. Affirmed.

A. J. Hill, County Counsel, Roy V. Reppy, Asst. County Counsel, and Edward T. Bishop, Deputy County Counsel, all of Los Angeles, for appellant. Charles C. Montgomery, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Frank Bryson, administrator of the estate of Louise Murphy, deceased, prosecutes this appeal from an order of court refusing to allow the item "Attorney's fees, statutory, $1,142.18," set out in his final account as being by him incurred for attorney's fees for legal services rendered in conducting the ordinary probate proceedings in said estate.

The matter came on to be heard upon objections interposed to the administrator's final account and petition for distribution. The court made findings of fact upon which no attack is made. Appellant, however, insists that the order made is not supported by the findings. It appears that at all of the times in question Bryson was public administrator of Los Angeles county, in which capacity he administered the estate of deceased; that by section 14, art. 6, of the county charter of Los Angeles county there was created the office of county counsel, which office was, during the time of the administration, filled by A. J. Hill, and whose duties as such officer were prescribed by section 21, art. 6, of such county charter, which provides:

"The county counsel * * * shall also act as attorney for the public administrator in the matter of all estates in which such officer is * * * administrator, and the county counsel shall, in every such matter, collect the attorney's fees allowed therein by law and pay the same into the county treasury."

The name of A. J. Hill, but not by him or his deputies, was attached to all papers with his concurrence and with the intention on the part of said administrator of designating Hill as his attorney in the matter of said estate, as provided in said article 6, § 21, of said county charter. Prior to the filing of

objections to the final account all papers filed in said estate were prepared by said public administrator, or by his deputies and in his office, with the exception that said Hill, county counsel of the county of Los Angeles, prepared and filed in court a brief upon the legal questions raised by a petition filed in the proceeding asking for a revocation of the letters granted to said public administrator, and said A. J. Hill, county counsel, prepared the order which was signed by the judge of the court and filed, denying the petition for revocation of letters issued to the public administrator. Aside from this, said A. J. Hill, county counsel, did not nor did any of his deputies prepare any paper or make any appearance by personal presence in court, or give any legal advice, excepting in connection with said petition for revocation of letters aforesaid, concerning the administration of the estate. The public administrator, either personally or through his deputies, did, with the exception above noted, perform all the services which were performed in connection with the administration of said estate, and did not, except as stated, find it necessary to obtain assistance or advice from the said A. J. Hill, county counsel, or his deputies, upon any matters connected with the administration of the estate, though Hill was at all times ready to perform legal services in connection with such administration. As conclusions of law the court found that no legal services had been rendered the public administrator in the conduct of the administration of said estate, and that neither Bryson, Hill nor the county of Los Angeles is entitled to be allowed attorney's fees therein in any sum whatsoever.

[1] The service performed in filing the brief in opposition to the petition for the revocation of letters of administration granted to Bryson and the preparation of the order therein was not the ordinary proceeding referred to in section 1619, Code of Civil Procedure, and for which the fees are claimed. If regarded as extraordinary service, no fees were asked therefor. Moreover, in such contest the public administrator was not acting as a trustee of the estate of deceased, but acting solely in and for his own interest or that of the municipality entitled under the charter to the fees of administration. Estate of Lermond, 142 Cal. 585, 76 Pac. 488. Hence the services so rendered constituted no basis for the allowance of statutory fees.

[2] The question then fairly presented upon the findings is this: Is the estate of a deceased person chargeable with attorney's fees where the attorney claiming them gives no advice and renders no service to the estate or administrator thereof, the sole basis for his demand being that he permitted the administrator to sign his name to the petition for letters of administration and other documents prepared by the administrator and to which the latter's signature as administrator would give them the same legal effect as though signed by the attorney? Section 1371, Code Civ. Proc. Appellant quotes from Estate of Goodrich, 6 Cal. App. 730, 93 Pac. 121, where it is said:

> "Under our practice the services of an attorney are not only essential, but the burden and responsibility of his work are usually much greater than those of the executor or administrator. The effect of the law is simply to allow the executor an additional fee for a certain expense of administration."

While this is true, we know of no law which requires an administrator to employ an attorney, and conceding that, where one is employed and acts as attorney his responsibilities are as great as those of the administrator, certainly the fact in this case that the administrator performed all the services himself without the assistance or advice of counsel, not only shows that no necessity existed for employing an attorney, but also shows, since he did nothing, the attorney claiming the fees assumed no burden or responsibility whatever. The fees demanded are the statutory fees provided by section 1619, Code of Civil Procedure, for services rendered in the conduct of the ordinary probate proceedings. This section provides that the court may make further allowance for "extraordinary services such as sales or mortgages of real estate, contested or litigated claims against the estate," etc. Upon the presentation of a claim based upon alleged extraordinary services, it would devolve upon the attorney to show that he had rendered the service, and in the absence of such showing it would be the duty of the court to disallow such claim. Likewise, where a claim for statutory fees is presented for services rendered in conducting the ordinary probate proceedings, the burden, where objection is made thereto, rests upon the attorney to show that he has rendered such service. We know of no law, statutory or otherwise, which requires an administrator to employ an attorney; nevertheless, if it appears that he has employed an attorney who has rendered the ordinary service contemplated by the statute in such proceedings, he is entitled to the statutory fees. Estate of Goodrich, 6 Cal. App. 730, 93 Pac. 121. The charter provision does not purport to be a revenue measure in the interest of the county. It contemplates that the county counsel shall act—that is, do something in conducting the probate proceedings—and section 1619, Code of Civil Procedure, contemplates that the attorney shall render some service in conducting the ordinary probate proceedings as a basis for his claim of compensation. Hill neither acted within the meaning of the charter nor performed any service whatsoever for the estate. In our opinion, it would be a travesty upon the law to uphold appellant's demand based as it is upon a mere pretense that he has rendered professional service to said estate.

This view renders it unnecessary to discuss the question of the validity of the charter provision. Suffice it to say that, assuming Hill had, at the administrator's request, rendered services to the estate, then, conceding the act invalid as claimed by respondent, he would nevertheless be entitled to the fees provided by section 1619, since it would be immaterial what motive prompted the administrator in employing him.

As stated, the appeal is prosecuted by the administrator, whose right so to do is not questioned by the respondent. Whether or not he is an aggrieved party possessing the right of appeal, since the statutory changes in sections 1616 and 1619, Code of Civil Procedure, providing for the making of an allowance direct to the attorney out of the assets of the estate and as to which the administrator incurs no liability, is not decided.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

171 Cal. 719

LARKIN et al. v. SUPERIOR COURT OF SHASTA COUNTY. (Sac. 2451.)

(Supreme Court of California. Jan. 17, 1916.)

1. DISMISSAL AND NONSUIT ⟸45—INVOLUNTARY—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 583, declaring that any action shall be dismissed by the court in which it shall have been commenced, or to which it may be transferred on motion of defendant after due notice to plaintiff, unless it is brought to trial within five years after defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended, is mandatory.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Dec. Dig. ⟸45.]

2. DISMISSAL AND NONSUIT ⟸60—INVOLUNTARY—STATUTES—STIPULATION OF PARTIES.

Under such statute, a stipulation by counsel of the respective parties for an extension of the time of trial is a stipulation of the parties.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. ⟸60.]

3. DISMISSAL AND NONSUIT ⟸60—INVOLUNTARY—STATUTES—CONSTRUCTION.

Where the answer was filed June 30, 1909, and the minutes of the court showed that on November 27th, the date set for trial, the parties appeared in court and through their counsel stipulated that trial should be fixed for April 11, 1910, and the court so ordered, that on April 11, 1910, the case was continued until June 29th, and on June 29th the case was again continued until September 19th, but there was no record entry of independent stipulation in writing providing that time of trial should be extended beyond the five-year limit, the action must be dismissed under Code Civ. Proc. § 583, declaring that an action not brought to trial within five years after answer shall be dismissed, unless extended by written stipulation of the parties.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. ⟸60.]

4. DISMISSAL AND NONSUIT ⟸60—INVOLUNTARY—STATUTES—CONSTRUCTION.

That the original defendant administrator died within the five-year period after answer in which actions must, under Code Civ. Proc, § 583, be brought to trial, and no other administrator was appointed until after the expiration of that period, will not excuse plaintiff's failure to bring the action to trial and so preclude dismissal.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. ⟸60.]

5. DISMISSAL AND NONSUIT ⟸60—INVOLUNTARY—PERSONS BOUND TO BRING ACTION TO TRIAL.

After defendant's answer, plaintiff's attorney died, and defendants served no notice on plaintiff in accordance with Code Civ. Proc. § 286, declaring that when an attorney dies or ceases to act a party to an action for whom he was acting must, before any further proceedings are had against him, be required by the adverse party by written notice to appoint another attorney or appear in person. Section 583 provides that if an action is not brought to trial within five years after answer it shall be dismissed. *Held* that, as defendants were not actors, their failure to file notice demanding appointment of an attorney did not preclude them claiming a dismissal for plaintiff's failure to bring the case to trial within five years.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. ⟸60.]

6. DISMISSAL AND NONSUIT ⟸60—INVOLUNTARY—GROUNDS.

In such case, the fact that one of defendant's counsel died within the five-year period and the other ceased to act will not excuse plaintiff from bringing the action to trial within that time, as he could have required defendants to appoint another attorney, or appear in person.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. ⟸60.]

7. QUIETING TITLE ⟸39 — ACTIONS — CROSS-COMPLAINT.

In a suit to quiet title, judgment in defendant's favor protects him against any of plaintiff's claims, so a cross-complaint praying that title be adjudged in defendant is effective merely to prevent plaintiff from dismissing it before trial without the consent of defendant.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 80; Dec. Dig. ⟸39.]

8. DISMISSAL AND NONSUIT ⟸60—INVOLUNTARY—RIGHT TO DISMISS.

In a suit to quiet title, though defendant filed a cross-complaint asking that his title be adjudged good, the suit may be dismissed under Code Civ. Proc. § 583, for plaintiff's failure to bring it to trial within five years after answer, for the filing of the cross-complaint did not make defendant an actor, as it would give defendant no greater rights than he would have had under an answer denying plaintiff's title, but merely precluded plaintiff from dismissing without his consent.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. ⟸60.]

9. MANDAMUS ⟸43—ISSUANCE OF WRIT—DISCRETION.

Where, under the statutes, defendant is entitled to dismissal of plaintiff's action for want of prosecution, mandamus to compel the lower court to order dismissal will not be denied on the ground that the writ is discretion-

ary, and will not be issued where it will cause injustice.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 88, 89; Dec. Dig. ⊂⊃43.]

10. MANDAMUS ⊂⊃180—RIGHT TO—REFUSAL.
Where one of several defendants defaulted, and the others were entitled to dismissal for want of prosecution, and the defendants who answered moved for a dismissal as to them, their application for a writ of mandamus to compel the trial court to order dismissal will not be denied under the rule that a petitioner for mandamus is concluded by the terms of the alternative writ, and, as the alternative writ prayed a dismissal of "the action," it was not wholly authorized.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 401–405; Dec. Dig. ⊂⊃180.]

11. MANDAMUS ⊂⊃180—RIGHT TO—RULES.
The rule that where an alternative writ is awarded for a purpose, partly proper and partly improper, the court will not grant peremptory mandamus, is not an iron-bound one, but is to be applied with principles of justice.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 401–405; Dec. Dig. ⊂⊃180.]

In Bank. Original application for mandamus by John Larkin, as administrator of the estate of Alexander Hulsey, deceased, and others, against the Superior Court of the County of Shasta. Petition granted.

W. D. Tillotson, of Redding (Carr & Kennedy, of Redding, of counsel), for petitioners. Chenoweth & Leininger, of Redding, and Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is an original application to this court for a writ of mandate to compel respondent to dismiss an action pending therein, instituted by the Potosi Land & Mining Company, a corporation, against a former administrator of the said estate of Alexander Hulsey, N. L. Peterson, James E. Lutman, the Shasta Dredging Company, a corporation, and certain fictitious defendants. The action was one by the plaintiff therein to quiet its alleged title to certain land in Shasta county. The action was commenced May 6, 1907, and summons was served during that year on all the above-named defendants. No appearance was ever made by the Shasta Dredging Company, and it must be accepted as a fact from the record before us that the plaintiff is entitled to a default judgment against that defendant. The other defendants filed their answer on June 30, 1909, denying plaintiff's alleged title, claiming title in themselves, and praying for a judgment establishing and quieting their title to said land. The action has never been tried. On November 3, 1915, these petitioners, being all of the defendants except the Shasta Dredging Company, gave notice of a motion in the superior court for the dismissal of said action as to them, on the ground that the same had not been brought to trial within five years after they had filed their answer. The motion thus noticed was duly heard and denied by the superior court, and this proceeding was then instituted to compel the dismissal asked.

[1-3] Petitioners' motion in the superior court and their proceeding here are based on the second paragraph of section 583, Code of Civil Procedure, enacted in 1905. The section is as follows:

"The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial with five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

It is obvious, from a mere reading of the second paragraph of this section, that a dismissal is mandatory in any case where the facts bring it within its provisions. It was so declared in Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002.

Various reasons are urged why this law has no application here.

As we have said, the answer of these petitioners was filed June 30, 1909. The following facts are alleged in the answer of respondent, and are not disputed by petitioners: On November 20, 1909, the court ordered that on November 27, 1909, the time of trial should be fixed. The minutes of the court show that on November 27, 1909, the parties appeared in open court by their respective counsel and stipulated that the trial should be fixed for April 11, 1910, and the court so ordered; that on April 11, 1910, with the same procedure, the trial was continued to June 29, 1910; and that on June 29, 1910, with the same procedure, the trial was continued to September 19, 1910. Nothing further appears with reference to the proposed trial of the action, other than that after November 3, 1915, more than five years after the date to which it had last been continued, the action was set for trial on December 20, 1915. No stipulation in writing relative to time or continuance of trial was ever made "in writing," unless an agreement of counsel for the respective parties made in open court and entered on the minutes satisfies the provision of the section in this regard.

We are satisfied that there is no force in the suggestion that "the parties" can be said to have stipulated within the meaning of the section only when they personally do so. It is clear that a stipulation by respective counsel for the parties would be a stipulation of the parties. Whether they can be said to "have stipulated in writing" within the meaning of the section, when they have simply orally agreed in open court and their agreement is entered on the minutes, is a more serious question. However, we regard

this question as of minor importance in view of the fact that we are satisfied that no stipulation of the character described, either oral or written, was ever made. This point, not suggested in the oral argument, has been forcibly made in petitioners' brief filed since, and to their contention we can see no good answer. The stipulations shown by the minutes were, first, one fixing as the time for trial a date within one year from the filing of the answer, and, second, two continuing the trial, the later one carrying it to a date within 15 months after the filing of the answer. The statute says that the court must dismiss the action "unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended." This seems to us to say very clearly that unless the parties have, in effect at least, stipulated in writing that the action need not be brought to trial within five years from the date of the filing of the answer, it must be dismissed at the expiration of such five years, if not "brought to trial" within that time. A stipulation in terms waiving the benefit of this section, or one in terms providing that the time fixed by the section within which trial must be had shall be extended indefinitely or for a definite time, or a series of stipulations continuing the trial to a date beyond the five-year period, might any of them suffice as an answer to a motion to dismiss, and constitute a stipulation in writing that the time (the five-year period) shall be extended. But no such effect can fairly be given to a stipulation fixing a trial date within one year of the filing of the answer, or to two others continuing the trial date to a time within fifteen months of such filing. There is nothing in this that can fairly be taken as indicating any consent on the part of the defendants that the five-year period shall be extended by as much as a single minute, or as intimating to plaintiff that any such extension would be permitted. It is a stipulation in writing extending the five-year period that the statute provides for, and without such a stipulation, certainly in the absence of some element of estoppel, there can be no effective answer to a motion to dismiss, if the action has not been "brought to trial" within such period. The language of the statute is so plain in this regard that no other intent can be attributed to the Legislature. We are not concerned here with the exact meaning of the term "brought to trial," for it is manifest that with whatever liberality we construe it in favor of plaintiff here, this action was not brought to trial within five years of the date of the filing of the answer.

[4] It appears that the former administrator of the estate of Hulsey, the original defendant administrator, died in February, 1915, and that petitioner Larkin was not appointed administrator until October 30, 1915, and was not substituted herein as a party until November 2, 1915. All this, however, was after the expiration of the five-year period, and cannot by any possibility affect the determination of this proceeding.

[5] It further appears that one Mr. Isaacs was the original attorney for plaintiff, that he died June 8, 1911, and that from June 8, 1911, to October 19, 1915, plaintiff had no attorney in the action. No notice was served on plaintiff requiring it to appoint another attorney in place of Mr. Isaacs or to appear in person, until September 23, 1915. It is claimed that, under these circumstances, the running of the five-year period was suspended from June 8, 1911, to September 23, 1915. This contention is based on section 286, Code of Civil Procedure, which provides that:

"When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person."

Clearly this section has no application here. It means no more than it plainly says, viz., that no proceedings may be had against him, no judgment or order or other step in the action taken, until he appoints an attorney, unless the prescribed notice be first given. The mere running of this five-year period, which had commenced to run prior to the death of Mr. Isaacs, was not a "proceeding" had against the plaintiff, even under the very liberal definition given that term as used in section 473, Code of Civil Procedure, in Stonesifer v. Kilburn, 94 Cal. 43, 29 Pac. 332. A good illustration of what is meant by the term "proceedings," as here used, is the dismissal sought by motion in the superior court in this very case, prior to the making of which motion the defendants gave the notice contemplated by the section. It must be confessed that the opinion of the District Court of Appeal of the Second District, in Troy Laundry, etc., Co. v. Drivers', etc., Co., 13 Cal. App. 115, 109 Pac. 36, supports the claim of respondent as to the effect of section 286 in this regard, but we are satisfied that the views there expressed are erroneous. No petition for a hearing of that matter by this court was ever presented, and the opinion therein has never received our approval. The court might well have refused to dismiss the appeal there involved in the exercise of a wise discretion, thus reaching the same result that it did reach, but to hold that the death of the appellant's attorney during the time allowed for the filing of the opening brief ipso facto extended the time for the filing of such brief is not warranted by anything said in section 286, Code of Civil Procedure, or by any other rule of law of which we are aware.

[6] The original attorneys of the petitioners as defendants, in said action, were the firm of Reed & Dozier. According to the an-

swer, Mr. Reed died shortly after the death of Mr. Isaacs, and Mr. Dozier in December, 1908, or thereabouts, removed his office from Redding to San Francisco and ceased to act as attorney for any of said defendants. Even assuming that for a portion of the five-year period there was no acting attorney of record for any of the defendants, we cannot see that such fact avails plaintiff in that action at all. The plaintiff could nevertheless have brought the case to trial, resorting to the procedure contemplated by section 286, Code of Civil Procedure, which we have just referred to.

We see no force whatever in the claim that, under the circumstances of this case, petitioners are estopped to claim that the action should be dismissed.

[7, 8] Respondent urges as material the fact that the action was one to quiet title, and that the defendants in their answer set up their own alleged title, and asked that they be adjudged the owners. Reliance is placed upon what is said in the opinion of the District Court of Appeal of the First District in Hickman v. Lynch, 149 Pac. 997, to the effect that, upon the filing of a cross-complaint by a defendant, the defendant became an aggressive and interested actor in the presentation of at least one phase of the case, and was therefore charged in part with the duty of bringing the case on for trial. The court therefore held that section 583, Code of Civil Procedure, had no application. That action was one for the recovery of money, in which the defendants, some two years and a half after the filing of the answer, had obtained leave to file and had filed a cross-complaint. Whatever may be said as to the correctness of the views of the District Court of Appeal as applied to such a case as the one before it, it is clear that they have no application here. While it is settled in this state that, in an action to quiet title, a defendant called upon by plaintiffs' action to quiet title to land to set up his own claim of title may file a cross-complaint setting up his own alleged ownership and asking that he be adjudged the owner, or may do the same thing in his answer, ordinarily no such practice is essential to his protection, as a conclusion against the plaintiff upon the issues raised by the complaint and answer fully determines the title as between the parties, and protects the defendant against any claim of the plaintiff as to title as fully as an affirmative decree in his favor would do. There is nothing before us to indicate or suggest that the action here involved is out of the ordinary in this regard. The principal object of such a practice would appear to be to prevent a plaintiff from dismissing his action before trial without the consent of the defendant. Subdivision 1, § 581, Code Civ. Proc. See Islais, etc., Water Co. v. Allen, 132 Cal. 432, 64 Pac. 713. What a defendant so situated is doing is really and substantially purely defensive. Brought into court by the plaintiff to defend his alleged title, he is simply defending it. It would seem unreasonable to hold that simply by reason of the fact that a defendant, whose alleged title is thus assailed by a plaintiff, asks for a decree adjudging that it is good as against such plaintiff, becomes an actor in the case in the sense that any duty devolves on him to bring the plaintiff's asserted claim to trial. We do not think that section 583, Code of Civil Procedure, should be so construed.

[9] It is urged that the issuance of a writ of mandate is not a matter of right, but a matter of discretion, and should never issue where it will work injustice or operate harshly or where it will not promote substantial justice. If we assume all this to be true, we still have no basis on which to hold that the dismissal of the action here involved will have any such effect. As has been said, as to the matter of discretion in such cases, "where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy, and adequate remedy in the ordinary course of law, he is entitled as a matter of right to the writ," and a court cannot lawfully refuse it. Gay v. Torrance, 145 Cal. 144, 148, 78 Pac. 540. This, in view of what we have said, is such a case.

[10, 11] It is suggested that in no event can the action be dismissed as to the Shasta Dredging Company, and that as petitioners sought a dismissal of "the action," and as the alternative writ heretofore issued required a dismissal of "the action," a writ should not issue requiring a dismissal of the action only as to the petitioners here. The rule invoked is that a petitioner for such a writ is concluded by the terms of the alternative writ, and that, where the alternative writ is awarded for a purpose partly proper and partly improper, the court will not enforce it by a peremptory mandamus as to that which is proper, but will give judgment for the respondent. Gay v. Torrance, supra. A ruling in favor of respondent on this point would be of little avail to plaintiff in the action, as what we have already said makes it manifest that the superior court would be compelled to dismiss the action as to these petitioners, either on its own motion or their motion hereafter made. But we think the rule invoked should not be applied under such circumstances as appear here. No such point is made by anything alleged in the answer of respondent. The motion for dismissal already made in the superior court was, as appears from the notice of motion annexed to the petition, simply for the dismissal of the action "as to these defendants," viz., the petitioners here. In the light of all the circumstances, the proceedings here, including the alternative writ, may fairly be regarded as simply looking to the dismissal there sought,

a dismissal of the action as to the petitioners, the only thing in which petitioners appear to have any beneficial interest. It may properly be added that the rule invoked is not an iron-bound one, to be enforced by a court regardless of circumstances, but is one to be applied in consonance with principles of fairness and justice.

What we have said disposes of the many points made by learned counsel for respondent. We see no answer to the claim that in view of the provisions of section 583, Code of Civil Procedure, the superior court is without authority to take any course in the action referred to, so far as petitioners are concerned, except to order the action dismissed as to them.

Let a peremptory writ of mandamus issue requiring respondent to dismiss, as to the petitioners, the action referred to.

We concur: SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.; SHAW, J.

(171 Cal. 672)

RECLAMATION DIST. NO. 1500 v. SUPERIOR COURT IN AND FOR SUTTER COUNTY et al. (Sac. 2361.)

(Supreme Court of California. Jan. 14, 1916.)

1. DRAINS ⟸17 — RECLAMATION DISTRICT — OFFICERS—DUTY.

The imposition on reclamation district No. 1500 of the duty of building a levee by its creative act (St. 1913, p. 130) is an imposition of such duty on its directing officers, since a corporation, either public or private, can act only through officers.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 12; Dec. Dig. ⟸17.]

2. INJUNCTION ⟸85—"OFFICER OF THE LAW"—RECLAMATION DISTRICT.

Such officers are "officers of the law" within the meaning of Civ. Code, § 3423, subd. 4, forbidding the issuance of an injunction to prevent the execution of a public statute by officers of the law for the public benefit.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. ⟸85.

For other definitions, see Words and Phrases, First Series, Officer of the Law.]

3. DRAINS ⟸6 — RECLAMATION STATUTE — PUBLIC BENEFIT—PRESUMPTIONS.

The building of the levee by such officers as directed by such reclamation act is for the public benefit, since, if the act is valid, its provisions must be deemed to have been enacted for the public benefit.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 2; Dec. Dig. ⟸6.]

4. CONSTITUTIONAL LAW ⟸38—STATUTES—CONFLICT WITH CONSTITUTION.

An act of the Legislature which is in conflict with the Constitution is utterly void, having no force or legal existence.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. ⟸38.]

5. INJUNCTION ⟸85—PUBLIC OFFICERS EXECUTING PUBLIC STATUTES—CONSTRUCTION.

The provisions of Civ. Code, § 3423, subd. 4, prohibiting injunctions against the execution of public statutes by public officers, refer solely to injunctions against the execution of valid statutes.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. ⟸85.]

6. STATUTES ⟸105—ACTS EXPRESSING SUBJECT IN TITLE—CONSTRUCTION.

Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in its title, is to be liberally construed to effect its object of preventing the passage of acts bearing deceitful or misleading titles.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. ⟸105.]

7. STATUTES ⟸123 — EXPRESSION OF SUBJECT IN TITLE.

The title of the act creating reclamation district No. 1500, and prescribing its duties (St. 1913, p. 130), was "An act creating a reclamation district, * * * providing for the management and control thereof. * * *" One of the provisions of the act was that the district construct a levee along a certain described line. *Held*, that such provision was not invalid as in conflict with Const. art. 4, § 24, providing that the subject of a legislative act be expressed in its title, since, the building of levees being a usual method of accomplishing reclamation, the provision therefor was sufficiently expressed as a detail incident to the general purpose of reclamation set out in such title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176–183; Dec. Dig. ⟸123.]

8. DRAINS ⟸2 — RECLAMATION DISTRICT — LEVEE—FIXING LOCATION.

It is no objection to the provision of such act for the building of a levee on a certain line therein specified that the location of levees is committed to the board of trustees by Pol. Code, § 3454, relating to reclamation districts, since in passing such reclamation act the Legislature was not bound to follow the procedure laid down in the general law governing reclamation districts.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17; Dec. Dig. ⟸2.]

9. EMINENT DOMAIN ⟸31 — RECLAMATION DISTRICT — DAMAGING COUNTY PROPERTY WITHOUT COMPENSATION — VALIDITY OF STATUTE.

The act creating reclamation district No. 1500 (St. 1913, p. 130) and providing for the building of a levee is not violative of Const. art. 1, § 14, prohibiting the taking or damaging of private property without compensation, in that such levee will destroy or damage county roads, bridges, and buildings by inundation, since such structures are not private property of the county, but are held by it on behalf of the state for governmental purposes; the county having no proprietary interest therein as against the state.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 77; Dec. Dig. ⟸31.]

10. COUNTIES ⟸24—PROPERTY—LEGISLATIVE CONTROL—COMPENSATION.

In the absence of constitutional restrictions, the Legislature has full control of the property held by the counties as agencies of the state, and may dispose thereof without the consent of or compensation to the counties.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 24; Dec. Dig. ⟸24.]

11. PROHIBITION ⟸9—SCOPE OF WRIT.

The writ of prohibition will not issue to restrain mere errors by the court below; its office being to prevent acts in excess of jurisdiction only.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 35; Dec. Dig. ⟸9.]

12. CONSTITUTIONAL LAW ⊂⊃55—PREVENTING EXECUTION OF PUBLIC STATUTES.

Civ. Code § 3423, subd. 4, forbidding the issuance of injunctions to prevent the execution of public statutes by public officers, is not a legislative invasion of the functions of the judicial department of the government, since such subdivision simply enunciates an old and generally recognized rule of equity jurisdiction.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 58–69, 71, 80, 81, 83; Dec. Dig. ⊂⊃55.]

13. PROHIBITION ⊂⊃3—EXCEEDING JURISDICTION—ADEQUATE REMEDY AT LAW.

The writ of prohibition will not issue to restrain an act in excess of the jurisdiction of the court below where there is a plain, speedy, and adequate remedy in the ordinary course of law.

[Ed. Note.—For other cases, see Prohibition; Cent. Dig. §§ 4–19; Dec. Dig. ⊂⊃3.]

14. PROHIBITION ⊂⊃10 — RECLAMATION DISTRICT—BUILDING LEVEE — INJUNCTION EXCEEDING JURISDICTION—ADEQUATE REMEDY AT LAW.

Where, in an action brought by a county to enjoin the construction by the officers of a reclamation district of the levee provided for by its creative act (St. 1913, p. 130), the superior court of Sutter county, in excess of its jurisdiction, issued a temporary injunction and set the cause for trial, the writ of prohibition will issue to prohibit the further prosecution of the action, since, being prevented by the temporary injunction from performing its duties under such creative act during the pendency of such action, the reclamation district is without adequate remedy at law.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37–56; Dec. Dig. ⊂⊃10.]

In Bank. Application by Reclamation District No. 1500 for a writ of prohibition against the Superior Court in and for the County of Sutter, State of California, and others, to prohibit further proceedings in an action for an injunction instituted by the County of Sutter against petitioner. Respondents' demurrer to the petition overruled, and writ issued as prayed.

A. C. Huston and Harry L. Huston, both of Woodland, and Devlin & Devlin, of Sacramento, for petitioner. Arthur Coats, of Yuba City, W. H. Carlin, of Marysville, and Lawrence Schillig and M. E. Sanborn, both of Yuba City, for respondents.

SLOSS, J. The petitioner has applied to this court for a writ prohibiting the respondents from taking any further proceedings in an action instituted in the superior court of Sutter county.

The action in question was instituted by the county of Sutter as plaintiff against reclamation district No. 1500, the petitioner herein, its trustees, and other parties for the purpose of obtaining an injunction restraining said defendants from constructing certain levees or completing their construction. The complaint alleged that the construction of such levees would, at times of high water, flood a large tract of land which, under natural conditions, was not subject to inundation, and would destroy or injure the county courthouse, jail, hall of records, and grounds of Sutter county, as well as numerous bridges and many miles of highway belonging to said county. The petitioner herein and its trustees appeared in said action and objected to the issuance of any injunction upon the grounds that are now relied upon as justifying the writ of prohibition here sought. Notwithstanding their objections, the superior court issued a temporary injunction restraining the construction of the greater part of the levee work described in the complaint, and thereafter set the cause for trial. The petitioner now seeks to prohibit the further prosecution of the action, contending that the superior court is without jurisdiction to grant the relief sought therein.

Reclamation district No. 1500 was created by an act of the Legislature approved April 30, 1913. Stats. 1913, p. 130. By section 1 of the act a reclamation district, to be known as reclamation district No. 1500, was created, and its boundaries were described. The same section contains the following provision:

"It shall be the duty of said reclamation district No. 1500 to construct a levee, forming the south side of Tisdale by-pass, and a portion of the westerly side of the Sutter basin by-pass, the center line of which levee shall be substantially along the following lines, the same having been approved by the state reclamation board March 31st, 1913: [Here follows a description of the line of the levee.]"

The Tisdale by-pass mentioned in the act forms the northerly boundary of district No. 1500. The described levee line along a "portion of the westerly side of the Sutter basin by-pass" is the easterly boundary of the district. This portion at its southerly end touches the left bank of the Sacramento river at a point known as Wild Irishman Bend, and the act declares:

"It shall be the duty of said reclamation district No. 1500 to continue the construction of a levee along the left bank of the Sacramento river, or adjacent thereto, from the said Wild Irishman Bend, upstream, to the place of beginning."

The Sacramento river, from said "place of beginning" on the Tisdale by-pass to Wild Irishman Bend, forms the westerly and southerly boundaries of the district, so that the levees described in the act would completely enclose the said district. The portion of the work sought to be enjoined is that bordering on the Tisdale by-pass and the Sutter basin by-pass. Section 2 of the act provides for the management and control of the district in accordance with the provisions of the Political Code, names five trustees who are to hold until the election and qualification of their successors, and declares that the district shall have the powers conferred by law upon reclamation and swamp land districts and certain other powers. The remaining sections of the act have no bearing upon the questions here involved.

The property which, as the complaint in the injunction suit alleges, will be damaged by the construction of the levee is not within the boundaries of reclamation district No. 1500. The petitioner's contention that the superior court is exceeding its jurisdiction in undertaking to restrain the acts complained of in the action pending before it is based upon the provisions of sections 3423 of the Civil Code and 526 of the Code of Civil Procedure. Each of these sections declares that:

"An injunction cannot be granted: * * * (4) To prevent the execution of a public statute by officers of the law for the public benefit."

The construction of the levee in question is, by the act creating the district, made the duty of the district, and it is contended that an injunction which restrains the performance of this duty comes directly within the terms of the Code sections cited.

[1-3] It will not be questioned that the act which creates reclamation district No. 1500 is a public statute. It is equally clear that the construction of the levees designated in the act constitutes the execution of such public statute. The injunction complained of restrains the district and its trustees from proceeding with the erection of such levees. The statute does not in terms impose the duty of building the levees upon the trustees. Such construction is declared to be the duty of the district. But, since a corporation, public or private, can act only through its officers or agents, the statutory imposition of a duty upon the district necessarily imposes the duty upon the directing officers of the district. We need not therefore inquire whether the reclamation district, as such, may be regarded as an "officer of the law" within the meaning of section 3423 of the Civil Code. It is enough if the trustees who are parties defendant in the injunction suit answer that description. The officers of an irrigation district have been held to be public officers of the state (Re Madera Irrigation District, 92 Cal. 296, 322, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106), and the trustees of the reclamation district created by the act of 1913 occupy an analogous position. They are officers of the law within the meaning of the Code section under discussion. That section declares that an injunction cannot be granted to prevent the execution of a public statute by officers of the law for the public benefit. If the statute creating reclamation district No. 1500 is valid at all, its provisions must be deemed to have been enacted for the public benefit. People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207; Heffner v. Case and Morgan Counties, 193 Ill. 439, 450, 62 N. E. 201, 58 L. R. A. 353.

[4, 5] The argument, in any case, against the validity of an injunction issued to restrain the execution of a statute, rests, of course, on the premise that the statute in question is a valid exercise of the legislative power. An act of the Legislature which is in conflict with the Constitution is no statute at all. It "is utterly void, has no force or legal existence. * * *" Wheeler v. Herbert, 152 Cal. 224, 228, 92 Pac. 353. The provisions of section 3423, subd. 4, of the Civil Code "refer solely to injunctions against the execution of valid statutes." Wheeler v. Herbert, supra.

[6, 7] The respondents attack the validity of the act creating reclamation district No. 1500, and the soundness of their contentions in this regard must be examined. The title of the act is as follows:

"An act creating a reclamation district to be called and known as 'reclamation district No. 1500,' providing for the management and control thereof and dissolving all levee districts, swamp land districts, and reclamation districts, lying wholly within the boundaries of said reclamation district No. 1500, providing for the liquidation and winding up of said dissolved districts, and excluding from any levee district, swamp land district and reclamation district any land lying within the boundaries of said reclamation district No. 1500."

The main contention of the parties attacking the validity of the law is that the provision making it the duty of the district to construct certain levees deals with a subject which is not suggested by the title of the act, and that this provision, therefore, must fall because of the terms of article 4, § 24, of the Constitution. That section reads:

"Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title."

The constitutional provision respecting the titles of acts has frequently been the subject of construction by this court. It is thoroughly settled that the provision is to be liberally construed with a view to effecting the object of the provision, viz., to prevent the passage of acts bearing deceitful and misleading titles. Ex parte Lidell, 93 Cal. 633, 29 Pac. 251.

"It is not necessary that the title of an act should embrace an abstract or catalogue of its contents." Abeel v. Clark, 84 Cal. 226, 229, 24 Pac. 383.

"When the general purpose of the act is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents." Ex parte Liddell, 93 Cal. at page 637, 29 Pac. 251; People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207.

The title of the present act states, among other things, that it is an act creating a reclamation district and providing for the management and control thereof. These words indicate plainly that the act is designed to erect a district for the purpose of reclaiming lands lying within its borders, and to prescribe the mode of managing and controlling such districts. Lands may be reclaimed by protecting them from overflow; and the most usual method of accomplishing this result is to surround the lands with

levees. How, then, can it be argued that a provision that protective levees shall be constructed along the boundary of the proposed reclamation district is not within the scope or the purposes contemplated in the creation of the district, or that such provision is not suggested by the title of an act which declares that its purpose is the creation, management, and control of such reclamation district? It is true that the act contains provisions relating to certain levee work beyond the boundaries of the district, but this work is not involved in the injunction suit. If the provision requiring this exterior construction is invalid—we are not to be understood as intimating that it is—the county of Sutter is not claiming to be affected by it, and is in no position to attack it.

[8] One ground of objection urged by respondents is that while, under the provisions of the Political Code relative to reclamation districts, the location of the levees and other details of the plans of reclamation are committed to the board of trustees (Pol. Code, § 3454), the present act by its own terms provides for the location of the levees. But since, as is well settled, districts of this kind may be created by special act (People v. Levee District, 131 Cal. 30, 63 Pac. 676; People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207), the Legislature in passing such act is not bound to follow the procedure laid down in the general law governing reclamation districts. It may adopt such procedure as it deems necessary or expedient, and there can be no constitutional objection to a location in the act itself of the lines of the proposed levees.

The petition herein refers to other acts of the Legislature (and an act of Congress) which contemplate the formation and adoption of a plan for the general control of flood conditions in the Sacramento valley under the joint direction of the federal and state governments. These acts are pointed to as indicating the reason for the direction in the present act that the levees be located as they are; such location being a part of the general plan referred to. We do not find it necessary to refer in greater detail to these matters, for the reason that, as already stated, we think it entirely within the power of the Legislature, in creating a reclamation district by special act, to define the manner and plan by which the contemplated reclamation work shall be carried out. It becomes unnecessary, therefore, to consider the question whether the other acts referred to, i. e., the one creating the reclamation board (Stats. 1911, Special Session, p. 117) and the one approving the plan of the California débris commission (Stats. 1913, p. 252), are open to attack as containing an unconstitutional delegation of power by the Legislature.

[9, 10] But the respondents argue that the action is one to restrain the commission of acts which will constitute a taking of the property of Sutter county, the plaintiff in the injunction suit, and that any statute which purports to authorize such taking without compensation is a violation of familiar constitutional restrictions. Const. art. 1 § 14. Payne v. English, 79 Cal. 540, 21 Pac. 952, was an action to enjoin the harbor commissioners of San Francisco from entering upon certain land claimed by the plaintiff and erecting a wharf thereon. The defendants objected to the issuance of an injunction upon the ground that they were authorized by statute to construct wharves, and that subdivision 4 of section 3423 of the Civil Code prevented the issuance of an injunction against the execution of a public statute. To this contention the court responded briefly:

"There is no public statute, or other law, which authorized defendants to take plaintiffs' land, at least without proceedings under the power of eminent domain."

See, also, Pierce v. City of Los Angeles, 120 Cal. 516, 114 Pac. 818.

The constitutional provision above referred to declares that "private property shall not be taken or damaged for public use without just compensation having been first made to * * * the owner." The public building, roads, and bridges of a county are not the private property of the county in such sense as to authorize the county to object to the taking or damaging thereof by the state for public purposes. The counties are governmental agencies of the state (County of San Mateo v. Coburn, 130 Cal. 631, 63 Pac. 78, 621), and the property intrusted to their governmental management is public property. The proprietary interest in all such property belongs to the public, and, if there be a legal title in the county, it is a title held in trust for the whole public. Board of Education v. Martin, 92 Cal. 209, 28 Pac. 799; People v. Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Heffner v. Cass and Morgan Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353. In the absence of constitutional restrictions, the Legislature has full control of the property held by the counties as agencies of the state, and may dispose of that property without the consent of the county or without compensating it. City of Edwardsville v. County of Madison, 251 Ill. 265, 96 N. E. 238, 37 L. R. A. (N. S.) 101. Upon analogous principles it has been established by a long line of decisions, in this state as well as elsewhere, that, except as restrained by constitutional limitations, the Legislature may alter the boundaries and extent of counties at will, may consolidate two or more into one, or divide and create new counties out of the territory of counties already existent.

"Upon the creation of a new county out of the territory of another, the Legislature, in the absence of constitutional restrictions, may make such provision with reference to the public property and debts, or their division, as to it may seem just. * * *" Los Angeles County v.

Orange County, 97 Cal. 329, 32 Pac. 316; Orange County v. Los Angeles County, 114 Cal. 390, 46 Pac. 173; Tulare County v. Kings County, 117 Cal. 195, 49 Pac. 8; Colusa County v. Glenn County, 124 Cal. 498, 57 Pac. 477; Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788; Laramie County v. Albany County, 92 U. S. 307, 23 L. Ed. 552.

So, too, this court has held that the Legislature may transfer the property of one reclamation district (Rec. Dist. v. Birks, 159 Cal. 233, 113 Pac. 170) or one school district (Pass School Dist. v. Hollywood City School Dist., 156 Cal. 416, 105 Pac. 122, 26 L. R. A. [N. S.] 485, 20 Ann. Cas. 87) to another without compensation. All of these rulings are founded upon the proposition that the county (or reclamation or school district) is a mere political agency of the state, that it holds its property on behalf of the state for governmental purposes, and that it has no private proprietary interest in such property as against the state. Applying the doctrine to the present case, it is clear that, if the building of the levees contemplated by the act creating the petitioner will or may injure or destroy buildings, roads, and bridges of the county of Sutter, the results will merely be an injury to or destruction of public property in the making of a public improvement authorized by the state itself. The state, damaging or taking its own property, is not required to provide compensation under the constitutional provision relative to eminent domain.

These views are in no wise inconsistent with the recognition of a sufficient title in the counties to justify their maintaining actions against private persons or corporations injuring roads or other public property. That such actions may be maintained is the full extent of the holding in cases like Sierra County v. Butler, 136 Cal. 547, 69 Pac. 418, and Yuba County v. Min. Co., 141 Cal. 360, 74 Pac. 1049, cited by respondents. Nor is there any conflict between our present holding and the decision in Grogan v. San Francisco, 18 Cal. 615, where the court was considering the status of land held by the municipality in its proprietary right. We are here dealing only with property held by a county in its governmental capacity for public purposes.

[11] The act being constitutional, and the injunction sought being one which contravenes the prohibition of section 3423 of the Civil Code, there still remains the question whether the superior court, in entertaining the application for such injunction, is exceeding its jurisdiction, and thus laying the foundation for a writ of prohibition. Such writ will not go to restrain mere errors by the court below. It is only an excess of jurisdiction which may be reached in this manner. This court has held, in Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145, that a writ of prohibition would issue to arrest the action of a superior court which was undertaking to enjoin an action pending in another court in violation of the first subdivision of section 3423 of the Civil Code. In Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225, a similar writ was based on the seventh subdivision of section 3423, which provides that an injunction cannot be granted "to prevent a legislative act by a municipal corporation."

[12] Section 3423 of the Civil Code does not in all of its provisions establish new rules for the granting or denying of preventive relief in equity. Some of the subdivisions are merely declaratory of principles which, in the absence of statute, were and are generally held to govern courts of chancery in determining what causes are proper subjects of equitable cognizance. Subdivision 1 is more than declaratory. It establishes a rule; it limits the right to issue injunctions as that right was understood in the English and American court before the adoption of our Codes. The Constitution of this state gives to the superior courts original jurisdiction "in all cases in equity." To the argument that this jurisdiction could not be limited by statute this court said in Spreckels v. Hawaiian, etc., Co., 117 Cal. 377, 49 Pac. 353, and in Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145, that subdivision 1 of section 3423 was an exercise of the legislative power to define the rights of persons. It did not limit the power of courts of equity to issue an injunction wherever the complainant was entitled thereto, but so operated on the complainant as to take away his right in certain cases to this form of relief. In the Wright Case, where, as we have said, a writ of prohibition was issued, the court held that the superior court was without jurisdiction to issue an injunction in a case in which such relief is forbidden by subdivision 1 of section 3423. The dissenting opinion of Shaw, J., took the ground that if, as the court held, the subdivision merely regulates the rights of persons, the issuance of a writ of injunction contrary to the statutory declaration is an erroneous determination that a cause of action exists, rather than an excess of jurisdiction. Whatever force this criticism may have, it is not applicable to the provision of subdivision 4 of section 3423. For here, in the subdivision declaring that injunction does not lie to restrain the execution of a legislative act by public officials, we have the enunciation of an old and generally recognized rule of equity jurisdiction.

This rule, like that of subdivision 7, which was involved in Glide v. Superior Court, supra, has its underlying basis in the division of the activities of government into three separate and independent departments, each of which is, in the exercise of its own peculiar functions, free from the control of either of the others. 5 Pom. Eq. Jur. § 327. The power to enjoin officers from enforcing a

statute, even where the statute was claimed to be unconstitutional, has been denied in some cases. Kneedler v. Lane, 45 Pa. 238; Thompson v. Com'rs, 2 Abb. Prac. (N. Y.) 248. This court has not carried the doctrine so far. The prohibition against enjoining the execution of statutes has been held to apply only to valid statutes. Wheeler v. Herbert, 152 Cal. 224, 92 Pac. 353. But, at least as so limited, the rule is generally recognized. In So. Or. Co. v. Quine, 70 Or. 63, 139 Pac. 332, the court said:

"We think the law is fixed beyond cavil that courts of equity have no power by injunction to restrain a public officer from performing an official act that he is required by valid law to perform. It is not sufficient to clothe the court with jurisdiction to say simply that, unless the court extends its restraining hand, hardships will follow, or irreparable damage will ensue, because the officer delegated to execute such law may act unwisely or injuriously to the party seeking relief. The acts must be such as are without the sanction of a sound law."

See, also, So. Min. Co. v. Lowe, 105 Ga. 352, 31 S. E. 191; Mendenhall v. Denham, 35 Fla. 250, 17 South. 561; Sup. of Greenville v. Seymour, 22 N. J. Eq. 458.

[13, 14] Even though the lower tribunal is about to exceed its jurisdiction, the writ of prohibition will not lie where there is "a plain, speedy and adequate remedy in the ordinary course of law." Code Civ. Proc. § 1103. It is true that in the case at bar the petitioner might by appeal review the correctness of any judgment or order enjoining it, but we do not think that such appeal would, under the circumstances here described, be an adequate remedy. Glide v. Sup. Ct., supra. To say nothing of the burden and expense of a trial of issues which, as we have seen, are not properly triable in the superior court, it may be observed that the preliminary injunction already issued ties the hands of the petitioner, and that an appeal from such injunction would not affect its operative force pending the appeal. If the petitioner is entitled to proceed with the work of building the levees which the statute commands it to build, an appeal would obviously not give adequate relief.

We have considered this proceeding as if it had been submitted upon an agreed statement of facts. The respondents have demurred to the petition, and have also filed an answer. For the reasons hereinbefore stated, the demurrer should be overruled. The answer does not raise any issue which we regard as material. There is therefore no occasion for the determination of any issue of fact, and the application should be finally disposed of at this time.

It is ordered that a peremptory writ of prohibition issue as prayed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

171 Cal. 689

CHINO LAND & WATER CO. v. HAMAKER et al. (L. A. 4343.)

(Supreme Court of California. Jan. 14, 1916.)

APPEAL AND ERROR ⟸1127—MOTION TO AFFIRM—ADVANCING HEARING.

Where it would amount to an advancement of the hearing of the appeal without good reason therefor, motion to affirm, on the ground that inspection of the record discloses that, in view of a recent federal Supreme Court decision, there must be an affirmance, consideration of which would necessarily involve a full consideration of the record and briefs as to the merits, will be denied as unfair to other litigants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4432–4440; Dec. Dig. ⟸ 1127.]

In Bank. Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Four actions, all by the Chino Land & Water Company; two against C. R. Hamaker and others, one against H. L. Moss and others, and the other against John K. Chalmers and others. From adverse judgments, defendants appeal. Motion to affirm denied.

Kimball Fletcher and Wm. A. Gaines, both of Los Angeles, and D. J. Hinkley, for appellants. O'Melveny, Stevens & Milliken and Walter K. Tuller, all of Los Angeles, for respondent.

ANGELLOTTI, C. J. Plaintiff and respondent Chino Land & Water Company, a corporation, has made a motion that this court affirm the judgment in each of the above-entitled cases, which are presented upon a single transcript, upon the ground substantially that an inspection of the record discloses that, in view of a certain recent decision of the United States Supreme Court, the judgments of the lower court must be affirmed. This motion is made long before the appeals are reached in regular order for hearing in this court, the real purpose of the motion being, of course, to advance the hearing of the appeals in this court over many other appeals preceding them on our calendar, when there is in fact no good reason for such advancement. It is apparent that this is not a proper case for such action as is desired. Mere consideration of the motion necessarily involves a full examination of the record and briefs of counsel as to the merits of the appeal, precisely the same examination we would be compelled to make upon the hearing of the appeals on their merits when the cases are regularly reached for hearing. Such a course on our part in the matter of these appeals would be unfair to other litigants in this court whose appeals are entitled to priority in the matter of hearing, and would establish a precedent that would operate greatly to their disadvantage, for we would be confronted with many such motions, the mere consideration of which would occupy much time that should be devoted to the consideration of earlier cases.

As we have suggested, the effect of such a practice would simply be to advance causes for hearing in preference to other causes, where no good reason for advancement exists, simply on the ground that it is asserted that the appeal is clearly without merit.

The motion is denied.

We concur: SLOSS, J.; MELVIN, J.; SHAW, J.; HENSHAW, J.; LAWLOR, J.

171 Cal. 668

TEAGUE v. HALL. (L. A. 3482.)

(Supreme Court of California. Jan. 13, 1916.)

1. FRAUD ⟸22—RELIANCE ON REPRESENTATIONS—DUTY TO INVESTIGATE.

The purchaser of citrus nurseries, induced to buy by the vendor's false representations that the nurseries contained 85,000 budded trees, could recover damages for the deceit practiced upon him, although he had an opportunity, and did not avail himself thereof, to make independent investigation of the truth of the representations, since one may act upon a positive representation of fact notwithstanding the means of knowledge are open to him.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19–23; Dec. Dig. ⟸22.]

2. APPEAL AND ERROR ⟸1064—PREJUDICIAL ERROR—INSTRUCTION.

In an action for deceit by the purchaser of citrus nurseries, induced to buy by the misrepresentations of the vendor that the nurseries contained 85,000 budded trees, an instruction that it was necessary for plaintiff's recovery for him to show that he had no independent knowledge of his own as to the number of budded trees, nor the means at hand to acquire such knowledge, or, having the means, was prevented by defendant from availing himself of them, and that matters equally within the knowledge or means of knowledge of both parties furnished no ground for relief, was prejudicially erroneous, since, under plaintiff's testimony that it would have taken a week to count the trees, the jury might have concluded, if properly instructed that failure to avail of a means of knowledge is not necessarily a bar to recovery, that the purchaser was justified in relying on the vendor's positive representation of the number of trees without verifying it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⟸1064.]

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by R. M. Teague against W. G. Hall. From a judgment for defendant and an order denying his motion for new trial, plaintiff appeals. Judgment and order reversed.

J. Vincent Hannon, of Los Angeles, for appellant. S. V. Landt, of Los Angeles, for respondent.

SLOSS, J. Action to recover damages for deceit. The defendant, Hall, had established citrus nurseries upon two tracts of land held by him under lease. One was known as the Keim nursery, and the other as the Yost nursery. On March 28, 1909, the parties entered into a contract whereby Hall sold to Teague all of his interest in these two nurseries in consideration of the sum of $37,000, $500 of this sum to be paid by the conveyance of a certain lot, and the balance to be paid in gold coin in certain installments running over a period of a year and a half or thereabouts. Under the contract Hall reserved the right to take 4,000 lemon trees from the Yost nursery. The contract contained this clause:

"It is understood that there is now in round numbers 60,000 number of budded trees upon the land described in the Keim lease and 25,000 of budded stock on the Yost lease."

It is not claimed that the clause last quoted constituted a warranty. The complaint alleged, however, that at the time of the execution of the contract the defendant, for the purpose of inducing the plaintiff to enter into it, falsely represented that the respective nurseries contained the number of budded trees mentioned in the contract, to wit, 60,000 in the Keim nursery and 25,000 in the Yost nursery, and that plaintiff, who had no knowledge of the number of trees in the nurseries or either of them, entered into the contract relying on said representations. It was alleged further that plaintiff subsequently discovered that there were not over 65,346 budded trees in the two nurseries, and that he had been damaged in the sum of $12,000, for which he prayed judgment. At the time of his discovery of the facts plaintiff had paid the defendant $34,000 of the contract price.

The defendant, in his answer, admitted the making of the contract and the payment of the $34,000 thereunder. He denied all the material allegations regarding fraud. By counterclaim he sought to recover the balance of $3,000 due under the terms of the agreement.

The action was tried before a jury, which returned a verdict in favor of the defendant for $3,000. Judgment was entered thereon. The plaintiff appeals from the judgment and from an order denying his motion for a new trial. On the material issues raised, viz., whether the defendant made the representations alleged, whether plaintiff relied upon them, whether they were, in fact, false, the evidence was conflicting. This court could not have said that a verdict either way was without substantial and adequate support.

[1] The main ground urged for reversal is founded on the instructions given by the court with relation to the plaintiff's duty to show that he was, in fact, deceived by the alleged misrepresentations. In this connection the court said to the jury:

"In order that the plaintiff may recover it is necessary that he show to the jury by a preponderance of the evidence: First, that Teague had no independent knowledge of his own as to the number of budded trees and did not have the means at hand to acquire such knowledge, or having the means at hand, was prevented by defendant from availing himself of them."

And further, on the same subject:

"Matters equally within the knowledge or means of knowledge of both parties furnish no

ground for relief, unless in the latter case the one party is prevented by the act of another from using his means of knowledge. It is a general principle that, if the means of knowledge be at hand and equally available to both parties, and the subject-matter be open to inspection of both alike, and there be no fiduciary and no confidential relations, and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentation of the other party."

The rule thus laid down is not qualified by any other instruction.

We think it must be held that the court erred in directing the jury, as it did, in effect, that a party who has relied upon a misrepresentation made by another and has suffered injury thereby is precluded from recovering, if he had an opportunity, and did not avail himself thereof, to test the truth of the representations by independent investigation. Some of the earlier cases state the rule in this broad way, but, as Mr. Bigelow says in his work on Fraud (Volume 1, p. 523):

"The proposition has now become very widely accepted at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge were specially open to him. * * *"

Similarly, in Pomeroy, Equity Jurisprudence, § 896, it is said that:

"Whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by an independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The mere existence of opportunities for examination or of sources of information is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact."

[2] This view of the law has been repeatedly declared in the decisions in this state. In Ruhl v. Mott, 120 Cal. 676, 53 Pac. 307, the court says:

"It is true that where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case no duty in law is devolved upon him to employ such means of knowledge."

The same doctrine is declared in Bank of Woodland v. Hiatt, 58 Cal. 234; Wenzel v. Shulz, 78 Cal. 221, 20 Pac. 404; Morris v. Courtney, 120 Cal. 63, 52 Pac. 129; Dow v. Swain, 125 Cal. 674, pp. 683, 684, 58 Pac. 271; Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 512, 137 Pac. 240; Eichelberger v. Mills L. & W. Co., 9 Cal. App. 628, 100 Pac. 117.

The nursery involved in the sale by defendant to plaintiff contained both budded and unbudded trees. The alleged misrepresentation referred only to the number of budded trees. The exact or even the approximate number of such trees could have been ascertained only by some form of computation or count. Under the instructions of the court the jury would naturally understand that, if the plaintiff had an opportunity to make such a count, and did not do so, he would be precluded from complaining of any misrepresentations, although he may, in fact, have relied upon them. The plaintiff testified, and the jury had the right to believe, that it would have taken a week to count the trees. The jury, accepting this evidence, might well have concluded, if instructed in accordance with the authorities above cited, that the plaintiff was justified in relying on defendant's positive representation (if he made one), without taking the time to verify its truth. But, under the instructions which were given, it is quite possible that the jury, while believing that the plaintiff had made the representation as alleged, that it was false, and that plaintiff had relied and acted upon it to his injury, nevertheless denied him recovery because they believed that he had had an opportunity to count the trees before making the contract, and had not availed himself of such opportunity. In this state of the case the error in the instructions cannot be treated as one which was not productive of prejudice.

The plaintiff also assigns as error certain rulings in the admission and rejection of evidence. No authoritites are cited in support of his contentions in this regard, and we do not find in such rulings any substantial ground for complaint.

The judgment and the order appealed from are reversed.

We concur: SHAW, J.; LAWLOR, J.

(171 Cal. 684)

PIERCE v. WORKS, Judge of Superior Court.

(L. A. 4369.)

(Supreme Court of California. Jan. 14, 1916.)

1. APPEAL AND ERROR ⟸660—PRESUMPTION —CORRECTION OF RECORD.

On an original petition for a writ of mandate directing a judge of the superior court to certify a transcript of proceedings alleged to have been prepared according to Code Civ. Proc. § 953a, for use on an appeal from an order granting a motion for a change of venue, where the opposing attorneys had objected solely on the ground that it was not a transcript contemplated by the statute and suggested corrections to which petitioner's counsel and the judge agreed, whereupon the transcript was amended accordingly, it would be presumed that the proposed transcript was correct and contained all matters essential to a proper determination of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2829, 2844–2847; Dec. Dig. ⟸660.]

2. APPEAL AND ERROR ⟸597—TRANSCRIPT—STATEMENT OF COURT.

Under Code Civ. Proc. § 953a, authorizing an appellant, by notice to the clerk, to require a transcript of the testimony and proceedings at the trial to be prepared, and requiring the reporter's transcript of his stenographic report,

including copies of all writings offered or received in evidence and all matters required by the notice, it was not necessary, on appeal from an order granting a change of venue where the only evidence was the files and records of the action and such indorsements of admission of service and filing as were found thereon, that the transcript contain the statements of the court at the hearing of the motion therefor or the objection of the counsel to the granting thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627–2638; Dec. Dig. ⟸ 597.]

3. Appeal and Error ⟸395—Undertaking —Statute.

Under Code Civ. Proc. § 953b, requiring the party appealing under section 953a on a transcript of the testimony in lieu of a bill of exceptions, to file an undertaking in an amount fixed by the clerk to pay the clerk the cost of preparing the transcript; and allowing the appellant to personally arrange with the stenographic reporter for his compensation, where it appeared that such undertaking was waived by the clerk, as it might be, the mere failure to give such undertaking was no objection to the certification of a transcript prepared and delivered by the clerk to the judge for settlement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2058, 2064–2070, 2085, 2086, 3127; Dec. Dig. ⟸395.]

4. Appeal and Error ⟸553—Transcript of Testimony—Statute.

Code Civ. Proc. § 953a, authorizes an appellant, in lieu of a bill of exceptions, and on notice to the clerk, to require the preparation of a transcript of the testimony and proceedings at the trial, and requires the reporter to prepare a transcript of his stenographic report, including copies of all writings offered or received in evidence and all other matters required by the notice, and that, if the judgment or order appealed from is not included in a judgment roll, the appellant shall specify the papers to be included in the transcript. Section 953b requires an undertaking to pay the cost of the transcript, and section 953c requires the clerk to transmit the prepared record on appeal. *Held*, that the statute authorizes such a transcript on appeal from an order granting a change of venue when the proceedings at the hearing were not taken down by a stenographic reporter, and the evidence submitted consisted only of the files and records of the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465–2471; Dec. Dig. ⟸553.]

In Bank. Original petition by Christine Pierce against Hon. Lewis R. Works, Judge of the Superior Court of the County of Los Angeles, for a writ of mandate directing respondent to certify a transcript of proceedings for use on appeal from an order granting a motion for a change of venue. Peremptory writ of mandate issued.

Riddle & Cheroske, of Los Angeles, for petitioner. Robert M. Clarke, of Los Angeles, and John J. Squier, of Santa Barbara, for respondent.

ANGELLOTTI, C. J. This is an original application to this court for a writ of mandate directing respondent to certify a transcript of proceedings claimed to have been prepared in accord with the provisions of section 953a, Code of Civil Procedure, for use on an appeal from an order granting a motion for change of place of trial from Los Angeles county to Santa Barbara county of an action brought by petitioner against A. M., Sallie Belle and Edith Pierce. Respondent judge declined to certify the same on the ground, expressed in writing, "that it is not such a statement or transcript as is contemplated by section 953a, Code of Civil Procedure." Although this was the only ground of refusal, and apparently, as indicated by the petition and answer, the only ground of objection to certification urged by opposing counsel before respondent, some other objections are urged by the answer of respondent filed herein. We think, however, that there is no force in any of the other objections, in view of the admitted facts.

[1] Although it is alleged in the answer that the proposed transcript was not certified by the clerk or any one else as containing true or correct copies of the original documents, papers, files, and records, it further appears that the opposing attorneys made no objection on any such ground, objecting simply that it was not such a transcript as was contemplated by section 953a, Code of Civil Procedure, and it further appears from the petition and answer that such attorneys suggested various corrections, to all of which petitioner's counsel and the judge agreed, and that the transcript was amended accordingly. So that it is fairly to be presumed from the pleadings here that the proposed transcript is absolutely correct and contained all matters essential to a proper determination of the appeal, and no suggestion is made to the contrary.

[2] It is further alleged in the answer that the proposed transcript does not contain the statements of the court made at the hearing of the motion for change of place of trial or the objections of counsel for plaintiff to the granting of the same. We cannot see any necessity for the incorporation of these matters in such a case as this, an appeal from an order granting a change of place of trial to the county of the defendant's alleged residence, where the only evidence was the files and records of the action, and such indorsements of admission of service and filing as there were thereon. There is no suggestion that the incorporation of any of such matters is essential to the protection of any right of any party. If neither party desires the insertion of such a matter, and it is not essential to a proper determination of the appeal, the statute does not require it to be inserted.

[3] It is further alleged that the undertaking provided for by section 953b, Code of Civil Procedure, was not filed with the clerk. This is the undertaking in an amount to be fixed by the clerk to secure to that officer the cost of preparing the transcript. Obviously this was enacted solely for the protection of

the clerk and stenographer, and, as amended in 1915, the party, instead of furnishing the undertaking, may arrange personally with the stenographic reporter for his compensation. According to the undenied allegations of the petition, it clearly appears that the giving of any undertaking was waived by the clerk, as it might be in such a case as this. Mere failure to give such an undertaking cannot be urged as a good ground of objection to the certification of a transcript in fact prepared and delivered by the clerk to the judge for settlement.

[4] The remaining question presented by this proceeding is whether the provisions of sections 953a, 953b, and 953c, Code of Civil Procedure, providing a record on appeal in lieu of the ordinary bill of exceptions, authorize such a record in a matter like the one here involved, when the proceedings at the hearing have not been taken down by a stenographic reporter, and the evidence submitted to the court consisted entirely of the files and records of the action.

The order appealed from is, of course, one not included in a judgment roll. It is an appealable order made before trial and judgment, to the review of which by an appellate court prior to the enactment of the sections referred to, it was essential that the evidence, upon which the motion therefor was heard, in whatever form it was received, should be incorporated in a bill of exceptions and properly authenticated by the trial judge. See Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526. This was true, although the evidence consisted only of the records and files of the action, including the papers presented and filed in support of the motion. Such papers could not be effectually certified to the appellate court by the clerk of the trial court. Hibernia Sav. & Loan Soc. v. Doran, supra. Section 953a purports to provide a method of preparation of record to which a party appealing "from any judgment, order or decree of the superior court" may resort "in lieu of preparing and settling a bill of exceptions," and under which, of course, he may bring to the appellate court anything he might properly include in a bill of exceptions. It is true, of course, that as to parol evidence, and as to writings merely offered or received in evidence at a trial, as distinguished from papers, records, and files in the cause, the section contemplates that there shall have been a phonographic report of the proceedings, and it may be that as to such matters there can be no record prepared under the section in the absence of such a phonographic report. Such was the situation in Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730, relied on by respondent, and we are not called upon here to dispute the correctness of the decision given therein. But, if there was no such evidence to report, and consequently no office for a stenographic reporter to perform, if the only matters considered on the hearing of the motion were the pleadings, papers, records, and files in the cause, as is always the case on a motion heard and determined solely on affidavits and the record and files of the action, we can see no reason why it should not be held that section 953a fully covers the matter. The section provides that:

"If the judgment, order or decree appealed from be not included in a judgment roll, the party desiring to appeal shall on the filing of said notice specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated in said transcript in addition to the matters hereinbefore required (the stenographic reporter's report of the trial including therein copies of all writings offered or received in evidence and all other matters and things required by the notice) and the same shall be included."

In Going v. Guy, 166 Cal. 279, 135 Pac. 1128 (decided by this court in bank October 4, 1913), this provision was held applicable on an appeal from an order confirming a sale of real estate in a probate matter; the appellants having requested a transcript containing copies of the petition for sale, the order of sale, the return of sale, the notice of hearing of the return, the bid received, and the order confirming the sale. In that case there was a stenographic reporter, who furnished a transcript of the testimony and proceedings at the hearing, but such transcript contained none of these papers. Such copies, prepared by some one whose identity was not disclosed, were delivered bound together and certified by the county clerk to be correct, to the judge, with the reporter's transcript, and, while certifying the latter, he refused to certify the former. It was admitted that the papers were true copies of the originals. The provisions of section 953a were fully discussed, and it was held that thereunder, especially in view of the paragraph we have quoted, the appellant was entitled to have such papers inserted in the transcript, and that it was the duty of the judge to authenticate the same. It was held, as is well settled, that the clerk's duty of authentication is limited to papers which constitute a judgment roll, and that the judge is not required to authenticate such papers (Christensen Lumber Co. v. Seawell, 157 Cal. 405, 108 Pac. 276; Knoch v. Haizlip, 163 Cal. 20, 124 Pac. 997; Totten v. Barlow, 165 Cal. 378, 132 Pac. 749), but that as to all other papers and records in the action it is the duty of the judge to make the authentication. See, also, Totten v. Barlow, supra. It was further said substantially that it was of no moment who did the typewriting, and that, "if the papers were correctly set forth in the certified transcript presented to the judge, as is conceded, he should have certified thereto, regardless of the identity of the person who copied them." That such papers as make up the proposed transcript in this case may be included in such a transcript was declared in Hibernia Sav. & Loan Soc. v. Doran, supra. If this be correct, as to which we

have no doubt, in view of what is said in Going v. Guy, supra, we can conceive of no possible reason why such a transcript may not consist exclusively of such papers, authenticated by the judge, in a case where the same constitute all the matters material to a proper determination of the appeal. The mere fact that there was no office for a stenographer to perform at the hearing of the motion, and that consequently there was no stenographic reporter present, certainly should not be held to preclude the bringing to an appellate court in this way of all papers, records, and files essential to a proper determination of the appeal, where the statute authorizes, as we must hold it does, the inclusion of the same in such a transcript. We think it clear that petitioner is entitled to the relief sought.

Let a peremptory writ of mandate issue in accord with the prayer of the petition.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

(171 Cal. 750)

In re WHITNEY'S ESTATE.
LANDERS et al. v. WHITNEY.
(S. F. 7240.)

(Supreme Court of California. Jan. 20, 1916. Rehearing Denied Feb. 17, 1916.)

1. WILLS ⟸6—PROPERTY DISPOSED OF—COMMUNITY PROPERTY.

A husband cannot, by his will, dispose of the wife's right to one-half of the community property should she survive him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 5–10; Dec. Dig. ⟸6.]

2. EXECUTORS AND ADMINISTRATORS ⟸176—FAMILY ALLOWANCE.

A widow's claim to a family allowance is strongly favored.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 661–666; Dec. Dig. ⟸176.]

3. EXECUTORS AND ADMINISTRATORS ⟸174—FAMILY ALLOWANCE.

The rights of testamentary disposition, and of beneficiaries to take under a will, being statutory, are subject to the power of the court to make provision for the support of the widow and children out of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 653, 654; Dec. Dig. ⟸174.]

4. EXECUTORS AND ADMINISTRATORS ⟸181—FAMILY ALLOWANCE—WHEN ORDERED—SPECIFIC DEVISE.

A family allowance, being analogous to a probate homestead, may be ordered even out of property specifically devised.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681–685; Dec. Dig. ⟸181.]

5. WILLS ⟸781—ELECTION—FAMILY ALLOWANCE.

A will may be drawn so as to put the widow to her election between taking the benefits given her by the testator and claiming her right of family allowance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2013–2017; Dec. Dig. ⟸781.]

6. EXECUTORS AND ADMINISTRATORS ⟸185—FAMILY ALLOWANCE—WAIVER.

The wife may, by an agreement, surrender the privilege of applying for a family allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. ⟸185.]

7. EXECUTORS AND ADMINISTRATORS ⟸185—FAMILY ALLOWANCE—WAIVER—CONSTRUCTION.

The right of a widow to a family allowance will not be held to have been surrendered by an agreement between the spouses except by clear and explicit language.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. ⟸185.]

8. EXECUTORS AND ADMINISTRATORS ⟸185—FAMILY ALLOWANCE—WAIVER—CONSTRUCTION.

Where the wife of the testator by an instrument concurrent with the will waived all her claims to her share of community property and "any and all other claims" upon the estate disposed of, the waiver, though in words broad enough to waive her right to the family allowance to which she was entitled by statute, must be construed with the will the purpose of which as declared by the testator was to dispose only of the community property, so that in fact the waiver did not waive her family allowance, and the general words being subject to the limitation of the specific words of the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. ⟸185.]

9. COURTS ⟸89 — JUDGMENTS IN OTHER CAUSES—CONCLUSIVENESS.

Decisions on the interpretation of written instruments have limited value when applied to the construction of documents embodying different language.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. ⟸89.]

10. WILLS ⟸782 — ELECTION — FAMILY ALLOWANCE—ESTATES CREATED.

To put the widow to an election between her legal estate and that granted by a will, it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018–2033; Dec. Dig. ⟸782.]

11. WILLS ⟸782 — ELECTION — FAMILY ALLOWANCE.

The mere fact that a legacy to the wife provides for payments at stated periods beginning from the testator's death does not deprive her of the right to a family allowance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018–2033; Dec. Dig. ⟸782.]

12. EXECUTORS AND ADMINISTRATORS ⟸186—FAMILY ALLOWANCE.

The fact that the will disposes specifically of the entire estate does not in and of itself destroy the widow's right to claim a family allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 669, 696; Dec. Dig. ⟸186.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceeding by Lucy A. Whitney, for a family allowance in her behalf, against John Landers and others, as executors of the will of Joel Parker Whitney, deceased. From an

order making the allowance, the executors appeal. Affirmed.

Corbet & Selby, of San Francisco, for appellants. Cushing & Cushing, of San Francisco (Erwin E. Richter, of San Francisco, of counsel), for respondent. W. T. Plunkett, of San Francisco, for legatee Helen Beryl Wheeler. Jas. P. Sweeney, of San Francisco, for legatee Parker Whitney.

SLOSS, J. The executors of the will of Joel Parker Whitney, deceased, appeal from an order granting to the widow of the decedent a family allowance of $1,200 per month during the administration of the estate, the payments to date from the day of the decedent's death.

Joel Parker Whitney died on the 17th day of January, 1913. The will was admitted to probate and the appellants were appointed executors thereof on the 28th day of March, 1913. An inventory and appraisement, showing the value of the estate to be $847,821.15, were returned on the 13th day of June, 1913. The widow's petition for family allowance was filed on June 10, 1914. The surviving heirs of the decedent were his widow, the respondent herein, and three adult children, Parker Whitney, Vincent Whitney, and Helen Beryl Wheeler. The testator owned certain dwelling houses and fishing camps in the state of Maine. A large amount of property in this state, originally owned by him, he had conveyed to a corporation known as the Whitney Estate Company, and the bulk of his estate consists of the shares of stock in this corporation. Included in the property of the Whitney Estate Company was a ranch in Placer county.

By the will the decedent gave to his widow the property in Maine, together with his books, silverware, pictures, furniture, and other articles of personal use. Certain minor legacies were given to various persons named, and the residue of the estate, including all of the testator's shares of stock in the Whitney Estate Company, was given to the executors as trustees. The executors thus named were Vincent Whitney, the testator's son, William J. Downing, and Frank Miller. The trustees were directed to pay to the widow $1,200 per month during her life. These payments had been made to, and accepted by, her up to the time of the proceedings here under review. The widow was given the right to occupy the houses on the ranch in Placer county, and the personal articles in such houses were bequeathed to her. The corpus of the trust estate was to be kept intact until the testator's son Vincent should reach the age of 35 years (or until his death if he should die before reaching such age). During this period each of the three children was to be paid the sum of $3,600 per year. Upon the arrival of Vincent Whitney at the age of 35 years, the trust fund was to be divided or distributed into three equal parts, all of which were to be subject to the provision for the benefit of the wife. One of these parts was to be transferred to Vincent Whitney, the second to be held in trust for the benefit of Parker Whitney and his issue as provided in the will, and the third to be held in trust for the benefit of his daughter Helen Beryl and her issue as provided. The further details of these trusts and of the provisions made in the event of Vincent's death before reaching the age of 35 years need not here be stated.

The preamble of the will ran as follows:

"Be it remembered that I, Joel Parker Whitney, * * * do make this my last will and testament hereby intending to dispose of all of my property of whatever kind or description, whether now or hereafter acquired, and intending hereby, with the written consent and acceptance of my wife Lucy, to dispose of any community property we may have, in the state of California or elsewhere if any such there be, including her share thereof as well as my own, and hereby revoking all other wills and codicils by me at any time made."

At the time of the execution of the will the testator's wife, Lucy A. Whitney, signed an instrument which was annexed to the will. This instrument, which the court below finds to have been executed at the request of the decedent, was in the following words:

"I, Lucy A. Whitney, wife of the said Joel Parker Whitney, do hereby certify and declare, that I have read the whole of the foregoing will of my said husband, and fully understand the same, clearly understanding that my said husband by his said will, disposes not only of all his individual property, but also all of our community property, in case there is any such, including my half thereof as well as his own, and I hereby elect to accept and acquiesce in the provisions of the said will, and hereby waive all claims to my share of any community property, and any and all other claims that I may have upon any of the estate disposed of by the said will, being fully convinced in my own mind of the reasonable and proper character of the said will, and the wisdom of its provisions, and hereby accepting such of the said provisions as apply to or concern me.

"Witness my hand and seal at San Francisco, Calif. in the state of California this eighth day of May A. D. 1909.

"Lucy A. Whitney. [Seal.]"

Attached to this instrument was the following attestation clause, signed by the witnesses to the execution of the will:

"On this eighth day of May, 1909, at San Francisco in the state of California, Lucy A. Whitney, wife of Joel Parker Whitney, executed the foregoing writing in our presence, declaring that she did so freely and voluntarily in token of her assent to the will of her husband and her waiver of all rights inconsistent with said will."

The testator made two codicils modifying the provisions of his will. The first of these, executed on April 5, 1911, revoked the appointment of W. J. Downing as executor and trustee and substituted John Landers in his place. It also altered other provisions relative to said Downing. The second codicil, executed on May 15, 1912, designated Parker Whitney as executor and trustee in place of Frank Miller, and made other changes which

have no bearing upon the questions here to be discussed. To the second of these codicils there was attached an instrument, executed by the testator's wife, Lucy A. Whitney, which was substantially in the same terms as the writing signed by her at the time of the making of the original will.

It is not questioned that the condition of the estate authorized the making of a family allowance; it is not suggested that the amount allowed to the widow was in any way unreasonable. The main contention of the appellants is that Mrs. Whitney was barred of the right to ask for a family allowance by reason of the writing executed by her at the time of the making of the will.

The soundness of this claim involves an inquiry into the true meaning and intent of the writing. It is of no great consequence whether the instrument be viewed from the standpoint of contract, of waiver, or of estoppel. In any aspect its operative effect, as against the right here claimed by the widow, must depend upon an interpretation of its terms. The important inquiry must be whether the words of waiver were intended to cover a possible claim for family allowance. In the paper Mrs. Whitney declared that she waived all claims to her share of the community property and any and all other claims that she might have upon any of the estate disposed of by the said will. It may readily be conceded that the general language "any and all other claims," etc., would be sufficient, standing by themselves, to cover a claim for family allowance. But the paper is to be read as a whole, in the light of surrounding circumstances and of the other elements of the transaction of which it formed a part. The paper signed by Mrs. Whitney was attached to the will, and it evidently was the paper referred to in the preamble of the will as "the written consent and acceptance of my wife Lucy." We have no doubt that, as is urged by the appellants themselves, the will and this waiver are to be read together. Such a reading clearly shows what the husband and wife had in mind and what they were undertaking to deal with in the drafting and execution of the two documents. The will itself begins with the declaration that the testator intends to dispose of all of his property, including any community property which he and his wife may have acquired.

[1] The husband could not, of course, without the consent of the wife, make a will which would effectively dispose of her right to succeed to one-half of the community property if she should survive him. He declares therefore that it is his intent, with her "written consent and acceptance," to dispose of her share of the community property as well as his own. The purpose of the writing which the wife was to sign and which she did in fact sign, is here clearly declared. That purpose was to enable the husband to exercise a right of disposition over the whole of the community property. The same view of the purpose and scope of the documents is disclosed by the recitals in the paper signed by Mrs. Whitney. After stating that she has read the will and fully understands it, she recites her clear understanding that her husband by his will "disposes not only of all his individual property, but also all of our community property, in case there is any such, including my half thereof as well as his own." After making these recitals, the wife goes on to state that she elects to accept and acquiesce in the provisions of the will and that she waives certain rights, as above set forth. As bearing on the intent of the parties, attention may also be directed to the attestation clause, in which the witnesses certify that Mrs. Whitney declared that she executed the writing "in token of her assent to the will of her husband and her waiver of all rights inconsistent with said will."

[2-7] The widow's claim to a family allowance is strongly favored in our law. In re Lux, 100 Cal. 603, 35 Pac. 341; Estate of Welsh, 106 Cal. 427, 432, 39 Pac. 805; Estate of Cowell, 164 Cal. 636, 642, 130 Pac. 209. The right of testamentary disposition, and the right of beneficiaries to take under the will, are alike statutory, and are both subject to the power of the court having jurisdiction of the estate to make a provision for the support of the widow (or minor children) out of the estate. Estate of Bump, 152 Cal. 274, 92 Pac. 643. A family allowance is, in this respect, analogous to a probate homestead, which, as has been held, may be ordered even out of property specifically devised. Estate of Huelsman, 127 Cal. 275, 59 Pac. 776; Estate of Gray, 159 Cal. 159, 112 Pac. 890. A will may, of course, be so drawn as to put the widow to her election between taking the benefits given her by the testator and claiming her right of family allowance. So, too, the wife may, by agreement, surrender the privilege of applying for an allowance. Whether the right to demand an allowance is inconsistent with the will, or has been surrendered, is a question of interpretation of the will or the contract. In the case of a contract, we think the right should not be held to have been surrendered by an agreement between the spouses "except by clear and explicit language." This was the rule of construction applied by this court to an antenuptial agreement which, as was claimed, barred the wife's right to select a homestead out of the separate property of the husband while both spouses were living. Warner v. Warner, 144 Cal. 615, 78 Pac. 24. In reason, the same principle should apply to the matter under consideration in this case.

[8] Here, then, we see that the parties executed writings in which they declared plainly that they were making arrangements and stipulations for the purpose of enabling the husband to dispose of the entire community

property and of binding the wife to assent to such disposition. The husband was asserting his intention to devise and bequeath the half of the community property which would pass to his wife if she survived him. She was consenting to such disposition and waiving her right to object thereto, or, as was said by the attestation clause, she was waiving her rights "inconsistent with said will." The language used should be interpreted in view of this general purpose and intent, and should not be held to surrender other and different rights unless language clearly and expressly declaring such intent was used. Under all the circumstances, we think the general language "any and all other claims, etc.," should be construed in the light of the apparent purpose of the agreement and limited to the particular words which preceded. In Mahaffy v. Mahaffy, 63 Iowa, 55, 18 N. W. 685, an antenuptial contract had been made, the prospective husband agreeing that a certain sum should be paid to his wife in case she survived him, "the same to be her dower and portion in full of my said estate, and in lieu and stead of any dower or rights of inheritance therein, given or created by operation of law." The wife, in consideration of the payment, agreed and bound herself "to receive and accept the said sum in full payment, and in entire and complete satisfaction of all my rights of dower and inheritance as the widow and heir of the party of the first part in his said estate, both real and personal, and I hereby now renounce, and relinquish all claim, right, title and interest therein by reason of the said relation of wife or widow of the said Mahaffy." Upon the death of the husband, the right of the wife to continue in possession of the homestead was opposed by reason of the words of renunciation and relinquishment above quoted. The court, in denying the validity of this claim, said:

"The clause in question ought, we think, to be construed with reference to the clauses which precede it, and the sense in which the words are used is also to be determined very largely by these preceding clauses. The language used in that portion of the contract which contains the covenant of William Mahaffy shows unmistakably, we think, that the benefit or advantage for which he was contracting was the relinquishment by defendant of the right to take any interest in his estate by inheritance, and the sum of money which he agreed should be paid her out of his estate was to be paid solely as consideration for such relinquishment by her. There is nothing in the language of this covenant, nor in her agreement to accept the money in satisfaction of her right of dower or inheritance, which by any possible construction can be made to cover or include any other right or interests in the estate, except the one named in express terms by each of the parties. The parties, then, by unmistakable language, indicated the subject-matter of their contract. They have identified the particular right or interest in the estate, which was the subject of their agreement. And this is followed by the general terms of the clause in question. The general language of this clause must be held to relate to rights and interests of the same nature and description with those that have been already mentioned. The clause is in the nature of a 'sweeping clause,' and its use and object was to guard against accidental omissions; and the rule of construction in such cases is that the 'general words are restrained by the subject-matter.'"

The language just quoted may very fitly be applied to the question before us. The rule that general words are to be qualified by particular recitals has often been declared, particularly in cases of releases. Texas & P. R. Co. v. Dashiell, 198 U. S. 523, 25 Sup. Ct. 737, 49 L. Ed. 1150; U. P. R. Co. v. Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581; Bassett v. Laurence, 193 Ill. 494, 61 N. E. 1098; Van Slyke v. Van Slyke, 80 N. J. Law, 382, 78 Atl. 179, 31 L. R. A. (N. S.) 778, Ann. Cas. 1912A, 498. The same theory underlies the provision of our Civil Code (section 1648) that:

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

There is nothing in the various decisions of this court cited by the appellants which is in conflict with the views we have expressed. In Re Noah, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829, the denial of the widow's right to a family allowance was really based upon the ground that she "did not constitute the immediate family of the deceased." This was also the basis of the decision in Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358, where the wife had obtained an order setting apart a homestead to her. The fact that the wife was not a member of the family of the husband at the time of his death was one of the grounds, though not, it is true, the only ground, of the decision in Estate of Yoell, 164 Cal. 540, 129 Pac. 999, a case strongly relied upon by the appellants. But if we go beyond this and look to the language of the agreement made by the wife in these various cases, we find that in each instance the words were such as to clearly import an intention to surrender the very right which was afterwards claimed. In the Noah Case the spouses had made a separation agreement by which the wife, in consideration of the payment of $10,500 by the husband, agreed not to demand any alimony or support from him, and that the $10,500 should be in full satisfaction of "all her marital claims." In Wickersham v. Comerford, supra, there was a separation agreement by which the wife agreed that she relinquished all right to the separate property of the husband "as his wife in law or equity or by descent." In the Yoell Case, supra, the agreement (also made in view of a contemplated separation) declared that the execution and consummation of the agreement was intended to be a full, complete, and final adjustment of all the property rights of the parties, who agreed that neither would at any time "assert any right, interest or title as heir at law of the other to any property devised or bequeathed by such will or as against the estate of the other, should the other die intestate and all claim as such heir or as surviving husband and wife respectively and all right to contest, or oppose the last

will of the other is hereby expressly waived." In the case before us there was no such explicit language. There was no specific reference to "marital rights" or to "or right as wife in law or equity or by descent" or to "all claim as heir or as surviving husband or wife." Besides, in each of these cases the court was construing a separation agreement, the very purpose of which was to make a final and complete adjustment of the mutual relations and rights of the parties with reference to property. The language of the agreement might very properly be construed, in case of doubt, in a way which would tend to carry out this purpose. Here, however, we have a case of a man and woman living together as husband and wife until the death of the former. The scope and purpose of their contract (if the papers in question are to be viewed as a contract) was entirely different from that of a separation agreement.

A case of different character from those just discussed is Estate of Lufkin, 131 Cal. 291, 63 Pac. 469, relied on by the appellants. Here there was no agreement by the husband and wife, the sole question being whether a bequest to the wife was so made that its acceptance would preclude an application for a family allowance. By the provision in question the testator gave to his wife the sum of $1,000 "on the payment of which $1,000 she relinquish all further claim to my estate." It was held that the term "claim" was broad enough to include the right of the widow to an allowance from the estate of the testator, and that it, "where a different intention is not manifested by the context," must be so construed. The intention to use it as including such claim was held by the court to be manifest from the circumstances of the case, it appearing that there was nothing but the claim for family allowance to which the term could be made to apply. The decision supports the conclusion (conceded in the earlier part of this opinion) that the words "any and all other claims," etc., contained in the writing signed by Mrs. Whitney, would, standing alone, cover a claim for family allowance. But the inquiry must go further than this. We are to decide, not the independent meaning of these words, but their meaning in the connection in which they are found, and under the circumstances surrounding their use. In Estate of Lufkin it was held that the surrounding circumstances indicated that the word "claim" was used in such manner as to include a claim for family allowance. Here, for the reasons which we have already elaborated, we conclude that the word was not used in this sense.

The appellants refer to a number of decisions from other states which, as they claim, support their contention that the widow by her writing barred herself of the right of a family allowance. Appeal of Cowles, 74 Conn. 24, 49 Atl. 195; Paine et al. v. Hollister, 139 Mass. 144, 29 N. E. 541; Pavlicek v. Roessler, 222 Ill. 83, 78 N. E. 11; Rieger v. Schaible, 81 Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700; Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63, 4 Ann. Cas. 801; Appeal of Staub, 66 Conn. 127, 33 Atl. 615. We shall not undertake to review these cases at length. One and all, they dealt with antenuptial agreements, and in each instance the language which was held to bar the right of the widow differed from that found in the paper signed by Mrs. Whitney.

[9] As this court has had occasion to say repeatedly, decisions on the interpretation of written instruments have but limited value when applied to the construction of documents embodying different language. To a great extent each writing must be viewed by itself, and the intent of the parties must be ascertained from a study of the particular terms employed, read in the light of the underlying purpose of the transaction and the circumstances under which it was made. So reading the paper before us, we do not find in the authorities cited any reason to adopt an interpretation other than the one given by the court below.

[10] There is no occasion to consider at length the claim that, by accepting the benefit given her by the will, the widow has made an election to claim no family allowance, or that she is thereby estopped to claim such allowance. These contentions rest upon the premise that the receipt of an allowance is inconsistent with the provisions made for the wife in the will. There is no such inconsistency. To put the widow to her election "it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by the law." Estate of Cowell, 164 Cal. 636, 642, 130 Pac. 209. The will shows plainly that the testator intended to require the widow to elect between taking under the will and taking one-half of the community property, but there is nothing to indicate an intention to put her to an election so far as family allowance is concerned.

[11] The fact that the legacy to the wife takes the form of a provision for payments at stated periods, beginning from the testator's death, does not deprive her of the right to a family allowance. In this respect the case is precisely similar to Estate of Cowell, supra. We see no force in the claim that the granting of a family allowance would operate to defeat the will.

[12] Assuming, as claimed by the appellants, that the will disposes specifically of the entire estate, this does not, in and of itself, destroy the right to claim an allowance. Such right stands on the same footing as her right to a homestead which, as we have seen, may be set apart by the probate court out of property specifically devised. There is therefore no room for the application of the doctrine of election or that of estoppel.

The order is affirmed.

We concur: SHAW, J.; LAWLOR, J.

171 Cal. 731

TILTON v. DECKER et al. (L. A. 3496.)

(Supreme Court of California. Jan. 18, 1916.)

1. EVIDENCE ⟸32—JUDICIAL NOTICE—ORDINANCES.

Generally a court of record does not take judicial notice of municipal ordinances, and they must, where a necessary part of the case, be proven; but as judicial notice presupposes the absence of evidence, the rule does not apply where a deed by the board of public works is prima facie evidence of the regularity of the proceedings on which it is based.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. ⟸32.]

2. MUNICIPAL CORPORATIONS ⟸582—VALIDITY.

Under Street Opening Act (St. 1903, p. 384) § 29, declaring that the deed is prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee, the deed of the board of public works reciting the adoption of the requisite ordinances is sufficient evidence to warrant a finding that all of the preliminary steps in the street opening proceedings have been taken, hence independent proof of the adoption of several street opening ordinances is unnecessary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. ⟸582.]

3. QUIETING TITLE ⟸35—ACTIONS—PLEADINGS.

Where the validity of defendant's mortgage depended on title acquired by the mortgagor through a street opening proceeding by a city, which divested plaintiff's title, a general averment of the title in the mortgagor is sufficient without pleading the source.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 73, 74; Dec. Dig. ⟸35.]

4. MUNICIPAL CORPORATIONS ⟸582—STREETS—PROCEEDINGS FOR OPENING—AFFIDAVITS OF DILIGENCE.

Under Street Opening Act, § 28, requiring the purchaser before he may obtain a deed to serve upon the owner of the property and occupants, if it be occupied, a written notice setting forth various matters, and to file with the street superintendent an affidavit showing that notice has been given, or if not served that due diligence was used to find the owner, an affidavit that the purchaser had inquired of neighbors nearest the property as to the whereabouts of the person whose name was given on the assessment rolls as owner, the property being unoccupied, that he had searched the city and telephone directories seeking to ascertain the address and whereabouts of the named person and knew of no other place or person where he could learn the address of such owner, when taken together is sufficient to show due diligence, though not averring the years for which the directories searched were issued.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. ⟸582.]

5. MUNICIPAL CORPORATIONS ⟸582—STREET OPENING—AFFIDAVITS.

In such case the street superintendent or those succeeding to the duties of his office are first called upon to determine the sufficiency of their affidavit, and to execute a deed upon such determination.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. ⟸582.]

6. MUNICIPAL CORPORATIONS ⟸486—STREET OPENING PROCEEDING—PUBLICATION—"TEN DAYS."

Street Opening Act, § 18, requires that after the assessment for the street opening is written and filed with the city council, the council shall give notice by publication for at least 10 days. An affidavit of publication stated that notice was published for 10 consecutive days, Sundays excepted, commencing on the 8th day of October and ending on the 18th day. October 9th and 16th were both Sundays, and therefore there had been only 9 publications. *Held*, that the expression "publication for 10 days" does not require any specific number of publications, but merely designates a period of time in which publication is to be made, so the intervening Sundays are properly counted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1084–1090, 1161; Dec. Dig. ⟸486.]

7. TRIAL ⟸105 — ADMISSION OF EVIDENCE — FAILURE TO OBJECT—STREET OPENING ACT.

Where the certificate of sale required by the Street Opening Act to be executed by the street superintendent is admitted in evidence without objection, its insufficiency may be reached by an attack on the findings, notwithstanding the deed itself furnishes prima facie evidence of regularity of prior proceedings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260–266; Dec. Dig. ⟸105.]

8. MUNICIPAL CORPORATIONS ⟸577—STREET OPENINGS—CERTIFICATE—SUFFICIENCY.

Street Opening Act, § 26, requires the street superintendent to execute a certificate of sale, setting forth the time when the purchaser will be entitled to a deed, while sections 27 and 28, respectively, declare that redemption may be made at any time prior to the delivery of the deed, and that the deed shall be executed at any time after the expiration of 12 months after the date of sale, if the purchaser is given 30 days' notice. A certificate of sale recited that the purchaser would on proper application be entitled to a deed at any time after the expiration of 12 months, unless the property be sooner redeemed. *Held*, that the certificate is sufficient, for the word "sooner" may be construed as referring to the date when the purchaser would be entitled to a deed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1290, 1292; Dec. Dig. ⟸577.]

9. MUNICIPAL CORPORATIONS ⟸582—OPENING OF STREETS—SPECIAL ASSESSMENTS.

Assessments for street improvements, like tax proceedings, are in invitum, and where the statute prescribes the form of the instrument which is to divest title, such form must be followed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. ⟸582.]

10. MUNICIPAL CORPORATIONS ⟸582 — STREETS—OPENING—DEEDS.

Under Street Opening Act, § 28, declaring that there shall be recited in the deed substantially the matters contained in the certificate, the deed is valid, though it did not recite with the detail of the certificate, the time when the purchaser would be entitled to a deed, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. ⟸582.]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Annie L. Tilton against Mrs. F. J. Decker and others. From a judgment for

defendant Russek, plaintiff appeals. Affirmed.

W. G. Van Pelt, of Los Angeles, for appellant. Frederick A. Preston, of Los Angeles, for respondent.

SLOSS, J. Plaintiff sued to quiet title to a lot in the city of Los Angeles. There were four defendants named in the complaint. Two defaulted. The third, Louis, answered, but did not appear at the trial nor introduce any evidence, and judgment was entered against him. The fourth, Russek, answered, denying the allegations of the complaint, and filed a cross-complaint alleging that Mrs. Decker (one of the defaulting defendants) was the owner of the property on September 20, 1911, on which date she had executed a mortgage upon the property, and that Russek had become the owner of said mortgage. The court found that the plaintiff was the owner of the property subject to the lien of Russek's mortgage. The plaintiff appeals from the part of the judgment in favor of Russek, and brings up the evidence by means of a bill of exceptions.

At the trial it was admitted that the plaintiff was the owner of the land, except so far as her title may have been divested by virtue of a deed executed by the board of public works of the city of Los Angeles to one Warden, pursuant to proceedings for the opening of an alley under the "Street Opening Act of 1903." Stats. 1903, p. 376. The respondent's mortgage was given by a successor in interest of Warden. The correctness of the judgment turns upon the validity of the sale and deed under the street opening proceedings.

The appellant attacks these proceedings in the following particulars:

[1, 2] 1. The deed from the board of public works recites the passage by the city council of Los Angeles of two ordinances, the one declaring the intention of the mayor and council to open the alley in question, the other ordering the improvement to be made. Plaintiff objected to the admission of the deed in the absence of pleading and independent proof of the adoption of these ordinances.

The defendant offered in evidence the ordinance first referred to in the deed, i. e., the one declaring the intention of the city council to order the work done, but there was no proof of the ordinance ordering the work done. We do not think the proof of this ordinance was essential to the admissibility of the deed or to the making of a prima facie case by the defendant. Under section 29 of the Street Opening Act the deed is prima facie evidence "of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee." The deed itself is therefore sufficient evidence to warrant a finding that all the preliminary steps in the proceedings have been taken. The power of the Legislature to make the deed prima facie evidence of such preliminary steps is well settled by our decisions. Rollins v. Wright, 93 Cal. 395, 29 Pac. 58; Clarke v. Mead, 102 Cal. 516, 36 Pac. 862. The appellant argues that courts of record do not take judicial notice of municipal ordinances, and that such ordinances must, where they are a necessary part of the case, be proven. This is no doubt the general rule. Ex parte Davis, 115 Cal. 447, 47 Pac. 258; City of Tulare v. Hevren, 126 Cal. 229, 58 Pac. 530. But we have here no question of taking judicial notice of the ordinances. The term "judicial notice" presupposes the absence of evidence. Under the act, the deed furnishes prima facie evidence of the regularity of all proceedings prior to its execution. Those proceedings include the passage of the ordinance. Prima facie proof of the passage of such ordinance was therefore made by the introduction of the deed, and the court was not asked to take judicial notice of anything.

In Metteer v. Smith, 156 Cal. 574, 105 Pac. 735, relied on by appellant, it was held that a tax deed issued on a sale of property for delinquent city taxes was not admissible in evidence without proof of the passage of an ordinance recited in the deed. The precise nature of the ordinance referred to is not disclosed by the opinion. If the passage of the ordinance was a step in the process of assessment, of equalization or of the levy of taxes, it is not easy to see why such ordinance was not sufficiently proven, in view of the provision of section 3786 of the Political Code (made applicable to the proceedings in question by section 871 of the Municipal Incorporation Act [St. 1905, p. 89]), that the deed is prima facie evidence, that (1) the property was assessed as required by law; (2) the property was equalized as required by law; (3) the taxes were levied in accordance with law. Be this as it may, the provisions of section 3786 of the Political Code are not so broad as those of section 29 of the "Street Opening Act of 1903," which, as we have said, makes the deed prima facie evidence of the regularity of all proceedings prior to the execution thereof, and of title in the grantee. This language includes city ordinances as well as any other intervening steps.

[3] There is no force in the contention that the respondent was bound to set up the ordinances in his answer. If he had undertaken to plead a title derived under a delinquent sale, he would have been required to allege every proceeding essential to the validity of such sale. Himmelman v. Danos, 35 Cal. 449; Russell v. Mann, 22 Cal. 131. But here the respondent's answer and cross-complaint alleged merely that, at the time of the execution of the mortgage owned by him, the mortgagor Decker was the owner in fee and entitled to the possession of the property.

The source of Decker's title was not pleaded. A general allegation of ownership of real property is all that is required, and under such allegation any proof tending to establish the title alleged is admissible.

[4] 2. Under section 28 of the act, the purchaser must, at least 30 days before he applies for a deed, serve on the owner of the property, and the occupant thereof, if it be occupied, a written notice setting forth various matters. If the owner "cannot be found, after due diligence," the notice must be posted upon the property. "The person applying for a deed must file with the street superintendent an affidavit or affidavits showing that notice of such application has been given, * * *" and if the notice was not served on the owner of the property personally, that due diligence was used to find such owner. There was no personal service in this case. It is claimed that the affidavit filed by the purchaser was insufficient to show that due diligence had been used to ascertain the whereabouts of the owner.

The declarations of the affiant in this regard were:

That he had "inquired of Miss Nelson at 857 East Adams street and of the occupants of 848 East Adams street for the address or whereabouts of Annie L. Tilton, or Annie L. Tilden, or the owner of said property, and said persons were unable to give any information relative to the whereabouts of said person, said persons being the neighbors nearest said property.

"That the name of Annie L. Tilden is given on the assessment roll as the owner of said property.

"That he has searched the city directory and the telephone directories, seeking to ascertain the address and whereabouts of the said Annie L. Tilton, or Annie L. Tilden, and to find the same affiant has been wholly unable, and that he knows of no other place or person where he could learn the address or whereabouts of said persons.

"That the property is vacant and unoccupied."

In Hennessy v. Hall, 14 Cal. App. 759, 762, 113 Pac. 350, 352, the court said:

That "to warrant the execution of a deed to the purchaser and foreclose the owner's right of redemption upon such constructive service, an affidavit must be filed showing, not merely stating, that due diligence was used to find the owner."

In other words, the affidavit must set forth evidentiary facts which justify the conclusion that due diligence was used. In this respect the requirement of the statute is not unlike that of section 412 of the Code of Civil Procedure, authorizing service of summons by publication when the person to be served "cannot after due diligence be found within the state * * * and this fact appears by affidavit to the satisfaction of the court or a judge thereof." In order to justify publication of summons "the affidavit must show two facts, viz., the exercise of due diligence to find the defendant within the state, and a failure to find him after the exercise of such diligence." Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. An affidavit which merely states these "ultimate facts," or conclusions in the language of the statute, is not adequate. Ricketson v. Richardson, 26 Cal. 149. But if the evidentiary facts set forth in the affidavit have a "legal tendency" to show the ultimate facts, the order for publication is sufficiently supported. Rue v. Quinn, supra; People v. Wrin, 143 Cal. 11, 76 Pac. 646; People v. Norris, 144 Cal. 422, 77 Pac. 998; Sharp v. Salisbury, 144 Cal. 721, 78 Pac. 282; Shepard v. Mace, 148 Cal. 270, 82 Pac. 1046; Roberts v. Jacob, 154 Cal. 307, 97 Pac. 671. In all of these cases the court upheld orders based on affidavits which, in their statement of facts tending to show the exercise of due diligence, were not materially stronger than the one here involved. The property in question is an unoccupied city lot. The affidavit states that the affiant made inquiry of persons residing at two certain addresses. It is true, as claimed by the appellant, that it does not appear how near these places were to the property in question. But it is stated that the occupants of these places were "the neighbors nearest said property." The statement of the affidavit that search had been made of "the city directory and the telephone directories" is not very satisfactory, in view of the omission to specify the years for which such directories were issued. But taking the whole affidavit together, we think it cannot be said that it is lacking in the allegation of facts tending to prove due diligence in seeking to ascertain the whereabouts of the owner. It is not unreasonable to say that the persons living nearest an unoccupied city lot are likely to know who owns the lot and where he is to be found. The affidavit held insufficient in Hennessy v. Hall, supra, was decidedly weaker than the one now before us. It appeared that the person whom the affiant had sought to locate was not the owner of the property at the time of the search, but had parted with all interest therein nearly 4 years before.

It is sought to distinguish Rue v. Quinn, supra, and similar cases, on the ground that in ordering a publication of summons the court or judge passes upon the sufficiency of the affidavit. The requisite facts must "appear by affidavit to the satisfaction of the court or * * * judge." Code Civ. Proc. § 412. The finding (implied in the making of the order) that a sufficient showing has been made will be sustained if the facts alleged in the affidavit justify a finding either way. Bender v. Hutton, 160 Cal. 372, 117 Pac. 322.

[5] The Street Opening Act, however, does not in terms empower any one to find the existence of the facts which are to be "shown" by the affidavit. The street superintendent (or, in the city of Los Angeles, the board of public works, which has, by charter provision, succeeded to the duties of such superintendent), is to execute the deed after the filing with him of the prescribed affidavit. He is therefore called upon to determine, in the

first instance, whether the affidavit shows the requisite facts. But, conceding that no particular weight is to be given to his action in accepting the affidavit and executing a deed, the sufficiency of the affidavit must necessarily be a subject for determination by any court in which the validity of the proceedings is put in issue. In the present case the lower court has, by finding in favor of the respondent, ruled that the affidavit was sufficient. We cannot overturn this conclusion. Whether we could sustain a holding to the contrary is a question that is not presented.

[6] 3. Section 18 of the act requires that after the assessment is completed and filed with the city council, the council shall give notice of such filing "by publication for at least ten days in a daily newspaper published and circulated in the city. * * *" The affidavit of publication states that the notice was published for "ten consecutive days (Sundays excepted), commencing on the 8th day of October, 1909, and ending on the 18th day of October, 1909, both days inclusive, and as often during said period as said newspaper was issued, to wit, daily." October 9 and 16, 1909, were Sundays, and there had, therefore, been only 9 publications. This is claimed to be insufficient under the statute.

The expression "publication for ten days," found in section 22 of the act, does not require any specific number of publications. It designates a period of time during which the publication is to be made. The intervening Sundays are properly counted as a part of this period. Taylor v. Palmer, 31 Cal. 240; Cal. Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802. A paper published only 6 days of the week is a "daily newspaper" (Richardson v. Tobin, 45 Cal. 30), and a publication for the required period in every issue of such a paper is a compliance with the statute (Cal. Imp. Co. v. Reynolds, supra).

[7] 4. Under section 26 the street superintendent must execute a certificate of sale setting forth "* * * the time when the purchaser will be entitled to a deed." Under section 27 redemption may be made at any time prior to the execution and delivery of a deed therefor. The deed is to be executed (section 28) at any time after the expiration of 12 months from the date of sale, if the purchaser has given 30 days' notice, as required by said section 28, of the time when he will apply for a deed. The certificate of sale in this case stated that:

"The purchaser or his assignee will be entitled to a deed of said property at any time after the expiration of 12 months from the said date of sale, upon giving notice of application therefor as provided by law, unless said property shall be sooner redeemed."

This, it is claimed, does not comply with the requirement of section 26.

It is questionable whether the alleged defect in the certificate may be complained of by the appellant. The certificate was admitted in evidence without objection. It was not necessary to the defendant's case, the deed itself furnishing prima facie evidence of the regularity of the prior proceedings. But since the certificate was in fact introduced, its insufficiency might have been reached by an attack on the findings. The specifications of insufficiency are, however, so limited as to exclude such attack.

[8] But, in any view, we think the certificate did recite correctly the time when the purchaser would be entitled to a deed. Under the act the deed is to issue at any time after the expiration of 12 months from the date of sale if the purchaser has complied with the provisions of the section and the property has not been redeemed. The purchaser is therefore entitled to a deed at any time after the expiration of 12 months upon giving the proper notice, unless said property is redeemed prior to the delivery of such deed. If we interpret the word "sooner" in the recital to refer to the date when the purchaser will be entitled to a deed—a perfectly permissible construction—the recital is in exact conformity with the provision of the law.

[9, 10] 5. The deed recites that the certificate set forth various matters, including "the time when the purchaser would be entitled to a deed." It did not repeat in detail the recital of the certificate setting forth the time when the purchaser would be entitled to a deed. It is claimed that such recital was necessary under the provision of section 28 that there shall be recited in the deed "substantially the matters contained in the certificate." Assessments for street improvements, like tax proceedings, are in invitum, and where the statute prescribes the form of the instrument which is to divest the title of the owner, such form must be followed. A want of the recitals required by law will make the deed void. Grimm v. O'Connell, 54 Cal. 522; Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761; Baird v. Monroe, 150 Cal. 560, 564, 89 Pac. 352. "It is not for the court to inquire whether the required recitals are of material facts. * * *" Baird v. Monroe, supra.

The statute does not specify, in terms, the precise recitals to be contained in the deed. It merely calls, by reference, for "substantially the matters recited in the certificate." The particular recital here involved relates to the happening, in terms of futurity, of an event which is to occur after the issuance of the certificate, but will have taken place when the deed is executed. Of a somewhat similar provision in section 3786 of the Political Code this court said (Hewes v. McLellan, 80 Cal. 393, 395, 22 Pac. 287, 288):

"The requirement of the Code that the deed shall recite when the purchaser will be entitled to it is absurd, and results from the general provision that it shall contain the recitals contained in the certificate, which was enacted no doubt without observing that one at least of the recitals proper in the certificate would be entirely improper and useless in the deed as the recital of a fact. We think, therefore, that it was suf-

ficient that the deed recited the fact that this statement was contained in the certificate."

Under the case just cited it would clearly have been sufficient if the deed had repeated the recital of the certificate. It did not do this, merely reciting, as has already been stated, that the certificate set forth "the time when the purchaser would be entitled to a deed." We think, however, that the reasoning in Hewes v. McLellan justifies the conclusion that this was a substantial compliance with the statute, in view, especially, of the rather indefinite language ("substantially the matters contained in the certificate") in which section 28 defines the necessary recitals in the deed. For the purposes of the particular recital here in question, we hold that every demand of the law, reasonably construed, is fully satisfied by such a deed as the one before us.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

171 Cal. 706

MARIN WATER & POWER CO. v. RAILROAD COMMISSION OF STATE OF CALIFORNIA. (S. F. 7451.)

(Supreme Court of California. Jan. 17, 1916. Rehearing Denied Feb. 16, 1916.)

1. EMINENT DOMAIN ⟸71—REGULATION AS TO PUBLIC UTILITIES—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 12, § 23, gives the Railroad Commission such jurisdiction to regulate public utilities, etc., as shall be conferred by the Legislature, and declares the legislative power to confer jurisdiction on the commission plenary. Section 22 declares the authority of the Legislature to give the commission such powers to be unlimited by any provision of the Constitution. Section 14, art. 1, provides that, when private property is taken for public use, the owner's compensation shall be fixed by a jury, unless a jury is waived. Article 12, § 23a (adopted November 3, 1914), declares the commission to have such power to fix the compensation to be paid for property of any public utility acquired by certain public corporations as the Legislature may confer upon it, and that the legislative power shall be plenary. *Held*, that Public Utilities Act (St. 1911, Ex. Sess. p. 18) § 47, as amended (St. 1913, p. 684), empowering the commission on petition of any water district intending to take by eminent domain the property of any existing public utility to fix the compensation, is valid.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 180–187; Dec. Dig. ⟸71.]

2. EMINENT DOMAIN ⟸262—REGULATION OF PUBLIC UTILITIES — REVIEW OF PROCEEDINGS—WAIVER—EFFECT.

Public Utilities Act, § 47, as amended in 1913, valid after Const. art. 12, § 23a (adopted November 3, 1914), gave the Railroad Commission power to fix the compensation payable to the owner of any public utility property taken by a municipal water district, etc., in eminent domain proceedings, and section 70 provided that, if the owner whose property is sought to be taken does not file an acceptance of the compensation fixed by the commission, the corporation seeking to condemn must commence an eminent domain proceeding, in which the compensation so fixed shall be conclusive. On a proceeding in certiorari or review instituted under section 47 as amended it appeared that the evidence had been taken before the Constitution had confirmed the amendment to that section, and that the matter had been submitted and the commission's decision made after such confirmation, and that the petitioner had waived any objection which might have been urged before such amendment. *Held*, that the court would consider the case on the theory that the commission, from the beginning, was authorized to entertain the proceeding.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681–686; Dec. Dig. ⟸262.]

3. CONSTITUTIONAL LAW ⟸62 — "JUDICIAL POWER" — DELEGATION — CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under Public Utilities Act, § 47, as amended in 1913, authorizing the Railroad Commission to fix compensation to be paid owners of public utility property condemned by a municipal water district, etc., the commission is given judicial powers, as its determination in eminent domain proceedings establishes the right to the owners to receive and the obligation of the public corporation to pay some fixed compensation for the property taken; "judicial power" being the power to determine what shall be adjudged or decreed between the parties and with whom is the right of the case; determination of the rights of the individual under the existing laws; the ascertainment of existing rights; the determination of controversies between parties; the power to investigate, declare, and enforce liabilities as they stand on present or past facts and under the laws supposed already to exist.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94–102; Dec. Dig. ⟸62.

For other definitions, see Words and Phrases, First and Second Series, Judicial Power.]

4. EMINENT DOMAIN ⟸264 — REVIEW—CERTIORARI—WRIT—SCOPE—STATUTE.

Const. art. 6, § 4, gives the Supreme Court power to issue writs of certiorari. Code Civ. Proc. § 1068, provides that the writ of review may be granted when an inferior board, etc., has exceeded its jurisdiction, and there is no appeal or any adequate remedy. Public Utilities Act, § 47, as amended in 1913, gives the Railroad Commission judicial powers in fixing compensation in eminent domain proceedings, and section 67 provides that the review shall extend only to the question whether the commission has legally pursued its authority, and excludes from review questions of fact. *Held* that, when a finding or conclusion of fact is based on uncontradicted evidence, its accuracy is usually a mere question of law reviewable if it goes to the jurisdiction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 688, 689; Dec. Dig. ⟸264.]

5. EMINENT DOMAIN ⟸231—RAILROAD COMMISSION—POWER TO CALL WITNESSES—EXAMINATION—JUDICIAL TRIBUNALS.

In a proceeding under Public Utilities Act, § 47, as amended in 1913, to have the Railroad Commission fix the compensation of lands, rights, etc., of a public utility intended to be acquired by eminent domain by a public water district, the commission, as a judicial tribunal, had power to call and examine witnesses in furtherance of justice and against the will of either party.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585–589; Dec. Dig. ⟸231.]

6. EMINENT DOMAIN ⟸231—RAILROAD COMMISSION — POWERS—RECEIVING TESTIMONY.

In such proceeding the Railroad Commission, after such witness was examined and cross-examined as to his knowledge on the subject, he having viewed and examined all the prop-

erty carefully and made exhaustive inquiries regarding the previous sales of similar property in the vicinity, and of the different uses to which the properties in question were adapted, did not exceed its authority in considering his testimony, together with other evidence bearing on the question of use and value.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585–589; Dec. Dig. ⟸ 231.]

7. EMINENT DOMAIN ⟸231—COMPENSATION —EVIDENCE—METHOD OF VALUATION.

In such proceeding, where it appeared that the land belonging to the public utility from which water might be obtained was so situated that the annual rainfall thereon might be conveniently collected, stored on the land, and thence distributed to consumers, and there was evidence as to the average rainfall upon such lands, the quantity which could be annually collected and stored, and the selling price, a witness' method of valuing the land without giving the advantage of water storage a separate value, but merely adding it to the land value and reporting it all as one item, where the commission gave additional value to the land on such ground, the refusal to require the witness to state its separate value or to give it a separate value, while erroneous, did not deprive the commission of jurisdiction or make its award invalid.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585–589; Dec. Dig. ⟸ 231.]

8. EMINENT DOMAIN ⟸234—WATER RIGHTS —ELEMENTS OF DAMAGES.

In such proceeding the claim that by means of additional dams the amount of water stored on the land annually could be greatly increased, that such possibilities increased the value of the property, and that the commission allowed nothing therefor was not sustained by a record showing that, while the commission refused to make a separate statement of the value of such possibilities, it did allow a value for the potential storage of storm water on the land by giving the land a present additional value because of such fact.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 592–600, 603; Dec. Dig. ⟸234.]

9. EMINENT DOMAIN ⟸231—COMPENSATION —VALUE—METHOD.

In such proceeding the valuation of the property by the commission, corresponding with the values fixed by a certain witness called by the commission, who had been examined and cross-examined by the parties, was proper, as the commission was not bound to limit itself to the testimony of witnesses offered by the parties, but might take the other evidence produced at the hearing.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585–589; Dec. Dig. ⟸ 231.]

10. EMINENT DOMAIN ⟸231—PROPERTY OF WATER AND POWER COMPANY—METHOD OF COMPENSATION — IRREGULARITY — PUBLIC UTILITY ACT.

Under Public Utility Act, § 47, as amended in 1913, requiring the Railroad Commission to fix the compensation to be paid for property of a public utility in accordance with section 70, which provides that it shall file its findings of fact upon all matters as to which evidence was introduced which in its judgment had any bearing on the value of the property, the commission's failure to find separately the value of each separate parcel of the property, while an irregularity, did not cause a loss of jurisdiction or make the proceeding void, as, when a court of limited jurisdiction has acquired jurisdiction of the parties and the subject-matter, the same presumptions as to subsequent proceedings apply as with respect to courts of general jurisdiction, and subsequent irregularities do not make its judgments void.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585–589; Dec. Dig. ⟸ 231.]

In Bank. Proceeding in certiorari or review by the Marin Water & Power Company, instituted under the provisions of the Public Utilities Act as amended in 1913, against the Railroad Commission of the State of California. Proceedings and determination of the Commission affirmed.

Lilienthal, McKinstry & Raymond, of San Francisco, for petitioner. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for respondent.

SHAW, J. This is a proceeding in certiorari or review, instituted under the provisions of section 47 of the Public Utilities Act as amended in 1913 (Stats. 1913, p. 684), and of section 67 of said act.

Section 47 originally gave the Railroad Commission power to ascertain the value of the property of public utilities and to make revaluations thereof from time to time, but for purposes of regulation only. The amendment of 1913 empowers the commission, on petition of any county, municipal corporation, or municipal water district which intends to acquire, under eminent domain proceedings, or otherwise, the property of any existing public utility, or any part or portion thereof, to fix and determine the just compensation to be paid for such property in such condemnation proceedings. The commission is also empowered to fix and determine such value upon the filing of a petition stating that such county, municipal corporation, or district intends to submit to the voters thereof a proposition to acquire the property of any existing public utility or any part thereof.

On May 20, 1914, the Marin municipal water district, a public corporation created under the act of May 1, 1911, and the amendment of December 24, 1911 (Stats. 1911, p. 1290; Spec. Sess. 1911, p. 92), filed with the commission a petition under the provisions of section 47, asking the commission to fix and determine the compensation to be paid by said district for all the lands, property, and rights of the petitioner, Marin Water & Power Company, connected with its business of selling water for domestic and other uses in Marin county. Such proceedings were had thereon that the commission heard the evidence of the respective parties and made a final determination as to the value of the property in question, which decision became final on May 10, 1915. This proceeding was begun within the time allowed by the Public Utilities Act for the review of said decision.

[1] At the time of the enactment of the amendment of section 47 aforesaid, and at the time of the filing of the petition to the Railroad Commission and the hearing of the evidence thereon, the Constitution, by section 23, art. 12, provided that:

"The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by the public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Section 22 of the article also provided that the authority of the Legislature to give the commission powers of the same kind or different from those conferred upon it therein "is expressly declared to be plenary and unlimited by any provision of this Constitution." Section 14 of article 1 provides that, when private property is taken for public use, the compensation to the owner shall be fixed by a jury, unless a jury is waived. So far as private property belonging to public utilities is concerned, this statute purports to abrogate the guaranty of section 14. The proposition that the above clauses of sections 22 and 23 were intended to authorize the Legislature, by the simple device of giving additional powers to the Railroad Commission to nullify all the other constitutional guaranties for the protection of persons and property is certainly startling. It may well be doubted if the people understood that they were thus investing the Legislature with all the powers of state. If this proposition arose, the question whether the rule of ejusdem generis would require a different construction would be presented. But after the enactment of said amendment to section 47 the Constitution itself was amended by the adoption on November 3, 1914, of section 23a of article 12, declaring that the Railroad Commission should have such power to fix the just compensation to be paid for the property of any public utility, when it is sought to be acquired by any of the public corporations above named, as the Legislature should confer upon it, that "the right of the Legislature to confer such powers upon the Railroad Commission is hereby declared to be plenary and to be unlimited by any provision of this Constitution," and that "all acts of the Legislature heretofore adopted, which are in accordance herewith, are hereby confirmed and declared valid." This, of course, removes all doubt of the present validity of the said amendment of section 47.

[2] The proceedings here under review were begun, it must be noted, and substantially all the evidence was taken therein, before the Constitution had confirmed said amendment to section 47. But the matter was submitted to the commission, and the decision was made thereon after said confirmation. In this condition of the case the petitioner now expressly waives any objection that might be urged because of the enactment of said amendment of section 47 before the amendment of the Constitution. This, of course, includes all objections on the ground that the proceeding was begun and the evidence taken therein before the commission was authorized to act in such matters, if such objection would otherwise lie. We have no doubt that the petitioner may effectually waive a matter of that character. As this would make the adjudication of the commission valid, so far as such objections are concerned, it is unnecessary for us here to express any opinion as to the soundness of the objections, or as to the effect, in this particular, of the several amendments to the Constitution above mentioned. We proceed, therefore, to consider the case upon the theory that the commission, from the beginning, had lawful authority to entertain the proceeding.

Section 47 of the Public Utilities Act, as amended, after giving to the Railroad Commission power to "fix and determine the just compensation that should be paid to the owner" of the public utility property, the procedure to be as provided in section 70 of the act, also provides that, if the owner whose property is thus sought does not, within 20 days after the commission has certified its findings as to such compensation, file with the commission an agreement to accept for the property the amount so fixed, the public corporation at whose instance such compensation was fixed must, within 60 days after the filing of such findings, commence a proceeding in eminent domain for the condemnation of such property for its use. Similar provisions are made for the case where the public corporation in its petition states its intention to submit such proposition to the voters. It further provides that the compensation so fixed by the commission shall be conclusive as to the amount to be allowed for the property in the proceeding in eminent domain begun pursuant thereto, leaving the court therein to decide only the remaining material issues.

[3] The first proposition to which the petitioner here directs our attention is that, in making this determination as to compensation, the commission exercises judicial power. To this counsel for the other parties and for the commission make no answer. They apparently concede it. We have no doubt that this is correct. The judicial function is to "declare the law and define the rights of the parties under it." Frasher v. Rader, 124 Cal. 133, 56 Pac. 797. To determine "what shall be adjudged or decreed between the parties, and with whom is the right of the case, is judicial action." Rhode Island v. Massachusetts, 37 U. S. (12 Pet.) 718, 9 L. Ed. 1233. "A determination of the rights of an individual under the existing laws" is an exercise of judicial power. Quinchard v. Board, 113 Cal. 669, 45 Pac. 856. An essen-

tial element of judicial power, distinguishing it from legislative power, is that it requires "the ascertainment of existing rights." People ex rel. Dean v. Board of Supr's of Contra Costa County, 122 Cal. 424, 55 Pac. 131. "It is not to be disputed that, as a general proposition, the judicial function is the determination of controversies between parties." Title, etc., Co. v. Kerrigan, 150 Cal. 319, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199, 11 Ann. Cas. 465. See, also, Robinson v. Kerrigan, 151 Cal. 47, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; Sinking Fund Cases, 99 U. S. 761, 25 L. Ed. 504; 23 Cyc. 1620. "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." Prentis v. Atlantic, etc., Co., 211 U. S. 226, 29 Sup. Ct. 67, 53 L. Ed. 150. "The Legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character; but, when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." Monongahela Navigation Co. v. United States, 148 U. S. 327, 13 Sup. Ct. 622, 37 L. Ed. 463. In the present case a controversy exists between the public corporation desiring the property and the private owners thereof conducting the public utility concerning the compensation to be paid to such owners for the property when it is taken by the public corporation. The initiation of the proceeding before the commission necessarily raises that controversy, if it did not exist before, and presents it for decision. Its determination establishes the right and obligation of the parties, respectively, in the expected action in eminent domain, the right of the owners to receive and the obligation of the public corporation to pay the sum fixed as compensation for the property if it is taken. It comprises an essential part of the action; it conclusively determines one of the facts to be determined therein for the purposes of that action. It is, to that extent, as much an exercise of judicial power, as above defined, as is the judgment of the court in the action to condemn the property.

[4] The functions of the commission being judicial, the Supreme Court would have had jurisdiction in certiorari to review its final decision in the proceedings without the express grant of such jurisdiction in the act itself. Const. art. 6, § 4; Code Civ. Proc. § 1068. The jurisdiction derived from the Constitution and from the Code of Civil Procedure, under the well-established rules, could extend only to the inquiry whether the commission had exceeded its authority. Section 47, however, refers to section 67 of the Public Utilities Act.

Section 67 provides that the review thereby authorized shall not extend further than to determine whether the commission "has regularly pursued its authority," but adds that the review may include the question whether the decision of the commission "violates any right of the petitioner under the Constitutions" of California and the United States, respectively. In view of our conclusions on the merits presently to be considered, we find it unnecessary to determine or discuss the question whether this additional clause enlarges our powers in certiorari, upon which the court has hitherto been equally divided. See Pacific T. & T. Co. v. Eshleman, 166 Cal. 651 and 692, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, for the opposing views on this point. There is also a provision excluding questions of fact from review. Notwithstanding this, however, the law remains that, when a finding or conclusion of fact is based on uncontradicted evidence, its accuracy usually becomes a mere question of law, and in that event the question may be reviewed if it goes to the jurisdiction. With this preliminary statement we proceed to consider the objections to the proceedings.

[5] At the hearing objection was made to the action of the commission in calling W. N. Wells to testify as a witness on the subject of the values of the several properties. He was sworn and testified at the instance and request of the commission and against the will of the Marin Water & Power Company. It is now conceded that judicial tribunals have power to call and examine witnesses in furtherance of justice and against the will of either party. No authorities are cited in the briefs, but we find that the following sanction the practice: 1 Roscoe, Cr. Ev. 139 (8th Ed.) 210; Selph v. State, 22 Fla. 543; Clark v. Commonwealth, 90 Va. 368, 18 S. E. 440; Hill v. Commonwealth, 88 Va. 639, 14 S. E. 330, 29 Am. St. Rep. 744; O'Connor v. National Ice Co., 4 N. Y. Supp. 537; Hurd v. Lill, 26 Ill. 497. From these it is clear that the calling of Wells and his examination as a witness was within the discretion of the commission.

[6] It is also contended that Wells was an incompetent witness on the subject, and hence that the commission went beyond its powers in considering his testimony. We think he was shown to be competent. He was regularly examined and cross-examined at great length as to his knowledge of the subject. His testimony showed that for the purpose of forming an opinion as to its value he had viewed and examined all the property with care and had made exhaustive inquiries regarding the previous sales of property of similar character in the vicinity and of the different uses to which the properties in question were adapted. He appears to have fol-

lowed substantially the same course in arriving at his opinions that was adopted for that purpose by the expert value witnesses called by the petitioner. See Spring V. W. W. v. Drinkhouse, 92 Cal. 535, 28 Pac. 681; Vallejo, etc., Co. v. Reed Orchard Co., 169 Cal. 574, 147 Pac. 252. In our opinion, the commission did not exceed its authority in considering the testimony of such a witness together with the other evidence produced before it bearing on the question of use and value. In view of these conclusions, we find it unnecessary to consider how far the commission is bound by the rules of evidence and procedure in courts of law. It did not, in these particulars, transgress those rules.

[7] The principal objection to the testimony of Wells relates to his method of valuing the lands belonging to the petitioner from which water could be obtained. These lands are mountainous, and so situated that the annual rainfall thereon may be conveniently collected, stored on the land, and thence distributed and sold to consumers. There was evidence tending to show the average annual rainfall upon these lands, the quantity thereof that could be annually collected and stored, and the selling price paid by the consumers. Wells did not give this advantage of water storage a separate value, but merely added it to the land value and reported it all as one item. The commission appears to have believed that separate values could not be given to the land and water respectively, basing its opinion upon the proposition that water which falls upon the ground as rain and runs off into the reservoir as surface water does not constitute a legal water right. We think this is no reason for saying that the two elements of value could not be separately estimated, or that there is any distinction in this respect between the added value to the land by reason of the water privilege from this cause and the added value which land may have by reason of a riparian right or a right appurtenant in a stream. Whether it is properly a water right or not is immaterial. The fact that water can annually be obtained therefrom for sale is the material element for consideration. Both the commission and the witness, however, did consider this element and gave the land additional value on that account. There can be no doubt that this element of the value of land is as much the property of the landowner as any other element which gives it value. So far as the commission appears to have held that it was not a property right, it was in error, but, inasmuch as it did give the additional value to the land, it is immaterial whether the commission, in allowing this element of value, styled it a technical water right, or a mere advantage of water storage giving additional value to the land. The refusal to give it a separate value would not deprive the commission of jurisdiction or make its award invalid.

[8] The company claims that by means of additional dams the amount of water stored on its land annually could be greatly increased, that these possibilities of future advantage largely increased the value of the property, and that the commission did not allow anything therefor. We do not think this claim is sustained by the record. The commission refused to make a separate statement of the value of these future possibilities, but it appears that it did allow a value for the potential storage of storm water on the land by giving it a present additional value because of that fact. Although the expert witnesses for the petitioner adopted a different method, they practically arrived at the same result. They estimated the run-off and storage and probable expense of storage, distribution, and sale, the probable selling price, capitalized the net profit, and added the present value of the result to the value of the land as estimated apart from its value for water. While the values were larger than those given by the commission, the principle is the same in either case if the valuation is honestly made.

[9] It appears from the record that the witnesses for the municipal water district fixed certain values for the property in controversy, that the witnesses for the power company also fixed certain somewhat different values therefor, and that the value as fixed by the commission falls below that fixed by the witnesses on either side, and corresponds more nearly to the values fixed by the witness Wells. This, they say, is a decision outside of the issues, upon evidence which neither party offered, and is upon a controversy which neither party submitted to the commission for its consideration. We do not so understand the law. Wells testified in the presence of the parties, and was duly examined and cross-examined by them. As heretofore stated, this constituted legal evidence upon the issue as to the value of the property in controversy. The commission was not bound to limit itself to the testimony of the witnesses offered by the respective parties, but had the power to take the other evidence produced at the hearing. We need not inquire concerning the additional point that the commission claimed that, under section 70 aforesaid, it was "empowered to resort to any other source of information available," including evidence not introduced at the hearing. Some remarks in its opinion indicate that the commission may believe that it has that power. But it did not exercise it in this proceeding. It considered only the evidence actually produced.

It is not to be supposed, from what has been said, that the objections we have considered would, if well taken, operate to avoid the award of compensation. It may be that they are matters not going to the jurisdiction, and hence not reviewable in certiorari. We have preferred to consider them

on their merits. As we find them not well taken, the question whether or not they would invalidate the proceeding becomes immaterial.

[10] Further objection is made on the ground that the commission did not find separately the value of each separate parcel of the property of the water company. Section 47 requires the commission to "proceed to fix and determine the just compensation * * * in the manner and in accordance with the provisions of section 70." Section 70 provides that it "shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have any bearing on the value of the property." Evidence was given showing separately the value of the respective parcels. Section 47 also provides that after the filing of the petition, and before payment of the compensation fixed, the commission may be required to find the amount of an alleged unreasonable depreciation in value, to be deducted from the compensation allowed; also that it may be called on to fix the amount the owner may have had to expend to preserve the property after the final judgment of condemnation and before payment, to the end that the owner may be reimbursed such amount. In fixing these amounts it might be found convenient to have the parcels separately valued. But, however, this may be, we do not think the failure to make such detailed findings causes a loss of jurisdiction or makes the proceeding void. It is admitted that the commission acquired full jurisdiction. When once it is made to appear that a court of limited jurisdiction has acquired jurisdiction of the parties and of the subject-matter, the same presumptions as to subsequent proceedings apply as with respect to courts of general jurisdiction, and subsequent irregularities do not make its judgments void. Van Fleet on Collateral Attack, § 806; Long v. Burnett, 13 Iowa, 28, 81 Am. Dec. 420. In such a case "jurisdiction cannot be lost by the erroneous exercise of the power conferred." Brown on Jur. § 25. Section 70 leaves it to the discretion of the commission to determine whether or not it will make detailed findings. It is not declared to be mandatory. At most, the making of a general finding is but an irregularity. If the parties have any remedy when injured by such failure, it is by mandamus, not certiorari. It does not go to the jurisdiction.

If the undisputed evidence had shown that the property had a special additional value, as, for example, that by reason of the situation and topography of a parcel of the land a quantity of water could be annually caught, stored thereon, and sold at a profit, and that the commission had refused to allow such value, as a part of the compensation fixed, it may be conceded that this would have been a deprivation of property without due process of law, a disregard of the petitioner's right to just compensation, and therefore a violation of both the federal and state Constitutions. Appleby v. Buffalo, 221 U. S. 524, 31 Sup. Ct. 699, 55 L. Ed. 838; Chicago, etc., Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Davidson v. New Orleans, 96 U. S. 102, 24 L. Ed. 616; Backus v. Fort St., etc., Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853; McGovern v. New York, 229 U. S. 363, 33 Sup. Ct. 876, 57 L. Ed. 1228, 46 L. R. A. (N. S.) 391. We do not find that the commission did thus refuse to allow an undisputed value, and therefore the argument founded on the above-stated proposition must fall.

With respect to the contention that the commission did not allow the value of the water in storage at the time of the award, it is sufficient to say that our attention has not been directed to any evidence of such value, nor of the quantity in storage. It is difficult to see how it could be valued, under the circumstances. It was the store for daily use, and the quantity would change from day to day. The time when the water district would take possession of the plant could not be foretold. It seems difficult to fix such compensation except by finding the value per gallon and directing a measurement at the time of the transfer of possession. But this question is not now before us, and we express no opinion regarding it.

The proceedings and determination of the Railroad Commission are affirmed.

We concur: SLOSS, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

The CHIEF JUSTICE took no part in the consideration of this cause, and does not participate in the decision.

29 Cal. App. 153

BANK OF BAKERSFIELD v. CONNER et al. (Civ. 1769.)

(District Court of Appeal, Second District, California. Dec. 13, 1915. Rehearing Denied by Supreme Court Feb. 10, 1916.)

1. PAYMENT ⇐22—CHECK—PERFORMANCE OF CONTRACT—"CERTIFICATE OF STOCK."

A contract for the purchase of shares of stock in a bank which acted as the seller's agent in the transaction provided that upon payment to such agent payment would be deemed sufficiently made, and when payment was due the buyer delivered to the bank, payable to it or bearer, a certified check for the price, which on the same day was delivered by the bank without indorsement to the seller. *Held*, in an action on the check, that it was given in payment, and not in tender of payment, and that the maker was liable thereon because he became the owner of the shares upon their identification and payment, and was entitled to compel delivery of a certificate therefor; a "certificate

of stock" not being the stock itself, but merely evidence of its title.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 87, 88; Dec. Dig. ⟸22.

For other definitions, see Words and Phrases, First and Second Series, Certificate of Stock.]

2. Evidence ⟸459 — Parties to Check — Parol Evidence.

Where, under a contract of sale of stock, a bank is agent for the seller to receive payment, and a certified check for the price, payable to it or bearer, is delivered to it by the buyer and received by it as such payment, parol evidence is inadmissible in an action on the check to show that the word "bearer" was left therein by mistake and that the check was intended for the bank itself and not for the seller.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906–1910, 2109-2114; Dec. Dig. ⟸459.]

3. Corporations ⟸121 — Transfer of Shares—Actions—Evidence.

In such a case, evidence of the bank's delivery of the check to the seller is admissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. ⟸121.]

4. Appeal and Error ⟸1050—Prejudicial Error.

The admission of such evidence, if erroneous for immateriality, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⟸1050.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Bank of Bakersfield against Sarah L. Conner, as executrix of the last will of C. L. Conner, deceased, and G. J. Planz, to determine their rights to a sum of money deposited with it, and for which the executrix held Planz's certified check. Defendants were required to interplead, and, from a judgment for the executrix and an order denying Planz's motion for a new trial, he appeals. Affirmed.

E. L. Foster, of Bakersfield, for appellant. C. C. Cowgill, of Sonoma, and Peter A. Breen, of San Francisco, for respondent.

CONREY, P. J. On July 21, 1910, the defendant G. J. Planz drew his check upon the Bank of Bakersfield for the sum of $3,799.66 and caused it to be certified by that bank. The check was payable to the Kern Valley Bank or bearer. Immediately thereafter defendant Planz delivered the check to the Kern Valley Bank, and on the same day the cashier of that bank delivered the check, without indorsement, to C. L. Conner. Conner died at some time between September, 1910, and March, 1911, and the check in question came into the possession of the defendant Sarah L. Conner as executrix of his last will and testament. The plaintiff, the Bank of Bakersfield, filed its complaint herein showing that it holds and has in its possession money deposited with it by defendant Planz sufficient to pay said check; but also that the defendant Planz gave notice and instruction to the plaintiff to refuse payment of the check, and that the defendant Conner as executrix has demanded payment thereof. The defendants were required to interplead herein for the determination of their adverse claims in the premises. A judgment having been entered in favor of the executrix, the defendant Planz has appealed therefrom and also from an order denying his motion for a new trial.

On July 21, 1908, an agreement in writing was entered into between C. L. Conner and one H. A. Blodget, whereby, in consideration of the sum of $5 in hand paid, Conner agreed to sell and deliver to Blodget, his nominee or assigns, 50 shares of the capital stock of the Kern Valley Bank, a corporation, upon the payment of the sum of $3,799.66 on or before July 21, 1909. It was agreed that upon payment to Conner on or before July 21, 1909, of the sum of $281.45, the time for payment of said larger sum should thereby be extended to, and the delivery of said stock extended to, July 21, 1910. It was agreed:

"That payment shall be deemed to be sufficiently made to said C. L. Conner by payment to the Kern Valley Bank for account of C. L. Conner of either of the sums above specified. And the said fifty (50) shares of said stock of the said Kern Valley Bank shall, upon payment made as hereinbefore provided, be delivered, on demand, to the said H. A. Blodget, his nominee or assignee, together with all dividends that may be declared and paid on said shares of stock during the life of this agreement."

On July 21, 1909, Blodget paid the sum required for extending the time of final payment to July 21, 1910, and on July 19, 1910, sold, assigned, and transferred to G. J. Planz "all my right, title and interest in and to the within and foregoing contract and the capital stock of the Kern Valley Bank, viz., fifty (50) shares thereof, therein described." Thereafter Planz delivered his certified check as hereinabove stated.

[1] The court found that said check was paid to the Kern Valley Bank for the account of C. L. Conner and was accepted by that bank for the account of C. L. Conner as and in full payment of the purchase price of said 50 shares of stock. Under his specifications of insufficiency of the evidence to justify the findings, appellant claims that the evidence does not show his delivery of the check for the account of Conner or as payment on the contract, but claims that it was merely a tender of payment conditioned upon delivery of the shares of stock. In our opinion, the evidence fully justifies the finding as made. In his testimony defendant Planz himself said:

"On July 21, 1910, under the contract, * * * I gave the Kern Valley Bank $3,799.66. I paid it with my certified check on the Bank of Bakersfield."

He further testified that on July 23, 1910, he demanded of Conner a transfer of the 50 shares of stock, and that Conner refused this demand and said that, if Planz would deliver back to the Kern Valley Bank the receipt

which that bank gave him, they would give him the money back or the check. On August 6, 1910, Planz filed a complaint in the superior court of Kern county against Conner and the Kern Valley Bank to enforce his demand for delivery to Planz of the 50 shares of stock to which he claimed to be entitled under the agreement with Blodget which had been assigned to him. In that complaint, verified under his oath, the plaintiff therein said that he had made the before-mentioned payment of $3,799.66 to the Kern Valley Bank for the account of C. L. Conner, and that "the said Kern Valley Bank, a corporation, received the sum of money for the account of C. L. Conner and now has the said sum of money in its possession and under its control for the account of C. L. Conner." The same statement was repeated in an amended complaint. To that complaint a demurrer was filed, and it appears that the action was pending without any other proceedings having been had therein at the time of the trial of the case now before us.

[2] Defendant Planz in his answer states that the certified check was by mistake made out to bearer. At the trial he was asked to state why the word "bearer" was left on the check, or whether he intended that it should be left on the check at the time when he made it. The court sustained an objection that the question was irrelevant, incompetent, and immaterial and an attempt to vary the terms of the written instrument by parol in the absence of any appropriate pleadings for reforming the instrument. It is now urged on this appeal that this ruling was erroneous, because it prevented appellant from showing that he was paying the money to the Kern Valley Bank and to no other person, and from showing that he had intended to strike out by drawing a line through the word "bearer." We think that the ruling was correct. Under the contract the Kern Valley Bank was agent of Conner for the purpose of receiving payment of the sum specified in the check. It is not claimed that the bank was aware of any mistake in the check or informed that it did not fully express the intention of the maker. Whether made payable to the order of the Kern Valley Bank or made payable to that bank or bearer, it was equally capable of being received and used for the purposes of the transaction.

The specifications of insufficiency of the evidence, although not in the usual form and in some instances perhaps not legally sufficient, will be considered as sufficient to raise the only other important question in the case, which is whether the evidence justified the court in finding that Conner was the owner of the check, and that it is now the property of the defendant Sarah L. Conner as executrix, etc. On this phase of the case, it seems to us that appellant is relying upon propositions which are not applicable to the case as made by the record. He refers us to authorities holding that refusal to perform a contract constitutes a rescission. Assuming that in some instances this principle would be applicable, we have here a case in which the purchaser, even though he had a right to claim a rescission, elected to continue his demand for performance of the contract and bring an action for that purpose. Therefore appellant is unable to recall the payment made by him, even if, as he contends, under the terms of the contract the obligation of the seller to deliver the goods and of the buyer to pay the price were concurrent conditions. The shares of stock were identified the price agreed upon was paid, and thereby Planz became the real owner of the shares. He was in a position which entitled him to compel the delivery to him of a certificate of stock. Certificates of corporation stock, it should be remembered, are not the shares, but are merely evidence of title.

[3, 4] Exception is taken to the court's ruling in allowing the cashier of the Kern Valley Bank to testify that on the same day when the certified check was received at that bank he delivered it to C. L. Conner. If this evidence was immaterial, the only reason would be that payment had been completed when the check came into the hands of the bank as Conner's agent. We see no error in the ruling, and at all events it would be without prejudice to any right of appellant.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(29 Cal. A. 131)

KEITH v. HAMMEL, Sheriff. (Civ. 1578.)

(District Court of Appeal, Second District, California. Dec. 7, 1915.)

1. MANDAMUS ⇐154—SUFFICIENCY OF PETITION—FEES OF COUNTY OFFICER.

A taxpayer's petition against the sheriff of a county for a writ of mandamus to compel the sheriff's payment into the county treasury of all fees collected by him as sheriff during three or four months, notwithstanding its insufficiency as to mileage, etc., claimed by the sheriff under the county charter and Pol. Code, § 4290, yet in view of other fees which the sheriff must collect and pay into the county treasury under sections 4300b and 4300c and its allegation that the sheriff had collected and appropriated to his own use $3,000 in fees belonging to the county, was good as against a general demurrer.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296–316; Dec. Dig. ⇐154.]

2. SHERIFFS AND CONSTABLES ⇐71 — ACTION AGAINST—PARTY PLAINTIFF—TAXPAYER—STATUTE.

Code Civ. Proc. § 526a, permits a taxpayer's action against public officers to restrain certain described illegal expenditures of county funds, not to affect any right of action in favor of a county or any public officer; Pol. Code, § 4041, subd. 16, gives boards of supervisors jurisdiction to direct the prosecution of all suits in which the county is a party; Los Angeles County Charter (St. 1913, p. 1490), § 21, declares that the county council shall have exclusive

charge of all civil actions in which the county or its officers are concerned as parties, and section 10 gives the board of supervisors the jurisdiction granted by the laws of the state. *Held*, that any right of action against the sheriff to compel him to pay into the county treasury fees collected by him during a certain time was a right of action in the county to be prosecuted by it as a party plaintiff, and that a taxpayer could not maintain an action or proceeding without showing that the county officers controlling matters of county litigation had refused to commence or prosecute such action.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 98; Dec. Dig. ⊂⊃71.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Mandamus by D. E. Keith against W. A. Hammel, Sheriff of Los Angeles County. Judgment for defendant, and petitioner appeals. Affirmed.

William H. Fuller, of Los Angeles, for appellant. Leon F. Moss, of Los Angeles, for respondent.

CONREY, P. J. Mandamus. The petitioner, a resident property owner and taxpayer in the county of Los Angeles, filed his petition in the superior court against the sheriff of Los Angeles county for a writ of mandamus to compel the respondent to pay into the county treasury all fees collected by him as such sheriff between the 2d day of June, 1913, and the 31st day of October, 1913, for the performance of official duties pertaining to that office. A demurrer to the petition for want of facts sufficient to constitute any ground for the relief demanded was sustained, and judgment was entered in favor of respondent. From that judgment the petitioner appeals.

Two principal objections among those relied upon by the respondent will be considered. These are: First, upon the merits, that the facts alleged do not show that the sheriff has received and retained any fees which he is under obligation to pay over to the county. Second, respondent claims that petitioner has not stated facts sufficient to establish his right to maintain the action, even though the demanded right exists in favor of the county.

[1] The petition is so framed as to indicate that the pleader was intending to enforce the payment to the county of mileage and other compensation claimed by the sheriff under the charter of Los Angeles county and section 4290 of the Political Code. The claim of the sheriff that he was entitled to retain such moneys for his own use was determined in his favor on appeal to this court in Los Angeles County v. Hammel, 26 Cal. App. 580, 147 Pac. 983. Appellant now concedes the points which were involved in that appeal, but he contends that since there are other fees provided by law which the sheriff of Los Angeles county must collect and pay into the county treasury (Pol. Code, §§ 4300b, 4300c), the petition herein is nevertheless broad enough to include those fees. Treating many of his allegations as surplusage irrelevant to his real case, he now says that the case includes and was intended to include all moneys collected by the sheriff in his official capacity. The petition states that the respondent as sheriff, between the dates specified, "collected and received and appropriated to his own use, the sum of $3,000 as fees belonging to Los Angeles county for the performance of his services as sheriff of Los Angeles county during said time." This appears to be sufficient, and the allegation is good as against a general demurrer.

[2] The law concerning the right of a taxpayer to maintain actions and proceedings to enforce public rights and protect public interests, has been a subject of discussion in many decisions, but is also to some extent affected by statutory declaration. Section 526a, Code of Civil Procedure, provides for the maintenance of a taxpayer's action against public officers to obtain a judgment restraining and preventing certain described illegal expenditures, etc., of county or municipal funds. It also says:

"This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer."

The charter of Los Angeles county, in section 21 thereof (Stats. 1913, p. 1490), declares that:

"The county counsel * * * shall have exclusive charge and control of all civil actions and proceedings in which the county, or any officer thereof, is concerned or is a party."

Section 10 of the charter states that the board of supervisors shall have all the jurisdiction and power "which are now or which may hereafter be granted by the Constitution and laws of the state of California, or by this charter." Under section 4041 of the Political Code, subdivision 16, boards of supervisors are given jurisdiction and power to direct and control the prosecution and defense of all suits to which the county is a party. The general effect of these provisions of charter and statute seems to be, not only that the conduct of actions in which the county is a party is committed to the charge and control of public officers, but it further appears to be the intention (in harmony with long-established principles) that the county shall be a party to actions and proceedings wherein the county "is concerned." From the many decisions of the courts of this and other states dealing with this subject, we derive the principle that in the conduct of the ordinary business of a county or city, where the care and protection of the rights of the corporation have been committed to public officers, the primary right goes with the duty belonging to those officers to control the ordinary business of the corporation without the interference of private citizens, even though they be taxpayers. The exceptions which have been permitted usually arise in those situations where an officer is threatening to

act in excess of his authority, or refuses to perform an official duty, and there is no other officer or official body empowered to act on behalf of the public or of the corporation, to enforce their rights in the matter, or where it appears that the officers empowered to act refuse to perform their duty in that respect. Instances which illustrate the subject may be given, such as Hyatt v. Allen, 54 Cal. 353, mandamus by a taxpayer within an assessment district to compel county assessor to assess property subject to assessment; Eby v. School Trustees, 87 Cal. 166, 25 Pac. 240, mandamus to compel board of school trustees to comply with instructions of electors as to location of schoolhouse site; Frederick v. City of San Luis Obispo, 118 Cal. 391, 50 Pac. 661, mandamus to require board of trustees to call an election on question of disincorporation of the city. All of these cases had to do with extraordinary situations, and not with the conduct of the ordinary business of the corporation. In Maxwell v. Board of Supervisors, 53 Cal. 389, petitioner was permitted to maintain a proceeding for writ of review to the board of supervisors to review its action in entering into a contract for printing. This related to a matter within the ordinary scope of the business of the corporation, but the recalcitrant body was the controlling board of officers of the county, and the taxpayer's right in such a case is one arising out of the necessity of the situation and is recognized for that reason. The principle which should control is very fully stated in Dunn v. Long Beach Land & Water Co., 114 Cal. 605, 46 Pac. 607, wherein a resident of and property owner and taxpayer in the city of Long Beach sought to have canceled a certain judgment affecting the title to a street and to quiet the title of the city to the street. It was held, not only that the complaint did not state facts sufficient to constitute a cause of action, but also that the facts were not sufficient to justify the plaintiff in bringing the action. The court said:

"The rule is that the municipality, through its governing body, has control of the property and general supervision over the ordinary business of the corporation; and there would be utter confusion in such matters if every citizen and taxpayer had the general right to control the judgment of such body or usurp the office. Where the thing in question is within the discretion of such body to do or not to do, the general rule is that then neither by mandamus, quo warranto, or other judicial proceeding, can either the state or a private citizen question the action or nonaction of such body; nor in such cases can a private citizen rightfully undertake to do that which he thinks such body ought to do. It is only where performance of the thing requested is enjoined as a duty upon said governing body that such performance can be compelled, or that a private citizen can step into the place of such body and himself perform it. If, therefore, in the case at bar it was not a duty enjoined upon the board of trustees of the city of Long Beach to bring an action similar to this present action brought by appellant, then we need not discuss the general subject of the right of private citizens to maintain actions concerning municipal affairs—which right is founded to a great extent upon necessity, and the want of any other proper party plaintiff. And the proposition that it was a duty enjoined upon said trustees to bring such an action cannot be maintained."

Then, after further discussion and decision that there was no cause of action stated, the opinion closes as follows:

"It cannot be rightfully said, * * * that the trustees now in office are not exercising a wise discretion by refusing, at the present time, to commence unnecessary and hazardous litigation."

In the case at bar we are not called upon to consider whether the officers of Los Angeles county are exercising a wise discretion by refusing to commence an action against the sheriff to recover fees unlawfully retained by him, since there is no intimation that they have refused or neglected anything in that respect. The case to which we have referred (County of Los Angeles v. Hammel) shows that the officers of the county were diligent in seeking to recover from this same sheriff another class of funds to which they claimed that the county was legally entitled. If there is any further right of action against the sheriff, it is a right of action of the county which should be prosecuted by the county as a party plaintiff. In order to justify the petitioner in maintaining an action or proceeding, we think that it would be necessary for him to show that the officers who control those matters of litigation in which the county of Los Angeles is concerned have refused to commence or prosecute proceedings for the protection of the county's interests in this matter. In Burr v. Board of Supervisors of Sacramento County, 96 Cal. 210, 31 Pac. 38, it was held that where by statute it is made the duty of the district attorney to institute suit in the name of the county for the recovery of money paid out without authority of law, the statute affords a plain, speedy, and adequate remedy available to taxpayers by complaint to the district attorney, and that "to say the least," the interest of a taxpayer does not entitle him to bring suit in his own name until the district attorney has refused to perform the duty so enjoined on him.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 126

NOLTE v. NOLTE. (Civ. 1539.)

(District Court of Appeal, Second District, California. Dec. 7, 1915.)

1. APPEAL AND ERROR ⊂=718—CONSIDERATION OF AFFIDAVIT—STATUTE.

Under Code Civ. Proc. § 951, providing that on appeal from an order the appellant must furnish the court with a copy of the notice of appeal and of the papers used on the hearing below, where an affidavit came into the transcript under certificate describing it as part of the judgment roll, which it was not, nor a paper used in connection with the order from

which the appeal was taken, the court could not take cognizance of its contents.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2379, 2463, 2645, 2956, 2957; Dec. Dig. ⊂⊃713.]

2. Appeal and Error ⊂⊃935 — Presumptions Favoring Court Below.

On appeal from an order vacating a final decree from which no appeal was taken, it will be assumed that the trial court had before it facts sufficient to authorize the vacating order to the full extent that the order could legally be made under any circumstances.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3783–3786; Dec. Dig. ⊂⊃935.]

3. Judgment ⊂⊃273 — Entry Nunc Pro Tunc.

Where a judgment has been rendered, and its entry omitted, it may be subsequently entered, and, if justice requires, may be made to take effect nunc pro tunc as of the date when it was actually made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525–541; Dec. Dig. ⊂⊃273.]

4. Divorce ⊂⊃170—Entry of Final Decree —Statutes.

Civ. Code, § 131, provides that in divorce actions, if the court determines that divorce should be granted, an interlocutory judgment must be entered declaring that the party for whom the court decides is entitled to divorce, and from such interlocutory judgment an appeal may be taken within six months after its entry as if it were final. Section 132 provides that, when one year has expired after the entry, the court may enter final judgment, but that, if any appeal is taken from the interlocutory judgment, or motion for new trial made, final judgment shall not be entered until such motion or appeal has been disposed of, and not then if the motion has been granted or judgment reversed. *Held* that, where a divorce case was submitted for decision June 28, 1909, and an interlocutory decree signed a year later, with an order "that the foregoing decree be entered nunc pro tunc as of June 28, 1909," which was done July 5, 1910, a final decree signed July 1, 1910, and entered July 6th, purporting to be based upon the interlocutory decree, was properly vacated, as entered within a week after actual entry of the interlocutory decree, while the statute prohibits entry until expiration of a year.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 552, 553; Dec. Dig. ⊂⊃170.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by A. Nolte against Barbara Nolte. From an order vacating a final decree for plaintiff, he appeals. Order affirmed.

H. H. Appel and E. J. Dennison, both of Los Angeles, for appellant. Charles W. Hoag, of Los Angeles, for respondent.

CONREY, P. J. Appeal by the plaintiff from an order vacating a final decree of divorce. On the 28th day of June, 1909, the case was tried and submitted to the court for decision. On June 28, 1910, an interlocutory decree was signed, together with an order "that the foregoing decree be entered nunc pro tunc as of June 28, 1909." This decree was entered July 5, 1910, as of June 28, 1909. On July 1, 1910, a final decree of divorce, purporting to be based upon such interlocutory decree entered nunc pro tunc as aforesaid, was signed by the judge. This decree was entered July 6, 1910. On the 12th day of November, 1912, the court, upon its own motion, entered an order setting aside and vacating said final decree "because it was entered within a week after the actual entry of interlocutory decree of divorce." It is from this last-mentioned order that the appeal is taken.

[1, 2] We find in the transcript an affidavit made by the plaintiff's attorney and sworn to on July 1, 1910, which the appellant claims contains a statement of the facts which led the court to make its order for nunc pro tunc entry of the interlocutory decree. This affidavit comes into the transcript under a certificate describing it as part of the judgment roll. As it is not part of the judgment roll, and does not appear to have been one of the papers used in connection with the order from which the appeal is taken, we find no legal ground for taking cognizance of the contents of such affidavit. Code Civ. Proc. § 951. But this defect is immaterial, since facts sufficient to satisfy the court may have existed and may have been shown to the court; and, since no appeal appears to have been taken from the judgment, it will be assumed that the court had before it facts sufficient to authorize such order to the full extent that the order could legally be made under any circumstances. Therefore if, as counsel claims, an interlocutory decree in like form as the one that was entered in 1910 had been signed on June 28, 1909, by the judge who tried the case, and had been delivered to the clerk for filing, and if without filing or entry of such decree the same was lost by the clerk, these would be circumstances strongly appealing to the court in the exercise of its judgment favorably to the request of the plaintiff that the decree be entered as of the date of trial.

[3] It is well established that, where a judgment has been rendered and its entry omitted, it may be subsequently entered, and, if justice requires, may be made to take effect nunc pro tunc as of the date when it was actually made. In re Skerrett, 80 Cal. 62, 22 Pac. 85; Fox v. Hale, 108 Cal. 480, 41 Pac. 328; Marshall v. Taylor, 97 Cal. 426, 32 Pac. 515; and many other cases.

[4] The order setting aside the final decree is not necessarily based upon lack of authority of the court to enter its interlocutory decree nunc pro tunc as of the date when it was rendered, but is based upon the ground that the court has no power to enter a final decree until the expiration of one year after the actual entry of the interlocutory decree.

"When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, * * * but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been grant-

ed or judgment reversed. * * *" Civ. Code, § 132.

During the period of time covered by the proceedings under review herein it was provided in section 131 of the Civil Code that from an interlocutory judgment in a divorce action "an appeal may be taken within six months after its entry, in the same manner and with like effect as if the judgment were final." In Spencer v. Troutt, 133 Cal. 605, 65 Pac. 1083, it was held that the time allowed for an appeal commences to run from the time of the actual entry of the judgment. The court said:

"It hardly requires argument or authority to establish the proposition that a court cannot by antedating an order, or the entry of it, cut off the right of a party to move for a new trial, to move to set the judgment aside, or to appeal. These rights, given by the Code of Civil Procedure, cannot be lost to a party by such action, whether the effect was designed or not. The test as to whether the period in which the party must act in order to get relief from an order or judgment against him must be whether he could have obtained the desired relief (on a proper showing) before the nunc pro tunc order was made."

In Baum v. Roper, 1 Cal. App. 435, 82 Pac. 390, it was said that, while it is true that an appeal will not lie from a judgment until it has been entered, the judgment in ather respects gets its force and vitality from its rendition, and not from its entry; that the rendition of the judgment is the judicial act of the court, and its entry is the ministerial act of the clerk. So it was held in Los Angeles County Bank v. Raynor, 61 Cal. 145, that it was not necessary that the judgment should have been entered when the execution was issued.

"The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised (Code Civ. Proc. § 681), or in which the judgment may be enforced (Code Civ. Proc. § 685), and the other for the purpose of creating a lien by the judgment upon the real property of the debtor (Code Civ. Proc. § 671)."

The effect of these decisions is that, while the power of a court over its records, in order to make them speak the truth, is fully recognized, and for that purpose errors or omissions in the entry of judgments may in some instances be corrected by entering them as of the date when rendered, the full effect of the nunc pro tunc order is limited so as to prevent results not contemplated by the law. There seems to be no reason why such limitation should not apply to the established time when the right to a final judgment of divorce will accrue, in the same manner that it applies to the time when an appeal may be taken, or to any other of the instances above noted. We do not doubt that these were the considerations which led the Supreme Court to hold, in Grannis v. Superior Court, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23, that:

The provisions of sections 131 and 132 of the Civil Code, "interpreted in the light of the previous legislation and decisions and the purpose to be accomplished by the law, are clearly to be understood as a limitation on the power of the court in the matter, and as intended to forbid the entry of a final judgment until after the prescribed period. The law can only be made effectual for the accomplishment of its object by holding that any final judgment purporting to grant the divorce is absolutely void if thus prematurely entered."

While in that case the court was not considering the power to make a nunc pro tunc entry of a decree, or the limitations on the effect of such entry, we are satisfied that the interpretation there placed upon the Code provisions necessarily leads to the conclusion that a final decree of divorce cauld not be entered until one year after the actual entry of the interlocutory decree. The language of section 131 contemplates that a final decree shall not be entered until after expiration of the time in which an appeal may be taken from the interlocutory decree, nor during the pendency of such appeal if taken. As we have seen, the entry of the interlocutory decree nunc pro tunc as of an earlier date does not affect the time prescribed within which an appeal may be taken. The result is that in this case, as in the Grannis case:

"The judgment in question being wholly void as a final judgment granting an immediate divorce, it was within the power of the superior court at any time, on motion of either party, or of its own motion, to declare it null in so far as it purported to be of such effect."

That we have correctly understood the intended effect of the Supreme Court's decision in the Grannis Case, further appears from the fact that on the same date, in Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897, the same court said:

"We think the defendant is correct in the position that the year which must elapse before final judgment can be given begins to run from the time of the actual entry of the interlocutory judgment, and not from any theoretical nunc pro tunc date of entry."

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 169

PEOPLE v. DYE. (Cr. 318.)

(District Court of Appeal, Third District, California. Dec. 14, 1915. Rehearing Denied by Supreme Court Jan. 10, 1916.)

1. EMBEZZLEMENT ⊂⊃4 — LARCENY ⊂⊃15 — WHAT CONSTITUTES.

"Embezzlement" occurs when the possession of property has been acquired lawfully and bona fide, and is afterwards fraudulently appropriated, the gist of the offense being the breach of trust; while, if a bailee acquires property with intent to steal it at the time of the acquisition, he is guilty of "larceny."

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 1; Dec. Dig. ⊂⊃4; Larceny, Cent. Dig. §§ 39–42; Dec. Dig. ⊂⊃15.

For other definitions, see Words and Phrases, First and Second Series, Embezzlement; Larceny.]

2. LARCENY ⟸15—POSSESSION—WHAT CONSTITUTES.

Where one desiring to take a hot bath similar to a Turkish bath hung his clothing on a nail or hook in the room where he undressed, and the proprietor of the bath did not at that time take charge of the clothing or the money therein, no relation of bailor and bailee was created, so the proprietor's subsequent appropriation of the money constituted larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 39–42; Dec. Dig. ⟸15.]

3. LARCENY ⟸15—POSSESSION—WHAT CONSTITUTES.

In such case the fact that the bather trusted the proprietor did not render him a bailee, and the proprietor's subsequent appropriation of the property was larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 39–42; Dec. Dig. ⟸15.]

4. CRIMINAL LAW ⟸406—EVIDENCE—ADMISSIONS.

A statement by accused in the district attorney's office concerning the charge that he had robbed one who took a bath in his establishment, consisting of a denial of the charge, is admissible without showing that it was voluntarily made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894–917, 920–927; Dec. Dig. ⟸406.]

5. CRIMINAL LAW ⟸518—EVIDENCE—CONFESSIONS.

Where before accused made any statement he was informed that he did not have to make any statement, any statement that he made concerning the charge is admissible in evidence against him, notwithstanding a confession, to be admissible, must not have been extracted by any sort of threats or violence nor obtained by promises.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1157–1162; Dec. Dig. ⟸518.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

G. B. Dye was convicted of grand larceny, and he appeals. Affirmed.

Ralph W. Smith, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was, jointly with one L. S. Purdy, charged with the crime of grand larceny, and upon his trial was convicted, and by the judgment of the court sentenced to six years' imprisonment in the state prison at Folsom. Defendant appealed from the judgment and from the order denying his motion for a new trial. The charge was that defendant, on the ——— day of January, 1915, did "willfully, unlawfully, and feloniously steal, take, and carry away certain personal property, to wit, one $100 bill of currency, one $20 bill of currency, and three $10 bills of currency, * * * being then and there of the personal property of one S. V. Halstead, and not the property of said defendant, contrary," etc.

It is earnestly contended that, if any crime was committed, it was embezzlement, and not larceny; that defendant's motion that the court instruct the jury at the close of plaintiff's evidence to acquit defendant should have been granted because of a fatal variance between the evidence and the charge in the information. To pass upon the merit of this contention requires an examination of what occurred after Halstead went to defendant's place of business.

It appeared from the testimony of the prosecuting witness, Halstead, that he came to Sacramento from San Francisco on Sunday, January 3, 1915, and stopped at the Western Hotel on his way to Nevada City, where he resided and pursued the profession of mining engineer:

He "was suffering from a severe cold and a congestion of the breast." Monday morning, January 4th, he met a stranger at the hotel of whom he inquired whether "he knew if there was a system of Turkish baths, a good system of Turkish baths, in the city. He said, 'Yes.' He says, 'I know of something that is better than the ordinary Turkish bath.' He then spoke of the Hygenic Institute at 327½ K street, or 527½. And he said, 'I have a pamphlet in my pocket describing it,' and he handed it to me, and I was impressed with it, and I says, 'I believe I will go there now.' He says, 'It is very near here, on the same street,' and I immediately went over; I went to this place, called at the office, and Dr. Dye was in."

This was in the forenoon. Halstead described his condition and was examined by defendant. "He took some instruments and sounded me, and he says, 'Your chest is badly congested.'" Halstead told him he was anxious to get to his home in Nevada City and wanted to know if he could get away that night, but was told by defendant: "I wouldn't dare let you out before to-morrow night; I can get you away to-morrow night." Halstead asked what it would cost him and was told that the fee would be $10, and if he would put it up he would give him the treatment at once. Halstead testified:

"I had in my inside vest pocket $140 in bills. I had a $5 gold piece in my left outside vest pocket, and I had some $5 or $6 in silver in my pants pocket. One bill was a $100 bill, United States currency bill, and two $20 bills. I pulled out one $20 bill and handed it to him. He says: 'I will have to go down and get this changed. I will be right up.' A few minutes after he had gone, Mr. Purdy came into the room, and he says: 'You are Mr. Halstead?' I says, 'Yes.' 'Well, Mr. Halstead, we are going to give you a treatment in the bake oven.' Dr. Dye had spoken about what the process was before. He says, 'Just come in this room and undress,' and I did so, and, while undressing, Dr. Dye came in. I took off everything, and either Dr. Dye or Dr. Purdy took my clothes and hung them up. Mr. Jones: Hung them up where? A. On a peg or a nail or a hook in the room where I undressed. Q. They were both present at that time? A. They were both present at that time; yes, sir. Q. Now, to go back a minute. When you took out your money and gave the $20 bill to Dr. Dye, from where did you take that $20 bill? A. From my inside vest pocket. Q. Did you take any other money out—any other bills—at that time? A. No. Q. Do you know of your own knowledge whether he saw the other bills in your pocket at that time? A. Not up to the time that I had taken off my clothes. I don't remember whether he looked into my clothes to see what was in there. I told him what I had—that I had— Q. (interrupting). You told Dr. Dye? A. Yes. Q.

What did you tell him you had? A. I told him that I had $150—that was including the $20 that he had taken down to get changed—and he says, 'That will be all right;' he says, 'It is here in your clothes;' he says, 'Everything will be all right, Mr. Halstead.' Q. Go ahead. A. After I took the bath, or while lying in this bath, he brought some kind of liquid—I don't know what it was—that I took through a glass tube. * * * I took it through a glass tube while lying on my back. And after I got out of the bath I was feeling very weak. He assisted me into a back room of his office and put me to bed. He went out of the room, after covering me up, and came in with some liquid in a glass, and I am not sure whether it was a tablet or a capsule that he had, and he said: 'Take this.' I asked him—I remember asking him—if that was an opiate. He said: 'No.' He says: 'It is a purgative.' He says: 'I want to bring you around just as quickly as I can.' Very soon after that I went off into a sleep or a stupor. I don't remember just when I awakened. When I did, I was suffering great pain. And he brought in something else in a glass and told me to take that. Q. When you gave him the $20 bill, did he give you any change? A. No. Q. What did he say about changing it, if anything? A. He never referred to having changed it at all. Q. Well, did he leave the room to go out to change it—anything of that kind? A. Yes; when I gave him the $20 bill, he went out of the room immediately. He said: 'I will go and get it changed and be right back.' Q. When he came back, was anything said about the change? A. No. Q. When you took your clothes off, they were hung up there in the closet? A. Yes, sir; not in a closet; in the room in which I undressed. Q. Did you authorize him, Purdy, or anybody else, to take the money out of your clothes and take care of it, or anything of that kind? A. No, sir. Q. Did you authorize anybody, Purdy or Dye, to take charge of your money in any way? A. Not at all. Q. You just took your clothes off with the money in and left it there? A. Yes, sir. Q. Now, what else occurred that night? A. Well, I don't remember how often he came into the room, or how often he gave me something from a glass. Once or twice I know, having rapped or called, he came in and I asked him for water —some water; I was very thirsty; and I think once he brought me in some water; and I know that the second or third time he gave me some sort of medicine from a glass. Once it was a dark color, and another time it was apparently of a clear color. Q. Did he give you any liquor? A. I don't remember whether he gave me any liquor that night or not. I think it was the next day that I was suffering, and I asked him what that was, whether it was brandy or whisky, and he says: 'It is a stimulant.' I believe, as I remember, that he said that it was brandy and peppermint. Whether there was anything else in it or not, I don't know. He said: 'I want you to take what I give you.' He says, 'I want to bring you around as quickly as I can.' Q. Well, how were you the next day? A. Well, the next night I was feeling worse than I did the night before. Q. How long were you kept there? A. From Monday morning until Friday, the following Friday night, before I got out. * * * Q. Now, when you were put to bed, what clothes did you have? A. My undershirt. Q. Were you given your clothes afterwards? A. Not until the following Wednesday or Thursday. I had asked often if he wouldn't bring my clothes in. Mr. Smith: Your honor, do I understand that you ruled that all this testimony is admissible to prove larceny? The Court: I just ruled on one question that you objected to. Mr. Smith: I object to this character of examination. It is not any proof of larceny in any way; it is irrelevant, immaterial, and incompetent so far as the issue in this case is concerned. I ask that it be stricken out, and that the prosecution be instructed not to proceed further along this line. The Court: The objection is overruled. Mr. Jones: The acts that I expect to prove will show larceny. The Court: I have overruled the objection. Mr. Jones: Go ahead, Mr. Halstead. State what you said to Mr. Dye about your clothes. A. I asked him to bring my clothes in, that I had occasion to get up out of the bed, and that every time I would do so I took a chill. I asked him the first night if he wouldn't bring my clothes into the room. I don't remember whether he said he would or not, but he did not do so; and almost every time he would come in I would ask him to bring in my clothes. I think it was either a Wednesday or a Thursday that he just brought my pants in—no other clothes. I asked him then for the rest of my clothes, and he said that I couldn't dress anyway, and he didn't want me to go out in the condition that I was in; that I must not leave my room. It was on a Friday —rather it was on a Thursday—that I began to get suspicious that something was wrong, because he had refused to bring my clothes in to me, and I told him on a Friday, I says: 'Doctor, I want you to bring my clothes in. I am going to dress. There is no use of my staying here. I will die in here. I am going to get out of here.' And he said something like this: 'Now, don't get excited; don't get excited.' He says: 'I am going to look after you; you are all right.' I had previously asked him if my money was all right. He says: 'Yes; your money and your clothes—everything is all right. Don't feel alarmed about anything.' 'Well,' I says, 'I want you to bring my clothes in to me.' He says, 'I will,' and he went out—he went out and came back in a few minutes, and he says: 'Purdy has gone out, and has the key of the room in which your clothes are located. I will have to wait until he returns. As soon as he gets back I will bring your clothes in to you.' He went out and probably a half an hour or longer had elapsed when I got up. I was feeling very bad and desperate. I put on my pants, and I went out into the hall and went toward his office door. I took hold of the knob of the door; I believe I rapped first; then I took hold of the knob of the door, and it opened. It was perhaps after 7 o'clock, because the lights I know in the streets were burning, and the light was shining in my room, and the second door from his office was open. That is where I had undressed, and I went in there, and I found my clothes hanging up, and my shoes and stockings were down on the floor. Q. The same room where you went to undress? A. In the same room, and the clothes were apparently just where he had hung them when I undressed. I put on my clothes—dressed—and was sitting in his office chair when he came in shortly afterwards. Q. Wait a minute. You put on your clothes and your vest. State as to whether or no you examined them to see whether your money was there. A. I did. Q. Was your money there? A. No. Q. Was any of it there? A. Nothing at all. Q. The last time you saw the currency that you spoke about, where was it? A. In my inside vest pocket. Q. Inside vest pocket; and the gold was where? A. The gold was in my outside vest pocket. Q. And where was your coin—silver? A. In my pants pocket. Q. Now, you looked through all those pockets, did you? A. Yes, sir. Q. And none of it was there? A. None of it was there. Q. You dressed and you went in your room? A. No; I don't remember whether I went into my room. I sat in his chair in the office. While sitting there, he came in and seemed very much surprised to see me there. Q. What was said? A. 'Well,' he says, 'here you are.' I says: 'Yes; and I have found my clothes; they were not locked up; they were right where they were left when I was taken out of the room.' I says: 'Doctor, where is my money?' And he never answered. I asked him two or three times; he stood there. I says: 'Where is my money?' 'Now,' he says, 'never mind anything about

that.' He says: 'Don't get excited.' He had often used that expression: 'Don't get excited.' He says: 'Now that you have got your clothes on, perhaps it is better for you to come out and get some fresh air.' 'Well,' I says, 'I want my money.' 'Well,' he says, 'you will have your money.' He says: 'Don't feel alarmed; you will have your money. Come outside and get some fresh air, and perhaps you will be able to eat something.' I went out with him, and we crossed over to the Thomas Café and sat down, and he says: 'Now, order anything that you want.' * * * Q. Well, where did you sleep that night? A. Back in his place; not in the room that we slept in the night before or at the time that I went there. Q. When you came out of the Thomas Café—you said you had nothing in there but a glass of beer? A. That was all. Q. Now, when you came out of there, did he give you any money? A. Yes, sir. Q. How much? A. I think it was $3. Q. He gave you $3? A. Yes. Q. How came he to give you that? A. I asked him for the money, and he says: 'I haven't much money with me now.' He says: 'I will get your money.' 'Well,' I says, 'I haven't any money at all; I have got nothing.' And he pulled out some money in his hand and handed me $3, and he says: 'That will do you now.' And he says: 'I will have all your money back to you.' Q. Well, you slept in his room that night, did you? A. Yes; not in the same room that I had been sleeping in. * * * Q. What conversation, if any, did you have with him the next day in regard to your money? A. It was during the next day that he admitted that he had taken my money. Q. Well, don't say 'he admitted.' Tell just what the language was and how he came to say it, and the conversation that was had between you. A. Well, those were the words that he used. He says: 'I must admit that I have taken your money.' Those were the words he used. Q. What did he say he had done with it? A. He didn't say what he had done with it. Q. What explanation did he give, if any, for not giving it to you? A. Well, I don't remember that he gave any reason for it at all. He said that he would get it and return it to me."

It appeared that Halstead remained there until the following Monday, when both defendant and Purdy were arrested, and Halstead left the place; that defendant admitted that he had taken his money and used it; that a week or two later, and while he was under arrest, defendant paid back $100 to Halstead. On cross-examination Halstead testified that after giving defendant a $20 bill the latter said he would get it changed, and left Halstead for that avowed purpose, and while defendant was away Purdy took him into a room adjoining the "bake oven" and told him to disrobe, and that while doing so, or as he was about to do so, defendant returned, and both defendant and Purdy assisted him in disrobing.

"Q. While you were disrobing you said you had valuables in your clothes? A. Either when I was disrobing or after I had disrobed, and he had taken that, I told him, and he said that would be all right; 'everything will be secure and safe.' Q. Was it not while you were taking off your clothes and handed your vest to Dr. Dye? A. I don't remember at just what time during my undressing that I said that, or if it was after I had undressed. It was before I went into the bath. * * * I was impressed that the place was reputable and genuine, and Dr. Dye impressed me very much, and I hadn't the least doubt in the world but that everything was all right and safe, and no question occurred to me at all. Q. The question of a breach of trust had never occurred to you? A. No. Q. You went there, and you might say trusted your life and what you had to Dr. Dye? A. Yes, sir. Q. And you trusted what you had to him? A. Yes. Q. You did not see him put your clothes in a locker of any kind, did you, or trunk or anything? A. No. Q. They were just hung on a nail? A. Hung on a nail or hook; yes. I think in the corner between the doors of the two rooms. Q. Your vest with the valuables was hung with the other clothes? A. I believe they were at the time all hung together."

He testified that he expected to be in the room there until the next day, and that no room was designated for him to occupy after leaving the bath.

"Q. After you had taken your bath, you did not expect to return to this room? A. Well, I hadn't thought anything about it at all where I would be placed."

He testified that defendant did not give him the change, but kept the $20 bill.

"Q. Did you not say you had trusted everything to his hands? A. I may have. I naturally would do so, because I think I remember his asking me if I had any doubts about anything being not right. I told him I had no reason for any doubt at all. Q. You trusted everything to him? A. I had confidence in the place and in him, or I would not submit to the treatment or trust him with what I had. Q. And you did trust your clothing and your money and your person to Dr. Dye? A. Yes."

He testified that, "with the exception of his pants," he did not see his clothes from Monday until Friday.

"Q. You turned your clothing and your money over to the care and custody of the defendant? A. Why, certainly. Q. And trusted implicitly in him? A. That my money would be there when I would come out, of course. Q. You gave him possession of your money and your clothing? A. I gave him possession of my clothing with money in it, and told him that my money was in my clothing, and he said it would be all right: it would be there when I came out. Q. And you expected him to look after your money and your clothing, did you not, Mr. Halstead? A. Why, certainly. Q. And keep it safely for you? A. Why, I expected just the same as any clothes. I couldn't think of anything else."

On re-examination in chief he testified:

"Q. Now, you took your vest off, and you simply handed your vest to one of these gentlemen to hang up, or hung it up yourself? A. I didn't hang it up myself. Q. You handed it to one of them? A. Yes, sir. Q. You left it there as you would if you had taken off your clothes and was going to take a bath? A. Yes, sir. Q. There was nothing said at that time about them taking care of your money as distinct from your clothes? A. No; no. Q. You simply left your clothes there as you would anywhere when you disrobed? A. Yes, sir. Q. You are sure you did not take out the money and hand it to him, and put it specially in his charge, or anything of that kind? A. No; I did not. Q. You went and took your bath? A. Yes, sir. Q. You frequently asked him for your clothes? A. Yes. Q. And he put you off? A. Yes."

The district attorney dismissed the information as to Purdy and called him as a witness. He testified that he assisted Dye in disrobing Halstead and in giving him the bath. He testified:

That he hung up part of Halstead's clothes, and Dye "hung the rest of them," and that he (Purdy) put the patient in the bake oven. "Q.

Was anything said at the time in regard to any money? A. Not to my knowledge." That the first he heard of any money was the following Friday, when he met Dye in the office. "I asked him if he had this man's money, and, if he had it, he better pay it back; that he would only get us in trouble. * * * Q. What did he say? A. He said that he had that all fixed up. He said everything was all right."

He further testified that he saw Dye have a $100 bill on Tuesday and asked him where he got it, and that Dye pointed in the direction of the treatment room.

Gertrude Walker, who kept the rooming house where defendant had his institute, testified that defendant showed her a $100 bill on Tuesday or Wednesday following the day Halstead came to the place. It is not necessary to state the evidence further as to defendant's having Halstead's money. He admitted it to Attorney Crowley, who was Halstead's attorney, but claimed that Halstead loaned it to him, which the latter testified was untrue. The question urged is that the evidence failed to establish larceny.

[1] The court correctly instructed the jury as follows:

"Embezzlement is when the possession of the property has been acquired lawfully and bona fide, and afterwards fraudulently appropriated. The gist of the offense of embezzlement is the breach of trust reposed in the agent, employé, or bailee by his principal, employer, or bailor. The crime may be in general terms defined to be the fraudulent conversion of another's personal property by one to whom it has been intrusted. When a bailee of property obtains possession of it from the owner with the intention of stealing it, and carries out that intent, he is guilty of larceny; but, where the intent to steal did not exist at the time of taking possession of the property by the bailee, but was conceived afterwards, it is embezzlement."

"In the case of grand larceny the taking must be with a felonious intent, as heretofore stated, but in embezzlement the original taking is lawful, and the crime consists in the fraudulent appropriation of property by a person to whom it has been intrusted."

[2, 3] We are of the opinion that at the time Halstead disrobed for his bath and his clothing was "hung up on pegs or hooks" in the dressing room adjoining the so-called bake oven the possession was not taken by defendant, nor in the sense of being intrusted to him by Halstead did he become a bailee. In fact, the clothing seems not to have been removed, except that the trousers were late in the week brought to Halstead, and he found his coat and vest where they had been placed when he entered the room to take his bath. Defendant was told at the time Halstead was undressing that his money was in his clothing, and defendant's subsequent conduct justified the jury in inferring that he formed the intent to take that money and appropriate it to his own use—in short, to steal it—when he was helping to undress Halstead. But, if this intent was formed the next day (and there was evidence that he had the money on Tuesday), the felonious taking would constitute larceny, for the reason that Halstead's property had not been placed in his custody and keeping. Halstead testified that he did not authorize Purdy or Dye to take charge of his money; that "he just took off his clothes with the money in and left it there." He was not told how long he would have to remain in the bath or when he was to be taken from there. People v. Montarial, 120 Cal. 691, 53 Pac. 355. He testified that he had no reason to distrust defendant, and that he trusted everything to him. Naturally he so felt, or, as he testified, he "would not have been there." We do not think that these expressions of confidence in defendant must necessarily be construed as having clothed defendant with the authority of a bailee in the sense that he could not be held guilty of larceny for having feloniously taken and appropriated his patient's money.

It is urged that the court erred in admitting the statement of the defendant taken in the district attorney's office by the chief deputy, Mr. Jones, and his stenographer. On January 11th, one week after Halstead went to these baths, defendant was arrested and taken first to his own office, and then to the office of the chief of police, and thence to the district attorney's office. When arrested he was told that: "It is relative to a fellow from Nevada. Probably you know about it." This occurred on the street where he was arrested. Nothing further was said until he was taken to his office.

"When he got up to the office he stated: 'I haven't any of this man's money. What are they trying to rib up on me now? Some more ribbing?' He says: 'All I had of this man's money was $20.' He says: 'I don't know anything about his money.' It was along those lines. Q. He said that voluntarily before you had said anything to him? A. Yes, sir. Q. You did not tell him before that that any statement that he made would be used against him? A. He was pacing up and down in the room, and he seemed to be excited and very nervous, and he was talking at random, there in the room before us. Q. Well, you did not tell him or you did not advise him of any rights, did you, before that—before making that statement? A. I hadn't asked him anything relative to it. Q. Just volunteered this statement? A. Yes."

Defendant moved that this testimony be stricken out because he was not advised of his rights. The motion was denied. Defendant was then taken to the district attorney's office, where he made a statement which was taken down by the court stenographer and was offered and admitted in evidence. Defendant objected that "he was not advised of his rights prior to the making of the statement," or "that it would be used against him on the trial, he was not properly informed." The preliminary questions were as follows:

"By Mr. Jones: Mr. Dye, this is the district attorney's office. A. Yes, sir. Q. This is Mr. Carragher, the deputy district attorney. A. Yes, sir. Q. And my name is Jones. I am chief deputy district attorney. A. Yes, sir. Q. This is Mr. Warren Doan, the shorthand reporter, and you know the officer. A. Yes, sir; I have had a sad experience with the officer. Q. We brought you here to have a talk with you. A. Yes, sir. Q. I do not want you to feel that you are under any restraint or that there are

any threats made against you or any promises made to you. A. Yes, sir. Q. There is a serious charge made against you, and we want to hear your statement if you have any to make. A. Well, what was the charge? Q. The charge is that you took $150 or thereabouts from a man by the name of Halstead."

Then follows the statement. Defendant stated the history of Halstead's coming to his place of business, his experiences while there, and his departure from the place. It is not necessary to set out this statement. In the main it disputes Halstead's story; is a justification for what was done in treating him; denies that Halstead had the money he claims he had; and states that all the money he (defendant) got was the $20 bill and a $1 bill. The statement was in no sense a confession of guilt, but was, in fact, an assertion of innocence.

Section 1324, Penal Code, has no application. People v. Panagoit, 25 Cal. App. 158, 143 Pac. 70. So far as the record shows, defendant made no objection to giving his connection with the transaction. There was, in our opinion, no violation of his constitutional rights in reading the statement to the jury. In People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042, relied upon by defendant, O'Bryan was arrested on suspicion, and was held in custody in the county jail. "He was taken before the grand jury which was investigating the offense, and sworn to testify. He was not informed of his constitutional right to decline to be a witness against himself, nor was he warned that his statements might be used against him." In that case the court said:

"The Constitution protects a person from being compelled to be a witness against himself. If at the time he appears no accusation, formal or informal, has been made against him, he does not, in testifying, become a witness against himself. Or if, even though charged with crime, he voluntarily gives evidence against himself, his rights are not infringed by the use of such evidence thereafter. These distinctions are well illustrated by a series of New York cases"—citing the cases.

In the case here defendant did not testify; he made certain extrajudicial statements, and, under the circumstances disclosed, we think they were voluntarily made. But, if there was error in admitting the statement, we are satisfied from an examination of the entire record that the result was just, and would have been reached if the error had not been committed. Const. art. 6, § 4½; People v. O'Bryan, supra.

Error is assigned because of alleged misconduct of the deputy district attorney. In addressing the jury he said:

"Gentlemen of the jury, let me call your attention to one thing; the punishment for embezzlement is exactly the same as the punishment for grand larceny. Mr. Smith: We object to that statement, if your honor please, and ask that the jury be instructed not to consider it. The Court: Yes; the jury cannot consider that. Gentlemen of the jury, you will not consider that statement of the district attorney."

The district attorney overstepped the boundary of his privilege in addressing the jury, for the question of punishment was of no concern to them, and, as the principal defense was that there was a fatal variance between the proofs and the charge, the statement, unchallenged, might have had some influence to defendant's prejudice. We must assume, however, that the jury obeyed the direction of the court and did not consider the statement.

The judgment and order are affirmed.

HART, J. I concur in the judgment and in all that is said by the Presiding Justice concerning the effect of the evidence and the justification of the verdict of conviction under the proofs. But I do not think it is necessary to invoke article 6, § 4½, of the Constitution to uphold the court's ruling in admitting in evidence the extrajudicial statement of the defendant when in the office of the district attorney. The application of said section of the Constitution in a case presupposes either error in the ruling as to which it is invoked or a doubt in the mind of the reviewing court as to the correctness of the ruling.

[4] In the first place, the statement of the defendant in the district attorney's office is not a confession. On the contrary, it involved an explicit and direct denial of guilt of the crime charged or of any crime in connection with the defendant's transaction with the prosecuting witness. It was therefore unnecessary to show, preliminary to the admission of the statement, that it was voluntarily made or not made under the inducement of hope or fear. Greenleaf on Evidence, § 213.

[5] In the second place, I am clearly of the opinion that, had the defendant confessed that he committed the crime of larceny against the prosecuting witness under the circumstances characterizing the making of the statement which was allowed to go to the jury over his objection, we would be required to hold that it was voluntarily made. Before being questioned as to his connection with the alleged crime, the defendant was informed by the deputy district attorney that he was then in the presence of the officers of the law, including an officer who would probably have something to do with the presentation of the case against him at the trial. He was further sufficiently given to understand that he was not compelled to make a statement or "under any restraint or that there are any threats made against you or any promises made to you." This warning, I think, was sufficient to apprise the defendant of his right not to make a statement if he so elected, and that he would be shown no favor if he did make one. Of course, a confession, to be admissible as proof of guilt, must not have been "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exercise of any improper influence." 3 Russell on Crimes (6th Ed.) 478. But, as our

Supreme Court declared in the case of the People v. Siemsen, 153 Cal. 387, 394, 95 Pac. 863:

"Whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it, and a considerable measure of discretion must be allowed that court in determining it."

See, also, People v. Miller, 135 Cal. 69, 67 Pac. 12; Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; People v. Fox Burns, 149 Pac. 605.

Obviously there must be some showing that the confession was freely and voluntarily made and without any previous inducement or offer of leniency in punishment or by reason of any intimidation or threat. People v. Miller, supra. And that there was such a showing in this case I am, as before suggested, thoroughly persuaded.

As I understand the object of section 4½ of article 6 of the Constitution, it is to be applied only where manifest error has been committed and a review of the whole record, including the evidence, does not justify the conclusion that a miscarriage of justice will be the inevitable result of such error, if the judgment should be affirmed.

I concur: BURNETT, J.

(29 Cal. A. 136)

LAPIQUE v. MORRISON. (Civ. 1543.)

(District Court of Appeal, Second District, California. Dec. 8, 1915.)

1. EASEMENTS ⟸18—WAY BY NECESSITY—WHEN ALLOWED.

If a landowner has access to his property over a hill route, though it be rough and difficult for transportation, but not shown incapable of development to a practical grade and width by even a considerable expenditure of money and labor, he cannot support a claim to a right of way by necessity over the lands of another on the ground that it is necessary to the reasonable use and enjoyment of his lands, for such right can only be claimed where the way furnishes the only access to the claimant's property.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50–55; Dec. Dig. ⟸18.]

2. EASEMENTS ⟸7—WAY BY PRESCRIPTION—ADVERSE USER.

If a way to which a right is claimed by prescription is plowed by the owner of the land and obstructed by him for his farm purposes during the time of prescription the claim cannot be supported.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 16–19, 27, 33; Dec. Dig. ⟸7.]

3. EASEMENTS ⟸36—WAY BY PRESCRIPTION—BURDEN OF PROOF.

The claimant of a right of way by prescription must prove a five years' continuous and uninterrupted use and enjoyment of the way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88–93; Dec. Dig. ⟸36.]

4. EASEMENTS ⟸2—WAY BY PRESCRIPTION—PARTIES—UNITED STATES.

If land over which a right of way by prescription is claimed is owned by the United States during part of the time of enjoyment of the way, the time of prescription to support the claim cannot commence to run until after title of the United States to the land is divested, for an adverse possession cannot operate as against the United States or the state.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 3; Dec. Dig. ⟸2.]

5. EASEMENTS ⟸8—WAY BY PRESCRIPTION—ADVERSE USER—NOTICE.

A claim to a right of way by prescription cannot be supported where claimant's use of the way has been allowed by the landowner as a matter of accommodation only on account of the nature of the country and the practices of travel therein, and the claimant's conduct in the use of the way has not been such as to put the landowner upon notice of an adverse user.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 27–33; Dec. Dig. ⟸8.]

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by Pierre Agoure against Alonzo Morrison to enjoin an interference with plaintiff's use of an alleged right of way and to quiet his interest therein. After trial and judgment in favor of plaintiff, John Lapique was substituted as plaintiff because of an assignment to him of Agoure's interest in the action. From a judgment for the plaintiff and an order denying a new trial, defendant appeals. Reversed.

Kendrick & Ardis, of Los Angeles, for appellant. Haas & Dunnigan, of Los Angeles, for respondent.

JAMES, J. This action was commenced by Pierre Agoure, who claimed the right to the use of a right of way for road purposes across the land of defendant. By the allegations of the complaint facts are alleged which support both a cause of action to assert the right in the plaintiff as of necessity to the use of the road, as well as the right by adverse user; at least, such is the general complexion of the allegations contained in the complaint. In the prayer it is demanded that defendant be enjoined from interfering with the plaintiff's use of the alleged right of way, and also that the interest of plaintiff therein be quieted as against the defendant. After trial was had and judgment in favor of the plaintiff, an order was made substituting the respondent herein as party plaintiff, the order of the court in that behalf reciting that it appeared that the estate, right, title, and interest in the action had been assigned by the plaintiff to the respondent. No point is made as to the regularity of this order. We think the assignability of the cause of action in this particular case might well be questioned, but as the point is not raised we are not called upon to determine that matter. However, we think that the judgment and order denying the defendant a new trial, both of which were appealed from, must be reversed. The evidence is not sufficient to support either.

[1] In the first place, the findings of the court are not such as to establish facts in support of the claim that the right of way existed in Agoure's favor as of necessity. The only suggestion in that direction is the statement in the findings that the roadway "is necessary to the reasonable enjoyment and use of plaintiff's said lands." It is well established that a right of way by necessity can only be claimed and held where it furnishes the only way by which access may be had to the property of the claimant.

"The right of way from necessity must be in fact what the term naturally imports, and cannot exist except in cases of strict necessity. It will not exist where a man can get to his property through his own land. That the way over his own land is too steep or too narrow, or that other and like difficulties exist, does not alter the case, and it is only where there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way." Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879.

The relation of grantor and grantee did not exist as between Agoure and this defendant, but even though such had been their relation, the facts found by the court do not establish the most material thing, to wit, that the plaintiff could not obtain access to his property except by use of the right of way claimed. Turning to the evidence, we find that the facts shown do not establish any such condition. It appears that for many years prior to the year 1903, Agoure and other persons had driven across the land now owned by the defendant in order to reach a certain tract composed of 15,000 acres held by Agoure. All of this land was in a hilly region, and it was more convenient for Agoure to cross the land of defendant and the former occupants thereof than it was to travel in a different direction. There was direct testimony of a hill route leading out from Agoure's land to the county road, which, however, it was stated was so rough as to make it difficult to transport any load thereacross. But it was nowhere shown that by the expenditure of some money and labor—perhaps a considerable amount of both—this hill route could not have been converted into a roadway of practicable grade and width. So it is very clear that no ground existed upon which Agoure or the plaintiff could assert legal necessity for the right of way as claimed.

[2,3] It appears that the plaintiff relied further, and the trial judge evidently sustained his claim in that regard, upon the fact that he had made use of the road for a long period of years. The court found that the right of way had been used for a period of more than five years prior to the commencement of the action. Easement rights may be so acquired, but where they are asserted the party claiming them must prove an uninterrupted use of the right of way.

[4] Title to the land now owned by the defendant was held by the government of the United States up to the year 1903, when a patent was issued by which such title was divested. Since the year 1903, the evidence showed that this roadway had been plowed over and grain had grown up at times in the tracks. There was testimony for the defendant, which was uncontradicted, that haystacks had been placed across the roadway subsequent to the year 1903. The period included within that which will give title by adverse possession cannot commence to run at any time as against the ownership of the United States or of the state. O'Connor v. Fogle, 63 Cal. 11. So, under the facts disclosed by the record, no claim by adverse user could have been raised prior to the year 1903, nor until five years had elapsed after issuance of patent to the defendant's land. During this latter period, we think the evidence clearly shows that the use which Agoure made of the right of way was not continuous and uninterrupted; it was more in the nature of a user by permission.

[5] The country there was largely open and uncultivated. It was hilly land, as above stated, and persons generally having occasion to travel in that region adopted whatever route might appear to be the shortest, which they were allowed to do as a matter of accommodation by the landowners. The defendant could hardly have been placed upon notice, under the circumstances, that Agoure expected, because of the permission accorded him, to base a claim to easement rights in the roadway, for his general conduct was not such as to indicate his determination so to do. If he had intended to insist upon such a claim, his acts, as they are generally described by the testimony, and considering the practice adopted by travelers in that sparsely settled country, do not sufficiently so indicate. On this point, see Clarke v. Clarke, 133 Cal. 670, 66 Pac. 10.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

(29 Cal. A. 139)

COMMINS v. GUARANTY OIL CO.

(Civ. 1762.)

(District Court of Appeal, Second District, California. Dec. 8, 1915. Rehearing Denied by Supreme Court Feb. 5, 1916.)

1. APPEAL AND ERROR ⊜123—"FINAL JUDGMENT"—ESSENTIALS.

A judgment of nonsuit for plaintiff's failure to prove a sufficient case, when entered in the court's minutes, need not be followed by a judgment of dismissal to make it a "final judgment," within Code Civ. Proc. § 939, providing for appeals, for such a judgment of nonsuit in itself constitutes a dismissal of the action, under Code Civ. Proc. § 581, subd. 5, providing for dismissal of actions or entry of nonsuits, and directing that a dismissal when entered upon the

court's minutes upon plaintiff's failure to prove a sufficient case is effective for all purposes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 875–881; Dec. Dig. ⇐ 123.

For other definitions, see Words and Phrases, First and Second Series, Final Judgment.]

2. LANDLORD AND TENANT ⇐130—COVENANT OF QUIET POSSESSION—BREACH.

Where a lessee relies upon an agreement in the lease that the lessor will protect him against any claims arising as to the ownership of the premises which the lessor holds under a contract of purchase, and no misrepresentations are shown to have been made by the lessor as to the nature of his title, the commencement of a suit by the owner of the paramount title to quiet its title as against the contract of purchase because of default in payment of installments does not constitute an eviction of the lessee, that operates as a breach of the covenant of quiet possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 470–481; Dec. Dig. ⇐ 130.]

3. MINES AND MINERALS ⇐56 — LEASE — FORM—DESIGNATION BY PARTIES.

An agreement between the holder of land under a contract of purchase and a second party, providing that the second party shall take possession of the land and develop oil thereon, rendering to the other a portion of the product in payment of its use, is a lease, irrespective of its form or the designation given it by the parties.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 166; Dec. Dig. ⇐ 56.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Thomas Commins, trustee of the Canadian Crude Oil Company, Limited, bankrupt, against the Guaranty Oil Company, for damages for breach of contract. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Collier & Clark, of Los Angeles, for appellant. Weaver, McCracken & McKee, of Los Angeles, for respondent.

JAMES, J. The plaintiff in this action, at the conclusion of the testimony introduced in support of his main case, was nonsuited. An appeal was taken from the order granting the motion of nonsuit, the record of which order or judgment appeared only in the minutes of the court.

[1] It is first claimed by the respondent that the order granting the motion for a nonsuit, not being followed by a formal judgment of dismissal, was not a final judgment in the sense that that term is used in section 939, Code of Civil Procedure, providing for appeals. Section 581, Code of Civil Procedure, provides that:

"An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * * 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. * * * The dismissals mentioned in subdivisions * * * and 5 of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered. * * *"

In the case of Kimple v. Conway, 69 Cal. 71, 10 Pac. 189, it was held that no appeal was allowed from an order granting a motion for a nonsuit, nor from a judgment of nonsuit. In that case, however, it was not finally affirmed that a judgment of nonsuit might not, by being entered in the judgment book, become a final judgment from which an appeal might be taken. However, at the time that decision was rendered section 581 did not contain the provision which was inserted in 1897 making an entry upon the minutes of the court of the orders or judgments sufficient for all purposes. It would seem under the present state of the law that none of the orders or judgments provided to be made by section 581, Code of Civil Procedure, need be entered in the judgment book at all or appear in any record except that containing the minutes of the court. This conclusion is sustained by the decisions of Matthai v. Kennedy, 148 Cal. 699, 84 Pac. 37, and Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352. We do not believe that a formal judgment of dismissal must follow the order or judgment of nonsuit, for the judgment of nonsuit in itself constitutes a dismissal of the action. It seems clearly to have been so considered in defining it in section 581, Code of Civil Procedure, which refers particularly to dismissals or the discontinuing of actions.

[2] The motion for a judgment of nonsuit was properly granted, in our opinion, because the plaintiff's evidence did not establish his right to the relief sought. Thomas Commins, the plaintiff, appears as the trustee of the Canadian Crude Oil Company, a bankrupt, and hereinafter, for brevity's sake, we will refer to that corporation as the plaintiff. The evidence introduced on behalf of the plaintiff showed that the defendant, in April, 1911, entered into an agreement with the plaintiff whereby the defendant let to the plaintiff, for a period of 20 years, 20 acres of land in Kern county, Cal. Conditions of the agreement of lease provided that the plaintiff should develop oil on the land and render unto the defendant a certain proportion of the gross amount of the product in payment for such use. The plaintiff took possession of the land, proceeded with the work of developing oil thereon, and continued in that possession until November 1, 1911, when it abandoned the property. The abandonment was made because of an alleged eviction suffered at the hands of the owner of paramount title. This suit was brought to recover as damages all of the money expended upon the property (amounting to more than $35,000), together with other sums claimed to have been laid out incidental to the making of the contract engagement. The evidence showed that about the middle of the year 1910 the defendant had contracted with the Lucky Boy Oil Company to purchase

a large tract of land from the latter, of which the 20 acres so leased to plaintiff were a part; that the contract of purchase provided for installment payments to be made; that, prior to the making of the lease to plaintiff, defendant was in default under its contract of purchase; and that in June following the making of the plaintiff's lease, the Lucky Boy Oil Company brought a suit to quiet its title as against the contract of purchase held by the defendant. What became of this suit to quiet title cannot be told from the record.

It is suggested in respondent's brief that it was dismissed, but the testimony of the attorney for the Lucky Boy Oil Company was to the effect that at the time of this trial the action was still pending and untried. It is the contention of the plaintiff that the evidence was sufficient to show that it entered upon the property under a covenant of quiet possession, and that when the action to quiet title was commenced, and it was made to appear that the Lucky Boy Oil Company possessed the paramount title and right to possession, an eviction was worked which entitled plaintiff to its damages. Very important to a consideration of this question is a certain term of the lease made by the defendant to the plaintiff. It was therein provided as follows:

"The first party [the defendant] agrees to protect the second party against the claims of any party or parties, should any contests ever arise as to the ownership of the same."

By this term in the agreement it may be assumed that the parties considered the matter of possible claims or contests arising to disturb the possession of the lessee. Nowhere in the complaint is it stated or intimated that any fraud was practiced upon the plaintiff by the defendant, and the evidence does not show that any false representations were made as to the quality of defendant's title to the land. The situation was, as expressed by the evidence, that the plaintiff was willing to accept the lease made to it by the defendant, resting for its security upon that term of the agreement which made the lessor bound to protect the lessee in possession against the claims of other persons. Clearly it would seem to follow by every fair inference that the plaintiff was not relying upon any implied covenants, but rather upon the specific and express terms of the agreement held by it. Under such a condition of the contract and the evidence, was the plaintiff justified in vacating the property after suit was brought to quiet title and assert the claim that it was evicted thereby? We think not. It is not shown but that the defendant at the time of this trial still possessed at least an equitable interest in the land, and it was not shown that it would not or could not in some way protect the possession of its tenant. This possession had not been the subject of direct attack or interference, for it was shown that, notwithstanding the suit to quiet title of the Lucky Boy Oil Company was brought in June, 1911, the plaintiff remained in possession and continued to operate the property until November of the same year. One of its managing officers, when asked whether it was not a fact that work was stopped because of the lack of funds, responded in the affirmative. There are authorities holding that, even conceding an eviction of the tenant might have followed the bringing of the action to quiet title by the owner of the paramount title, the right to take advantage of such eviction might be waived by the tenant remaining in possession. However, our conclusions do not involve any application of the holding made by such decisions.

[3] Respondent has all along contended that the agreement, which we have called a lease, did not amount to such; but we think that it should properly be so termed. Any matter of mere form or designation which the parties may give to a document will not change its legal effect. In order that plaintiff might make a case sufficient against a motion for judgment of nonsuit, we think that it should have shown a breach of the express term of the contract which bound the defendant to protect it in possession. It voluntarily gave up possession, abandoned the property, and did that, too, without there being any judgment declaring the rights of the Lucky Boy Oil Company or foreclosing the interest of the defendant.

The view we have taken of the main question makes it unnecessary to consider or discuss the objections urged as to the admission and rejection of testimony.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

171 Cal. 761

GUYER v. STERLING LAUNDRY CO.
(L. A. 3498.)

(Supreme Court of California. Jan. 27, 1916. Rehearing Denied Feb. 24, 1916.)

1. MASTER AND SERVANT ⟸155, 219—INJURIES TO SERVANT—LIABILITY OF MASTER—WARNING OF DANGER.

A master is not liable for failure to warn the servant of an obvious danger, since the employé ordinarily assumes the known risks and dangers of his occupation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 310, 610–624; Dec. Dig. ⟸155, 219.]

2. MASTER AND SERVANT ⟸101, 102—INJURIES TO SERVANT—LIABILITY OF MASTER—DUTIES.

An employer is not bound to furnish the safest machinery or the best methods and appliances for the conduct of his business, but this rule applies only to his duty as to employés who have arrived at majority or at maturity of judgment or discretion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192; Dec. Dig. ⟸101, 102.]

3. MASTER AND SERVANT ⟸101, 102—INJURIES TO SERVANT—LIABILITY OF MASTER—DUTIES.

The duty of an employer is only to furnish reasonably safe machinery for his employés, but what is reasonably safe depends upon the maturity and discretion of the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192; Dec. Dig. ⟸101, 102.]

4. MASTER AND SERVANT ⟸121—INJURIES TO SERVANT — LIABILITY OF MASTER — NEGLIGENCE.

To place an immature boy or girl at work upon a laundry mangle unprotected by a guard is negligence, and shows failure of the employer to supply the employé with a reasonably safe appliance as demanded by the law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228–231; Dec. Dig. ⟸ 121.]

5. MASTER AND SERVANT ⟸121—INJURIES TO SERVANT — LIABILITY OF MASTER — NEGLIGENCE.

Where a particular type of laundry mangle is ordinarily equipped with a guard, and the employer's attention was called to the fact that one used by his operative was not so equipped, it was negligence on his part to fail to have it so equipped, for which he was liable to the operative who was injured because of the absence of the guard.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228–231; Dec. Dig. ⟸ 121.]

6. MASTER AND SERVANT ⟸289—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

Whether contributory negligence was shown in a servant's action for injuries is a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ⟸289.]

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Maud Guyer against The Sterling Laundry Company, a copartnership consisting of Charles H. Clay and William V. Clay. From a judgment for plaintiff and order denying a motion for new trial, defendants appeal. Affirmed.

Morton, Hollzer & Morton, of Los Angeles, for appellants. R. A. Dunnigan and E. B. Drake, both of Los Angeles, for respondent.

HENSHAW, J. Plaintiff, a young woman 19 years of age, sustained severe injury to her hand while in the employ of defendant. She was engaged in operating a machine known as a "baby mangle," a rapidly revolving heated cylinder about six feet long, used for the purpose of drying and pressing thin, soft fabrics such as handkerchiefs, towels, etc. Plaintiff had been operating this machine for about two months before the accident happened. The machine itself appears to have been in perfect working order. At the time of the accident, plaintiff was holding an apron in her hands and was stretching the apron to its limit to take out a crease so that it would be pressed smoothly. While thus engaged her right hand was caught, drawn under the steam-heated roller, crushed, and burned. The injury further resulted in the contraction of the tendons of the fingers so as to incapacitate her from earning her livelihood at her chosen vocation, which was that of seamstress and dressmaker. The machine at which she was employed was not provided with any guard. The guard for such a machine is a rod of brass or other metal so placed in front of the revolving cylinder as to admit the clothes sought to be pressed, but preventing the catching and drawing in of the operator's hands. The complaint charged a failure upon the part of the defendant to provide plaintiff with a machine reasonably suitable and safe for her work, and specifically in failing to see that the machine was equipped with a guard such as has been described. Trial was had before a jury, whose verdict was for the plaintiff. From the judgment which followed and from the denial of defendant's motion for a new trial, it prosecutes this appeal.

[1-3] Many propositions which appellant here advances may promptly be resolved in its favor. Thus it is true that the master is not liable for failure to warn the servant of the danger where that danger is obvious, and that the employé ordinarily assumes the known risks and dangers of his occupation. Also, the evidence shows that plaintiff was sufficiently intelligent to have and did have a realization, indeed, a full appreciation, of the fact that injury to her would certainly result if her hand were caught and drawn under this rapidly revolving steam heated roller. So also it is true, speaking now generally, that so far as concerns an employer's duty to his employé the former is not bound to furnish the safest machinery or the best methods and appliances for the conduct of the particular

operation in which the employé may be engaged. Sweeney v. Berlin, etc., Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; Wormell v. Maine, etc., R. Co., 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321. But there is a limitation to this doctrine dictated by humanity, demanded by experience and declared by this court. The cases pronouncing the general doctrine have had to do largely not only with employés who have attained their legal majority, but with employés who have arrived at the maturity of judgment and discretion. In our own books will be found many such cases, as Bresette v. E. B., etc., Stone Co., 162 Cal. 74, 121 Pac. 312. The time fixed by our law for attaining full legal majority—18 years for the girl, 21 years for the boy—embodies a useful and indeed a necessary declaration of the law, since some time must be named when the individual will become entitled to the full rights of the adult and be charged with his full duties and responsibilities. But the law itself cannot change the facts of existence, and no one will argue that merely because a girl of 18 or a boy of 21 has attained legal majority they have thus and thereby been endowed with the care and discretion and judgment of full maturity. Physically they may be fully mature. Mentally a tremendous growth must take place and usually does take place before knowledge has ripened into wisdom and wisdom coupled with experience has developed a sound and sane judgment. A girl of 19 is still in her youth. Youth is ever the time of heedlessness, of impulsiveness, and of forgetfulness. Lacking power of continuous application and concentration, it will, upon the other hand, center its thought for a brief time and to its peril upon one matter to the exclusion of all else. Those who employ young girls and young women in and about machinery which may inflict injury are properly chargeable by the law with knowledge of these self-evident truths, and it becomes therefore their duty to guard youth against its own inevitable shortcomings. The employer in such a case is still charged only with the duty of furnishing reasonably safe machinery for his employés, but an appliance or machine to be reasonably safe in the case of a girl 18 or 19 years of age may properly require more safeguards than would be demanded in the exercise of reasonable care where the employé is a man of mature years and judgment, trained and skilled to his finger tips in the matter of the occupation in which he is engaged.

[4] This court has declared, in the case of another young girl of the same age and injured in like manner in the operation of an imperfectly guarded mangle, that such a machine is inherently dangerous and that it was the duty of the employer, in view of the fact that it was operated by a young girl, to see that there were safety guards and that they were in good condition. Quinn v. Electric Laundry, 155 Cal. 500, 101 Pac. 794, 17 Ann. Cas. 1100. The same declaration is made in another case where a young girl was injured by a like machine. Larsen v. Bloemer, 156 Cal. 752, 106 Pac. 62. In the latter case also it happened to the young girl that:

"While attempting to smooth the cloth on the rollers thereof, and without fault on her part, 'her fingers were caught between the rollers.'"

And it is in this case laid down as a sound proposition, quoting from Sibbert v. Scotland Cotton Mills, 145 N. C. 308, 59 S. E. 79, that:

"Recognizing the danger of such accidents, employers use such safety appliances as are in general use, either to avert the danger or to stop the machine in the event that an injury is imminent."

The too frequent recurrence of accidents such as this, in the operation of mangles, has led to the declaration of law which we repeat and approve, that to set a young girl or young boy at work at such a machine unprotected by a guard is a failure of the employer to supply his operative with the reasonably safe appliance which the law demands.

[5] But to supplement the law the evidence in this case shows, by at least one witness with knowledge of laundry machinery, and experience in various laundries, that all such mangles have guards on them, that this particular mangle was made with a guard, that he put the machine in position for work and called the attention of defendant to the fact that the guard was not on the machine where it should have been, and was told not to mind and not to put it on. We hold therefore that negligence was shown upon the part of defendant.

[6] Whether contributory negligence upon the part of plaintiff was shown, that is to say, whether, as a young girl of 19 years of age, she did not comport herself with the care and prudence due from one of her years and experience, was strictly a question for the jury, and was resolved against defendant's contention.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

171 Cal. 765

PLANT v. PLANT et al. (L. A. 3604.)

(Supreme Court of California. Jan. 26, 1916.)

1. TRUSTS ⊂=198—SALE OF TRUST PROPERTY —PURCHASE BY TRUSTEE.

The inhibition upon a trustee from purchasing at his own sale is removed by the determination of a court of equity that he may be such purchaser, and a sale under direction of and by officers of such court is not a sale by the trustee, so that there is nothing to prevent him from becoming a purchaser.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 258–265; Dec. Dig. ⊂=198.]

2. JUDGMENT ⟸822—FOREIGN JUDGMENT—CONCLUSIVENESS—DISTRIBUTION OF ESTATE.

Where the estate of one dying in California was distributed to the heirs "in trust" to use the rent during their lives or until they should mutually agree to sell the property and divide the proceeds equally among the testator's children and the heirs of deceased children, and the testator's Illinois realty was distributed to the testamentary trustees, a judgment of the circuit court of Cook county, Ill., on a bill in equity by defendants herein against the other heirs, including plaintiff, resulting in a decree adjudging that the property be sold for cash to the highest bidder, permitting any of the parties to become purchasers, and in which defendant in good faith purchased the property, and plaintiff received his share of the proceeds, was res judicata and could not be disturbed by the courts of this state upon a collateral attack merely because the decree in this state distributed the property "in trust."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488–1490, 1496–1500; Dec. Dig. ⟸822.]

3. TENANCY IN COMMON ⟸19—PURCHASE BY COTENANT—JUDICIAL SALES.

A cotenant, who may not purchase and assert an outstanding title against his cotenants, may purchase their own titles at a judicial sale.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 55–59; Dec. Dig. ⟸19.]

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Suit by George W. Plant, a minor, etc., against Charles Plant and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Bernard Potter, of Los Angeles, for appellant. Anderson & Anderson, and Tanner, Taft & Odell, all of Los Angeles, for respondents. D. K. Trask and Trask, Norton & Brown, all of Los Angeles, for executrix.

MELVIN, J. Plaintiff appeals from an adverse judgment. The suit was brought on behalf of the minor, George Washington Plant, by his guardian, for the purpose of having the court decide and declare that the defendants were trustees of certain funds received by them from the rentals and sale of certain property which they had purchased from the estate of their deceased father (plaintiff's grandfather), Roger Plant. The court made findings to the effect that Roger Plant died testate in California on February 19, 1894; that his will was probated in the following month; that Charles Plant, one of the defendants, was duly made executor; that the estate was duly settled and the executor was discharged. Other findings were in substance as follows:

In March, 1895, the superior court made and entered its decree by which the real property of the estate was distributed to William Plant, Susan Plant Tweedy, Roger Plant, Henry Plant, Phoebe Plant, David Walter Plant, George Washington Plant, Richmond Plant, and Charles Plant, children of deceased, all over the age of 21 years. This distribution was "share and share alike," but as the decree recited "in trust nevertheless they to use the net rents and profits during their lives, or until such time after 10 years from the date of the death of said Roger Plant as that all of his said children or in case any of them shall be dead, then all said children then surviving and the heirs of the body of said deceased children, shall mutually agree in writing to sell said real property and divide the proceeds, when the same shall be sold and the proceeds divided equally among said children." The findings recite proceedings in the probate court of Cook county, Ill., where the will had also been admitted to probate and letters had been duly issued to Henry Plant in 1894. As a result of these proceedings an order was there entered declaring the estate settled and discharging the executor. At the time of his death Roger Plant was seised in fee of certain valuable real property in Cook county, Ill. By the decree of distribution this property was distributed to the trustees named in the will of Roger Plant. In September, 1905, the same persons named as defendants in this action (except the administratrix of David Walter Plant's estate, for he was then living) filed their bill in equity against the other heirs of Roger Plant, including the minor, George Washington Plant, whereby they petitioned the said court to make a decree distributing the property of the estate in Cook county, giving to each heir his or her allotted proper share in accordance with the will of their common ancestor. Two of the defendants in that action were sued as surviving trustees under the will of Roger Plant, deceased, but in the present suit the court found that they were not in fact trustees at the time of the sale of the property in Illinois. The superior court in this action also made the following finding:

"That no express or formal appearance in said partition suit was made by the plaintiff in person, and that plaintiff never directly authorized any person or persons to appear for or on behalf of plaintiff in said proceeding; but that plaintiff did duly and regularly appear in said proceeding by and through his duly appointed, qualified and acting guardian ad litem, and was represented therein and throughout said proceeding by counsel duly authorized by said guardian ad litem to appear and act for him; and that said circuit court of Cook county, Ill., acquired jurisdiction of all parties to said proceeding, including plaintiff herein."

There was never any agreement in writing among the children of Roger Plant to sell any of the property in Cook county and to divide the proceeds.

According to the findings the suit in equity resulted in 1907 in a decree that the property could not be physically divided without prejudice to the persons interested, and it was adjudged that the premises be sold for cash to the highest bidder, provided the amount

offered should equal at least two-thirds of the valuation of $135,000 put upon the property by the commissioners. By said decree it was also provided that after due notice the master in chancery should sell the property, and that any of the parties to the proceeding might become purchaser or purchasers. The sale was made in conformity with the decree. There was competitive bidding, and Charles Plant acted for himself and his brothers Henry, Richmond, William, and David Walter Plant. He and they acted in good faith and for the best interest of all persons concerned. Their bid, $99,500, was the highest and best one that could have been obtained for the property at the sale, and after due confirmation of said sale by the circuit court the master in chancery made a deed of the property to Charles Plant, in accordance with the court's directions. It was further found that Charles Plant raised $50,000 by a loan secured by a trust deed to the property; that a large part of this money was divided among those entitled to share in the estate, other than purchasers at the sale, George Washington Plant (the plaintiff here) receiving approximately $12,000. The purchasers receipted for their shares of the amount bid for the property, but received no money. The property was sold in June, 1908, by the defendants in this action for $127,700 after they had received by way of rents a net sum not in excess of $10,000. There were further findings that the defendants were not at the time of the sale acting as trustees or in any fiduciary relation towards the plaintiff, and that they have not since and do not now hold the property or the proceeds in trust for the said plaintiff. There were elaborate findings negativing the allegations of the complaint whereby defendants were charged with conspiracy to conceal their joint interest in the purchase of the property, to keep down the price by deterring others from bidding at the probate sale, and to do certain alleged dishonest acts. It was also found that while plaintiff had no direct notice of the date of the sale, he was nevertheless a party thereto represented throughout the proceedings by his guardian ad litem and attorney, and although not until April, 1909, did he receive notice of the fact that Charles Plant had made such purchase that fact and the circumstance of the subsequent sale were not concealed from him by the defendants. There is another finding that:

"It is true that the plaintiff, through his guardian, Julia L. Woods, and attorney for said guardian, Bernard Potter, received notice of the fact that said sale had been made shortly after the same had been consummated, and received and accepted his pro rata share of the proceeds of said sale."

No attack is made upon the foregoing findings, except in those particulars in which they relate to the absence of trust relations between the defendants and the minor and the propriety and legality of the acts of said defendants in the premises.

[1, 2] Respondents rely upon the rule as declared in Felton v. Le Breton, 92 Cal. 466, 28 Pac. 490, where it is held that the inhibition upon a trustee from purchasing at his own sale is removed by the determination of a court of equity that he may be such purchaser. When the sale is made under the direction of a court of equity by officers appointed by the court, it is not a sale by the trustee, and there is no rule or principle preventing him from becoming a purchaser. This is the doctrine of the Le Breton Case, and appellant has not succeeded in his effort to convince us that it does not apply here. Plaintiff admits in his pleading that the circuit court of Cook county, Ill., acquired jurisdiction of all parties to the partition proceedings, and that this plaintiff was one of them. The decree of that court therefore is res judicata and absolutely binding upon plaintiff. The court determined in advance of the sale that certain of the heirs might become purchasers, and confirmed the sale to them through Charles Plant. The defendants had ceased to be trustees, and by ordering the sale to them by the master in chancery the court so found. Such finding may not be collaterally attacked in this suit. The property was in Chicago. The court had jurisdiction of the parties to that proceeding and of the subject-matter. Under such circumstances the courts of this state may not disturb the judgment upon a collateral attack merely because the decree in the estate of Roger Plant in this state distributes the property "in trust." The judgment of the court of Illinois is absolutely binding upon the plaintiff herein. 23 Cyc. 1055; Reed v. Cross, 116 Cal. 484, 48 Pac. 491; Estate of Harrington, 147 Cal. 124, 81 Pac. 546, 109 Am. St. Rep. 118.

It is argued that the case of Felton v. Le Breton, supra, is authority only where the trusteeship is coupled with a power of sale. We do not think such limitation may be placed upon it. Indeed the opinion in that case (92 Cal. at page 467, 28 Pac. 490) discusses the reason for the rule announced which is that, where a trustee is also a beneficiary, the court should consider his rights under the latter capacity as well as his duties under the former office.

[3] Even a cotenant, who may not purchase and assert an outstanding title against his cotenants, may purchase their own titles at a judicial sale. McNutt v. Nuevo Land Co., 167 Cal. 466, 140 Pac. 6, in which, by the way, Felton v. Le Breton is incorrectly cited as Felten v. Le Breton.

It follows from the foregoing discussion that the judgment must be affirmed; and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

29 Cal. App. 166

PEOPLE v. CARIDIS. (Cr. 578.)

(District Court of Appeal, First District, California. Dec. 14, 1915.)

1. LARCENY ⇐23 — ELEMENTS — VALUE OF STOLEN ARTICLE.

It is essential to the crime of grand larceny that the thing stolen be intrinsically worth in excess of $50, unless taken from the person of another.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 50–52; Dec. Dig. ⇐23.]

2. LARCENY ⇐5—INFORMATION—SUFFICIENCY—VALUE.

An information under Pen. Code, § 492, fixing the value of a stolen evidence of indebtedness as the amount recoverable thereon, which charged the larceny of a lottery ticket, charged no crime, since a lottery ticket cannot evidence a valid indebtedness for it exists in violation of law and is valueless, nor did the subsequent payment of a prize for the ticket make it legally of value so as to support the information.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 11–17; Dec. Dig. ⇐5.]

3. LARCENY ⇐28—INFORMATION—SUFFICIENCY—TIME.

In such case, the subsequent payment, even if valid, could not affect the sufficiency of the information, which depends on facts existing at the time of the offense and not on subsequent occurrences.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 58, 59, 62, 99, 101; Dec. Dig. ⇐28.]

4. LARCENY ⇐5 — ELEMENTS OF OFFENSE — VALUE OF STOLEN ARTICLE.

While a lottery ticket is of no value as an evidence of indebtedness, its value as a paper will support an information charging petty larceny, however small its actual worth.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 11–17; Dec. Dig. ⇐5.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Antonio Caridis was charged with the crime of grand larceny, and demurred to the information. The demurrer was allowed, and the action dismissed, and the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and Frank L. Guerena and John H. Riordan, Deputy Attys. Gen., for the People. M. L. Choynski and Jos. T. O'Connor, both of San Francisco, for respondent.

LENNON, P. J. The defendant in this case was, by an information filed in the superior court of the city and county of San Francisco, charged with the crime of grand larceny, alleged to have been committed as follows:

"The said Antonio Caridis on the 29th day of July, A. D. 1914, at the said city and county of San Francisco, state of California, did then and there willfully, unlawfully, and feloniously steal, take, and carry away one lottery ticket of the Original Nacional Company, No. 16235; that theretofore, and on the 27th day of July, 1914, the said ticket was, after a drawing held by said Original Nacional Company, and its officers, representatives, and agents, declared by said Original Nacional Company and its officers, representatives, and agents, to be one of the winning tickets of the said Original Nacional Company, and its officers, representatives, and agents, after said drawing aforesaid, did become liable for and did promise to pay to the holder of said ticket the sum of $1,250 in gold coin of the United States of America, and did then and there promise to pay to the holder of said ticket the sum of $1,250 in gold coin of the United States of America; that thereafter, and on the 30th day of July, 1914, the said Antonio Caridis did present said ticket to said Original Nacional Company and to its officers, representatives, and agents, and did receive from said Original Nacional Company, and its officers, representatives, and agents, the sum of $1,250 in gold coin of the United States of America therefor; that at all of said times the said lottery ticket was the personal property of Jim Papas and was of the value of $1,250 in gold coin of the United States of America."

[1] A demurrer to the information was allowed upon the ground that the facts stated did not constitute a public offense in the particular that it affirmatively appeared that the subject-matter of the alleged larceny had no legitimate value. The action was thereupon dismissed, and the people have appealed from the order allowing the demurrer.

The ruling of the court below was correct. It is essential to the commission of the crime of larceny that the property alleged to have been stolen have some value—intrinsic or relative—which, where grand larceny is charged and the property was not taken from the person of another, must exceed the sum of $50. Penal Code, § 847. Payne v. People, 6 Johns. (N. Y.) 103; Culp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357; Wharton's Criminal Law, p. 1333.

[2, 3] Evidently the information in the present case was framed to fit the requirements of section 492 of the Penal Code, which fixes the value in cases of the larceny of written instruments by providing that:

"If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen."

Clearly this section contemplates and controls the value to be placed only upon written instruments which create some legal right and constitute a subsisting and an enforceable evidence of a debt. People v. Dadmun, 23 Cal. App. 293, 137 Pac. 1071; State v. Campbell, 103 N. C. 344, 9 S. E. 410; McCarty v. State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152; Wilson v. State, 1 Port. (Ala.) 118.

The lottery ticket which was the subject-matter of the larceny charged in the present case had no relative value save, as affirmatively alleged in the information, as the evidence of a debt due from an enterprise which was denounced by law and which apparently existed and was conducted by its promoters in defiance of the law. Pen. Code, § 319 et seq. It is a well-settled principle that an ob-

ligation which exists in defiance of a law which denounces it has, in the eyes of the law, neither validity nor value. An instance of the application of this principle is to be found in the analogous case of Culp v. State, supra, where the court held that an indictment charging the larceny of several "bills of credit of the United States Bank," which were alleged to be of the aggregate value of $310, could not be sustained because each of the bills was for a sum less than the bank was authorized by its charter to issue, and consequently could not, in contemplation of law, be the subject-matter of a larceny.

The fact, as alleged in the information, that the drawing had taken place prior to the alleged larceny of the ticket, and that the defendant ultimately collected thereon the sum of $1,250 from the lottery company, added nothing to the validity or value of the ticket. Being a void and valueless obligation in the eyes of the law from its very inception, it could not be transformed into a legitimate and valuable thing by a voluntary payment, which in itself was a contravention of the law. Crutchfield v. Rambo, 38 Tex. Civ. App. 579, 86 S. W. 950. Moreover, the sufficiency of the information must be determined by the facts as they existed at the time of the alleged taking, and not by anything that may have occurred subsequently. People v. Stevens, 38 Hun (N. Y.) 62.

[4] Considered as a mere piece of paper, the lottery ticket in question possessed perhaps some slight intrinsic value, which, however small, would have sufficed to make the wrongful taking of it petit larceny, and, if that had been the charge preferred against the defendant, it doubtless would have stood the test of demurrer. 1 McClain on Criminal Law, § 543.

The order appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

29 Cal. App. 200

CONGDON v. CALIFORNIA DRUG & CHEMICAL CO. (Civ. 1419.)

(District Court of Appeal, Third District, California. Dec. 18, 1915. Rehearing Denied by Supreme Court Feb. 14, 1916.)

1. MASTER AND SERVANT ⟸278, 281—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action by the driver of a delivery wagon for injuries sustained when the cork came out of a demijohn, and the concentrated ammonia therein flew into his face, evidence *held* sufficient, in connection with the allegations or admissions of the answer as to the character of such ammonia, its liability to explode, and the necessity of securing the cork, to warrant jury findings that the employer was negligent in sending out the demijohn without securely fastening the cork, and that plaintiff was not guilty of contributory negligence in driving the wagon or in handling the demijohn.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977, 987–996; Dec. Dig. ⟸278, 281.]

2. APPEAL AND ERROR ⟸1064 — HARMLESS ERROR—INSTRUCTIONS.

In a delivery wagon driver's action for injuries sustained when the cork came out of a demijohn and the concentrated ammonia therein flew into his face and eyes, the evidence showed that he was 20 years old, had received a grammar school education and a business course in high school, and had been driving a delivery truck or wagon for four months. *Held*, that while, in view of the nature of plaintiff's employment, his intelligence, and his experience in the kind of work he was doing, the fact of his minority should not have been presented to the jury as an element affecting his responsibility, the jury could not have been influenced in any material degree by being reminded in the instructions that plaintiff was a minor, where they were also told that his conduct was to be judged by his knowledge, experience, and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⟸1064.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Leland Congdon, a minor, by H. W. Congdon, his guardian, against the California Drug & Chemical Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant. H. P. Brown, of Fresno, and Earl Rogers, of Los Angeles, for respondent.

CHIPMAN, P. J. Plaintiff brings the action, by his guardian ad litem, to recover damages for injuries alleged to have been suffered while in the employ of defendant. He recovered judgment, from which, and from the order denying its motion for a new trial, defendant appeals.

It is alleged in the complaint that in the month of February, 1912, plaintiff, who was then of the age of 19 years, was employed by defendant in the work of driving an automobile truck and the delivery of packages from defendant's place of business to its various customers in Los Angeles county, and that, after so working for about four months, defendant shifted plaintiff's employment to driving a delivery wagon drawn by a horse; that at no time during said employment did plaintiff have any knowledge of drugs and chemicals of any kind, nor did he understand the natural dangers of said employment or dangers of handling the drugs and chemicals placed in his possession for delivery. The circumstances attending the injury are stated as follows:

"That on the 28th day of June, 1912, and while so engaged as aforesaid with the said defendant, the said defendant caused to be placed in said wagon aforesaid for delivery a gallon demijohn filled with and labeled concentrated ammonia, to be by said Leland Congdon delivered to one of its customers in said city of Los Angeles; that the said Leland Congdon thereafter started on his way with said horse and wagon and said demijohn so labeled concentrated ammonia to deliver the same as directed by said defendant; that in the course of the trip from the said place of business of the said defendant, then located at Nos. 843 and 855 Stephen-

son avenue, said city of Los Angeles, the jolting of said wagon in passing over the rough places in the street caused the said demijohn to be turned over on its side, and it was shifting about in the bottom of said wagon, when the said Leland Congdon halted said horse and alighted from the said wagon, and took hold of the said demijohn, and was about to place the same in a box and place some excelsior around it to prevent it from again turning over or working about in said wagon, when the cork in said demijohn, which had not been secured in any way, or tied down, popped out of the said demijohn, and the contents of said demijohn, to wit, the ammonia therein, shot out of the demijohn and into the face and eyes of the said Leland Congdon."

Then follows a detailed statement of medical treatment given in an effort to preserve Leland Congdon's eyesight, despite which he suffered the total loss of his left eye and serious injury to his right eye. It is alleged:

That "none of the agents or representatives of said defendant ever at any time or at all in any way warned or advised the said Leland Congdon of the dangers incident to the handling of ammonia put up in the way that the same was put up in said demijohn, or the dangers of being employed in or about the drugs and chemicals, which he was required to handle and deliver as aforesaid," and that by reason of his youth and inexperience and lack of knowledge "he did not know, appreciate, or understand the difficulties and dangers of his said employment;" that in preparing said ammonia for delivery by plaintiff defendant "placed in the hole in the neck of said demijohn a common cork, and did not secure said cork by seal, wire, or other means, and by reason of the action of said ammonia in said demijohn by being jolted around in said wagon, and by reason of the action of the warm weather thereon, the said ammonia did expand, and the cork in said demijohn, not being secured as aforesaid, popped out of said demijohn, and the said ammonia flew therefrom into the face and eyes of the said Leland Congdon, with the result as hereinabove alleged;" that said cork "should have been secured in said demijohn by seal, wire, or other means, so as to have prevented its being so forced out as aforesaid, and that the failure of said defendant to so secure said cork was neglect and carelessness and want of ordinary care on its part," and "said injury was wholly caused by reason of said wrongful acts, carelessness, neglect, and want of ordinary care on the part of said defendant."

The answer admits the minority of plaintiff as alleged; admits his employment as alleged, but denies the averments of plaintiff's want of knowledge of drugs and chemicals and the danger attending the handling of the same; admits that on June 28, 1912, "defendant did cause to be placed in said delivery wagon a gallon demijohn filled with and labeled concentrated ammonia, to be delivered by plaintiff to one of defendant's customers;" alleges that plaintiff "did at said time know the character of said concentrated ammonia, and did know its liability to explode, and did know that the same was dangerous;" admits the facts set out in the complaint as to the jolting about of the demijohn, and alleges that said "shifting was caused by the careless manner in which the said Leland Congdon placed the same in said wagon;" admits that plaintiff "was about to place the same in a box and was about to place some excelsior around it to prevent it from again turning over or working about in said wagon," and alleges that he should have so secured it at the time he placed it in the wagon, and that he was careless and negligent in not doing so, and that he well knew at that time that he should have so secured the demijohn; "admits that the cork in said demijohn did come out," but on information denies that the cork was not tied down or secured in any manner; denies that the ammonia struck the face and eyes of plaintiff, and denies the alleged result of the escape of ammonia; alleges that defendant "did at all times inform plaintiff of the nature and character of the work required of him to be done and of the danger by him incurred, and did in particular inform said Leland Congdon of the danger of carrying ammonia in a demijohn in a delivery wagon, and did warn and instruct said Leland Congdon at all times to see that the same was securely packed in a box with excelsior surrounding it to prevent any jarring of the same"; denies that plaintiff by reason of inexperience or want of knowledge did not appreciate the danger of his said employment. It is further alleged that:

When plaintiff "picked up said demijohn and did place the same in said delivery wagon, the cork of the same had not yet been secured, and that he did know that the same should not be placed in said delivery wagon without having said cork secured. Defendant admits that by reason of the action of said ammonia in said demijohn by being jolted around in said wagon, and by reason of the action of the warm weather thereon, the said ammonia did expand, and the cork in said demijohn not being secured, did pop out of said demijohn, and the said ammonia flew therefrom, but as to whether or not said ammonia flew into the face or into the eyes or into either eye of said Leland Congdon this defendant is not informed. This defendant admits that said cork should have been secured in said demijohn by seal, wire, or other means so as to prevent its being forced out. This defendant denies that the failure of this defendant to so secure said cork was neglect or carelessness or want of ordinary care on its part. Defendant alleges that said demijohn had not at said time been prepared for transportation in the said delivery wagon, and that said Leland Congdon did take the same and did place the same in said wagon before the same was fully prepared for transportation therein by this defendant, and that he did know the same was dangerous, and did know that the cork in the same had not been secured, and that he did place the same in said delivery wagon without instructions from this defendant or any of its officers, and purely upon his own responsibility."

Summing up the defense, it is alleged that plaintiff's injury was caused solely by his carelessness and negligent act: First, in placing the demijohn in the wagon before it was ready for transportation; second, in failing to place it in a box surrounded with excelsior; third, in driving the wagon negligently so as to cause the demijohn to be jolted and moved about in the wagon; and, fourth, in attempting to lift the demijohn in such manner that its opening where the cork was situated was directed towards plaintiff.

[1] We have given the pleadings somewhat at length; for it will thus be seen that the issues are thereby considerably narrowed.

The answer alleges that plaintiff "did know the character of said concentrated ammonia, and did know its liability to explode, and did know that the same was dangerous." If plaintiff knew these facts, it must be assumed that defendant believed them to exist.

The answer admits that plaintiff took hold of said demijohn, "and was about to place the same in a box, and was about to place some excelsior around it to prevent it from again turning over or working about in said wagon." The answer also admitted that "by being jolted around in said wagon, and by reason of the action of the warm weather thereon, the said ammonia did expand, and the cork, not being secured, did pop out of said demijohn, and the said ammonia flew therefrom." The answer admits "that said cork should have been secured in said demijohn by seal, wire, or other means so as to prevent its being forced out."

The controverted issues of fact may be reduced to the following: Was it defendant's duty to see to it that the liquid in the demijohn, or concentrated ammonia, was secured by a cork sealed, wired or otherwise fastened before being placed in the wagon? Was the failure properly to secure the cork in the demijohn the proximate cause of the injury? Was plaintiff guilty of contributory negligence either by reckless driving or careless handling of the packages he was hauling, or in handling the demijohn at the time of the accident? Was plaintiff sufficiently instructed as to the dangerous character of the concentrated ammonia, or was he of such mature age and experience as not to require any instruction in his employment? Was the defendant guilty of culpable negligence?

The uncontroverted evidence was that plaintiff was 20 years old in June, 1912; had received a grammar school education and business course in high school; "just took bookkeeping, but knew nothing of chemistry." He entered defendant's employment as driver of a gasoline delivery truck in February, 1912, and later changed to driving a horse and wagon and continued in defendant's service until June 28, 1912, the day of the accident.

Plaintiff testified that he reported to Mr. Bryant, defendant's shipping clerk, for duty, and that nothing special was said about his work:

"He give me my orders to take goods to a certain place. He just give me a bill of goods to deliver. He give me some tissue with the numbers of boxes, and I carried the boxes out and put them in the truck and delivered the goods. The goods were put up in the boxes by him and turned over to me. I took the boxes and put them in the truck and delivered them pursuant to what instructions were on the tissues. These tissues were the same as bills, tissue paper, and there was a bill for each box. The address was on it. * * * This manner of employment continued right along during the time that I was in the employ of the defendant. Each day I would receive these orders and these boxes and go out and deliver them. * * * Q. Now, in the course of your employment there did any of these gentlemen ever say anything to you about any of these packages that you were delivering? A. They did not, nor did they call my attention to any particular manner in which any of them should be packed, particularly the demijohns. We did not have anything to do with the packing at all. My duties did not involve the preparation of any of these packages for delivery. Q. And what was the general custom there in setting these packages out for delivery; were they placed in a particular place for you to receive them? A. Yes; they had a place they put all the boxes and demijohns, and we would carry them out and put them on the platform on the back of our wagon. Sometimes they would put them on the back, and we would load them up on the front end when we were starting. On the 28th day of June, 1912, when I started from defendant's shipping department, I had a load of boxes in the back and I had a demijohn of ammonia under the seat. That's the only way. I had a big load. There was a cork in the demijohn. It was just pushed in the neck of the bottle. It was not secured by anything. I think I placed the demijohn in the wagon. It was set out to be delivered, and had a tag to deliver it to a certain place. That had been the custom that prevailed there ever since I had been there. I had not seen any different custom. They never placed in my charge a demijohn containing this concentrated ammonia, that had a cork secured in it, or that was packed in excelsior."

He was asked to explain how he "came to receive this shot of ammonia in the eye or eyes."

"A. I noticed that it had shifted, and when I made my first stop I had an empty box, and I went to take hold of it. I had delivered a box of goods, and was returning with the empty box, was putting the empty box in the wagon, and I took hold of the demijohn to put the concentrate of ammonia in. Just as I got hold of it the cork flew out and went in my face. That is all I remember. I could not see after that. I crawled in the drug store there, and the druggist helped me. I could not walk hardly. I could not see anything. I got down on my hands and knees and crawled for a ways. I got up, I think, before I got to the door. He helped me to the wash basin to wash it off, and washed my face and eyes out."

He then describes the treatment given him and the effort made to preserve his eyesight. His left eye was finally removed, and a glass eye substituted.

"Q. Now, then, this glass eye you have, is this a source of annoyance and trouble to you? A. Yes; I have to take it out every night, and it hurts during the day sometimes, and, if I go out in the evening, it hurts. In riding the pressure of the wind makes it hurt. It makes a mucous, and it dries on there. It has more or less matter or accumulation there each day. I wash it two or three times a day sometimes. When I am out in the field engaged in any kind of work or riding along the road, this eye dries and causes a sticky substance and a painful feeling. In the evening it is worse, and in a cold wind. I take it out and clean it two or three times a day if I am where I can. I always do it at night. The loss of this eye interferes with the performance of my usual duties on the farm. I cannot see so good on that side naturally. In working around anybody I have to be very careful. Q. Now, Mr. Congdon, have you ever had any education or instruction of any kind in regard to drugs or

chemicals? A. No, sir; I have never had any instructions in any school in relation to such matters. Q. As I understand you, the defendant in this case never told you it was a dangerous matter to be handling these demijohns full of ammonia? A. No, sir. Q. And did the defendant or any of its officers ever tell you that you should securely fasten those corks in the ammonia bottles? A. No, sir. Q. Did they ever say anything at all about it? A. No, sir. Q. And you had had no previous experience— A. No, sir. Q. In handling ammonia, had you? A. No, sir. Q. You had never seen a bottle of ammonia from which the cork was blown out on account of the accumulated gases inside? A. No, sir; never heard of it. Q. Never heard of it before? A. No, sir. Q. And did not know at the time there was any danger in handling this demijohn of ammonia? A. No, sir. * * * Q. Just state to the jury what effect, if any, the ammonia had on your face. A. Well, on my eyelids it made the skin come off, and burn my hands, and give me an awful headache. It had an effect on the right eye. I could not see out of it for a long time; not to amount to anything; not as well as I could. I could hold it open for a little while at a time. That eye bothered me for a little while after I had the left one removed—that is, for about two months. Before the accident happened I could see out of the left eye as well as I could out of the right eye. The left eye had not been previously damaged. Q. And the only affection that you have had that has caused the loss of it has been the ammonia in your eye, as far as you know? A. Yes, sir. Q. Had you any knowledge or information about this occupation you had being a dangerous one? A. No, sir."

His cross-examination developed nothing to materially affect his testimony in chief. As to the method of loading the wagon he testified:

"Sometimes Mr. Bryant put them in the back and we would load them up at the front end. We would place them in the truck in the way we wanted to carry them out. A few articles were packed in boxes with excelsior around them, glass and such things. Sometimes the bottles were in boxes, and there was not any excelsior around them. Q. You mention in your complaint when you started to take out the demijohn you started to put it in a box? A. Yes, sir. Q. What occurred for you to want to pack that in a box with excelsior in it? A. Well, I did not want it shaking around in the bottom of the wagon. I had not seen other demijohns or bottles packed in boxes with excelsior around them. I did not want it to break, so I put it in there, and there happened to be some excelsior in there. The excelsior was around some articles I had already delivered."

He testified that Mr. Bryant assisted him in loading the wagon on the day of the accident.

"Q. Now, then, you had made one delivery from the wagon on that trip? A. Yes; to this drug store where the injury occurred. Q. And then, when you came out to the wagon, was that where you first saw the demijohn lying on its side? A. No, sir; I picked it up once before, but I did not have no box to put it in. When I got there I thought I would put it in the box. Q. When you started out and put the demijohn under the seat of the wagon, did you put any box or anything against it to keep it from falling? A. No, sir; I do not know as to that. Q. What was the custom in the way of packing your articles in the wagon in that regard? A. Well, if we could fix them in that way, we did. I do not think we could do it in this case. I had such a big load that day. I do not think I could get the boxes under the seat. The load was mostly boxes with open tops and articles in them. The demijohn was about a foot tall. I could slip it under the seat. The demijohn was in the corner of the wagon when I started. I could not shove a box up against it. It was too big. I had some big boxes. I had some small boxes, but we loaded them in so they would come out in order. Q. Well, you could have, with a change in the method of putting in the boxes, have packed the boxes up against it? A. I do not think that I could or I would have. I don't think there was room in there. It was only about that wide (indicating) under the seat. Right in front where I had the demijohn the seat came over around. The seat was the full length of the wagon. I had boxes under half of the seat, and there was a vacant space left for the demijohn. I don't think I could have shoved those boxes up against the demijohn because there was not room enough."

He was asked further to explain what occurred when the cork blew out of the demijohn, and he answered:

"I just picked the demijohn up, and I had not got it anywhere nears out when the cork blew out. I had the box on the ground with excelsior in it. I was intending to put the demijohn in the box. I reached over into the wagon and took the demijohn and started to pull it towards me. As I started to pull it towards me the cork came out. * * * Q. Now, you are absolutely positive that nobody told you to be careful of these articles as they were taken out? A. Yes, sir; I never had any bottle or box break while I was delivering. I dropped a bottle in the store itself. I was not cautioned at that time by anybody. I do not know anything of other drivers having bottles blow out on them or spilled in any way. I never heard Mr. Bryant mention to the drivers to be careful with these articles. I never heard Mr. Clendenen tell them or Mr. Blumenberg or anybody during the entire four months say anything about any danger."

He testified that it was a very hot day, but did not think the sun shone on the demijohn.

"Q. Now, just before your eye was taken out had there been any change in the situation? Was it aggravating or hurting you more? A. Well, they thought it was getting better. Then the day before or two or three days before they took the eye out my eye began to get weak again. That is the right eye. They said they would have to remove the left eye to save the right eye. Then I was put under ether or something, and the eye was removed, and I remained there another week for treatment."

We do not deem it necessary to give the testimony of the different physicians who treated plaintiff. There was abundant evidence to show that he was given proper medical attention, and that the injury complained of was the direct result of the accident, and in no wise was attributable to improper treatment.

Some testimony was submitted by defendant tending to show that concentrated ammonia is not explosive; that, when the cork is removed from the container, fumes pass out, but no liquid; that it is not caustic, and will not burn the cuticle when in contract with it; that general instructions were given to drivers of delivery wagons to use care in handling chemicals, but no witness was able to say that plaintiff had been personally instructed. Whatever the character of ammonia may be as to explosiveness or as to whether it burns the skin when in contact

with it, the undisputed fact is that in the present instance it burned the skin around plaintiff's eyes, and so burned his left eye that he lost the use of it, and that he was at the trial still suffering from the necessity of using a glass eye. We think, in view of the admissions of the answer and the testimony of plaintiff—and he alone was able to describe the accident and the circumstances surrounding it—the jury were warranted in the implied findings; that defendant was guilty of negligence in sending out the demijohn of concentrated ammonia without securely fastening the cork; that plaintiff was not guilty of contributory negligence in the way he loaded his wagon or in driving it or in handling the demijohn when he took hold of it to place it in a box.

It is urged that the law would impute to plaintiff the knowledge that "almost any drug or chemical is injurious when brought in direct contact with the eyeball" and that, "as matter of law, the defendant had a right to assume that plaintiff was possessed of common knowledge, and, as a matter of law, the defendant was not obliged to instruct the plaintiff as to any matter of which he had knowledge or presumed knowledge." It may be that plaintiff knew ammonia brought in contact with the eyeball would injure it, and that he needed no instruction on that fact; still there remained to be considered by the jury the question whether in sending out the demijohn of ammonia without properly securing the cork defendant was not negligent, and whether or not such negligence contributed to the injury.

[2] In this connection it is claimed that the court erred in giving instructions to the jury which held the plaintiff—

"to a different degree of care for his own preservation than he would have been if he were a year older, whereas there is nothing in the proof or the circumstances which would justify the inference that the plaintiff was under any disability by reason of his age."

One of the instructions was as follows:

"You are further instructed that the conduct of a minor and the question as to whether he acted negligently or not must in the nature of the case be a question of fact for the jury, rather than of law, as it is the province of the jury to determine whether or not the minor duly exercised such judgment as he possessed, taking into consideration his years, experience, and ability. The ordinary care which a minor of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which an adult would be called upon to use under the same circumstances."

Other instructions followed in which this difference of responsibility is pointed out, the court saying:

"His [plaintiff's] conduct is to be judged in accordance with the knowledge, experience, and judgment he may possess when called upon to act. And it is a question for you, gentlemen of the jury, to say whether in the performance of his task Leland Congdon duly exercised such judgment as he should possess, taking into consideration his years, his experience, and his ability in connection with his employment, and the risks and dangers thereof."

Defendant cites Lemasters v. Southern Pacific Co., 131 Cal. 105, 63 Pac. 128.

When we consider the nature of plaintiff's employment, his intelligence, and his experience in the kind of work he was doing, we do not think the fact of his minority (he was 20 years old) should have been presented to the jury as an element affecting his responsibility. Coupled, however, with the qualification that he "exercised such judgment as he possessed, taking into consideration his years, experience, and ability," and further stating that "his conduct is to be judged in accordance with the knowledge, experience, and judgment he may possess when called upon to act, * * * taking into consideration his years, his experience, and his ability in connection with his employment, and the risks and dangers thereof," we feel assured that the jury were not influenced in any material degree by being reminded by the court of the fact that plaintiff was a minor; for, notwithstanding that fact, the jury were told that his conduct was to be judged by "the knowledge, experience, and judgment he possessed."

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

29 Cal. App. 184

WILEY B. ALLEN CO. v. EDWARDS.

(Civ. 1584.)

(District Court of Appeal, First District, California. Dec. 15, 1915.)

1. GIFTS ⟸49—INTENT—SUFFICIENCY OF EVIDENCE.

In an action of claim and delivery for the possession of a piano, evidence *held* to show defendant's intent to make a gift of it to his stepdaughter, plaintiff's assignor.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95–100; Dec. Dig. ⟸49.]

2. GIFTS ⟸19—"DELIVERY"—SUFFICIENCY.

In such case, where there was never any formal delivery of the piano to defendant's stepdaughter, but it was in exclusive use in their home under a claim of ownership by her, there was a sufficient actual "delivery" to constitute a valid gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 34, 38; Dec. Dig. ⟸19.

For other definitions, see Words and Phrases, First and Second Series, Delivery.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action of claim and delivery by the Wiley B. Allen Company against R. L. Edwards. Judgment for plaintiff, and defendant appeals upon a statement of the case. Affirmed.

John Ralph Wilson, of San Francisco, for appellant. Fred J. Goble, of Oakland, for respondent.

KERRIGAN, J. This is an action in claim and delivery for the possession of a Mason

& Hamlin piano, or its value, conceded to be $1,200. The appeal is taken by the defendant from the judgment, and is before this court upon a statement of the case.

[1, 2] From the evidence it appears that at a time perhaps as far back as 20 years ago the defendant married the mother of Eloise Edwards, a widow, and in the year 1894, when Eloise was about 5 years old, Mrs. Edwards bought in her name a Knabe piano, which was paid for by the defendant. The piano was purchased to be used by Eloise, who, even at that early age, had shown considerable musical talent, and who later, and at the time this case was tried, was generally recognized as a talented musician. In the year 1911 Eloise and her mother entered into negotiations with the plaintiff for the purchase of a new piano, which negotiations culminated in a written contract between Eloise and the plaintiff, whereby the former agreed to purchase the piano in dispute in this action. The old piano was to be taken in part payment of the new one, the sum of $450 being credited therefor upon the price of the latter, and the balance of the purchase price was to be paid in monthly installments. In January, 1912, Mrs. Edwards died, and the following year defendant and Eloise quarreled and became estranged. Prior to that time and since she was a little child Miss Edwards had lived with the defendant as his own daughter, being entirely dependent upon him for her support, and occupying as to him in every respect the position of daughter. All the monthly payments on account of the new piano were made either by Eloise or her mother or by the defendant, but in every instance with money earned by the defendant. There is still due on account of the purchase price thereof a small amount. No default in payment, however, has been made and none is claimed. Prior to the commencement of the action Eloise assigned her interest in the piano to the plaintiff, and plaintiff's right to recover herein is based entirely upon Miss Edwards' right to the possession of the instrument as its owner. While too much stress must not be attached to the fact that this piano was purchased for the exclusive use of Miss Edwards, and was constantly referred to by the members of the family as her piano, it is of considerable significance when correlated with the other facts in the case that the contract for the purchase of the instrument was made in her name, and that it was delivered to her personally at the residence of her mother and stepfather. All that was done with reference to the purchase of the first piano and with reference to its exchange and the purchase of the second one was with the knowledge and acquiescence of the defendant.

We think from the evidence in the case that it is clear that the defendant intended to make a gift of the new piano to his stepdaughter; and we think, too, that, while there was never any formal delivery to her of the piano, there was nevertheless under the circumstances of the case a sufficient actual delivery thereof to constitute a valid and subsisting gift. 14 Am. & Eng. Enc. of Law, 1020, 1033. The piano being bulky forbade manual delivery; and the only possession its nature admitted of, so far as defendant's stepdaughter was concerned, consisted in its exclusive use in her home under a claim of ownership. Ross v. Draper, 55 Vt. 404, 45 Am. Rep. 624. Miss Edwards was regarded in every respect by the defendant as his child; and, while in the case of one's child the necessity of a delivery is not dispensed with in order to constitute a gift, the formal ceremony of a delivery is not absolutely necessary, but it is sufficient if it appears that the donor intended an actual gift at the time, and evidenced his intention by some act which may be fairly construed into a delivery. 29 Cyc. 1659; Colby v. Portman, 115 Mich. 95, 72 N. W. 1098; Bennett v. Cook, 28 S. C. 353, 6 S. E. 28.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(29 Cal. A. 187)

ELSEA v. FASSLER. (Civ. 1433.)

(District Court of Appeal, Third District, California. Dec. 16, 1915.)

1. BROKERS ⇐50—REAL ESTATE BROKERS—OPTION TO SELL—CONSTRUCTION.

An option on lands to real estate brokers, providing that it should remain in full force for 90 days from date, and that, if the owner sold to any one, within 90 days after the expiration of the option, to whom the property had been recommended by the agents or their assigns, the owner would pay a commission of 5 per cent., limited to 90 days the time during which the agents' authority to sell or negotiate a sale should exist.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 68; Dec. Dig. ⇐50.]

2. BROKERS ⇐50—REAL ESTATE BROKERS—OPTION TO SELL—CONSTRUCTION.

An option given by the owner of lands to real estate brokers, providing that it should remain in force for 90 days from date, and that, if the owner sold within 90 days from expiration of the option to one to whom the property was recommended by the agents, he would pay a commission of 5 per cent., was an agreement to pay the brokers a commission of 5 per cent. on the gross amount for which the owner, within 90 days from expiration of the option, might sell the property to one to whom the brokers had recommended it during the 90-day life of the option.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 68; Dec. Dig. ⇐50.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by J. B. Elsea against Joseph Fassler. From a judgment for defendant and an order denying his motion for new trial, plaintiff appeals. Judgment and order affirmed.

Albert H. Elliott, Guy C. Calden, and Clarence E. Todd, all of San Francisco, for appellant. John T. Carey, of San Francisco, for respondent.

HART, J. This is an action to recover the sum of $3,100 alleged to be due the plaintiff as for a broker's commission on the exchange of real estate. Judgment passed in favor of the defendant, and the plaintiff prosecutes this appeal therefrom and from the order denying his motion for a new trial.

The basis of this action is the following "option to sell" the property therein described:

"Option to Sell.

"San Francisco, Cal., Jan. 5th, 1910.

"For and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I hereby give to Chandler & Bourn, of this city, the exclusive right to sell for me at the net price of one hundred and eighteen and $^{75}/_{100}$ dollars ($118.75) the following described property, to wit: [Describing it.]

"This option to remain in full force for a period of ninety (90) days from date hereof. I agree to grant all necessary time in which to examine the title to said property, and to give a good and sufficient deed free and clear of all incumbrance. I authorize said agents, or their assigns, to accept for me and in my name, a deposit on account of the sale of said property, and in the event of the title proving defective I agree that they are to return the said deposit, providing that the said defects cannot be cleared within sixty days after notice thereof to me in writing. If I sell to any one within ninety days after the expiration of this option to whom said property has been recommended by said agents or their assigns, I agree to pay them a commission of five (5) per cent. of the amount of said sale.

"Said agents are hereby authorized to contract for me and in my name accordingly.

"Witness my hand this 5th day of January, 1910. Jos. Fassler.

"Witness: F. E. Ware."

On the day upon which the foregoing instrument was executed Chandler & Bourn, to whom said option was given by the defendant, assigned a two-thirds interest in the said agreement to J. B. Elsea and F. E. Ware, who were copartners doing business under the firm name of the "Golden Gate Land Company." Neither Chandler & Bourn nor Elsea and Ware succeeded in selling or procuring a purchaser of the land described in said agreement during the life thereof. It appears, however, that after the expiration of the 90 days during which the option was to retain vitality and force Ware succeeded in interesting one Dr. Maxson in the property to which the said agreement related, with the final result that Fassler exchanged said property with said Maxson for an apartment house in the city of San Francisco.

It is not claimed that the evidence does not support the findings, but the contention of the plaintiff is that he is entitled to judgment upon the findings as made by the court. This contention is founded upon the theory that the trial court's conception of the meaning and scope of the option agreement, as indicated by its findings and the conclusion of law therefrom, is erroneous.

The court found that the agreement as pleaded was made and entered into between Fassler, owner of the property, and Chandler & Bourn; that the latter assigned the same or an interest therein to Elsea and Ware, and that finally the entire interest in the agreement was assigned to Ware; that on the 29th day of May, 1910, a contract was entered into between Fassler and Maxson whereby they agreed to exchange the properties above mentioned, and that they did subsequently make said exchange; that the said Chandler, Bourn, Elsea, and Ware "did not recommend the property of the defendant described in said contract to the said W. H. Maxson prior to the expiration of 90 days from and after the 5th day of January, 1910, but did recommend said property to said W. H. Maxson prior to May 27, 1910, and urged said property upon said W. H. Maxson, and procured the said W. H. Maxson to enter into the said contract or agreement of exchange between said W. H. Maxson and said defendant, and recommended the property of said defendant to said W. H. Maxson, and urged said property of defendant upon said W. H. Maxson, and rendered services to said defendant in and about the procuring of the exchange of said properties."

The court further found that the value of the apartment house for which Fassler exchanged the land described in the option agreement was at the time of said exchange the sum of $62,000 over and above a certain mortgage existing on said property in the sum of $45,000.

As suggested, the controversy between the plaintiff and the defendant arises out of a difference of opinion as to the true meaning and scope of the option agreement.

It is the position of the plaintiff that he is entitled, under the terms of the concluding covenant of said agreement, to a commission of 5 per cent. on the value, as found by the court, of the property for which Fassler exchanged the land referred to and described in said agreement.

On the other hand, the defendant contends: (1) That the exchange of the properties did not constitute a sale within the meaning of the concluding covenant of the agreement; (2) that said part of the agreement contemplated and meant that the property should have been sold by Fassler to a party recommended by the plaintiff and his associates or some of them during the life of the option agreement.

The court made no special finding upon the question whether the transaction involved a sale of the property, but adopted the construction put upon the contract by the defendant as to the time within which the plaintiff and copartners in the agreement should have negotiated the transfer of the property to have justified them in claiming compensation for such service.

[1] The plaintiff construes the instrument as one involving two separate and distinct contracts or agreements, viz.: The one giving to the plaintiff and his assignors the exclusive right or option to sell, within 90 days from the date of the agreement the 465 acres of land described in the instrument for the net sum of approximately $55,000, they to receive as their compensation therefor all money obtained for the land in excess of that amount; (2) the other, by the terms of which the plaintiff and those interested with him in the agreement were to receive a broker's commission of 5 per cent. on the gross amount for which the land might be sold by them or through their negotiations within 90 days from and after the time of the expiration of the so-called option agreement. This construction is predicated mainly upon the consideration that the agreement provides for two different bases of compensation to the plaintiff and his co-obligees for effectuating a sale, and particularly upon this language of the contract:

"If I sell to any one within ninety days after the expiration of this option to whom said property has been recommended by said agents or their assigns, I agree to pay them a commission of 5 per cent. of the amount of said sale."

But the construction so given the agreement is, in our opinion, contrary to its general tenor. It will be noted that the right conferred upon the plaintiff and his associates by the agreement to sell the property is expressly limited by the instrument to exist for the period of 90 days from the date thereof, while the construction to which the plaintiff subjects the writing would obviously have the effect of extending or prolonging its life 90 days beyond the period of time to which it was so limited. In other words, if the plaintiff's construction be correct, then certainly it was intended by the parties that the agreement should possess vitality and force for the term of 180 days in the place of the period of time specifically fixed therein as the term during which it should exist. Indeed, if the plaintiff's notion of the meaning of the language of the writing be well conceived and sound, the provision expressly designating the period of time during which the agreement should remain in force would be wholly meaningless and entirely supererogatory. But no such meaning can reasonably be extracted from the language of the agreement. It must be assumed that the provision expressly fixing a time to which the existence of the right under the option is restricted was intended to express the idea which its language naturally implies, and the only reasonably permissible construction of that language is that thus the parties intended to limit the time during which the authority of the plaintiff and his associates to sell or negotiate the sale of the land should exist. This construction is only in consonance with the prudent methods which ordinarily characterize business transactions of importance to all the parties connected therewith.

It results from the views thus ventured as to the meaning and scope of the agreement that upon the expiration of the 90 days during which the option was to exist the said agreement became functus officio, so to speak, and by necessary consequence all authority of the plaintiff and his associates in the agreement to sell or negotiate the sale of the property of Fassler under the terms of the said instrument ceased to exist or was terminated. It follows, therefore, that any act or step done or taken by the plaintiff and his partner and assignors or by any one of them looking to a sale or transfer of said property was wholly without authority from Fassler, so far as the agreement involved here is concerned.

[2] What, then, was evidently intended by the language of the agreement, "If I sell to any one within ninety days after the expiration of this option to whom said property has been recommended by said agents," etc., was that, if Fassler himself sold the property within the time so specified to any party to whom it had been recommended by the plaintiff and his associates during the life of the option agreement—that is, if the property had been so recommended while the plaintiff and his associates still had the authority to sell or negotiate the sale of the property under the provision expressly limiting their right so to do to the term of 90 days—then, in that case only, he would pay the brokers a commission of 5 per cent. on the gross amount for which he might so sell the property.

Upon undisputed evidence the court found, as seen, that the negotiations for the exchange of Fassler's property for that of Maxson was initiated by the plaintiff within 90 days *after* the expiration of the 90 days within which the plaintiff and his associates in the agreement were authorized to sell the property, and thus it is to be observed that the plaintiff performed no service in the transaction eventuating in the exchange of the properties for which the plaintiff would be entitled to be compensated by the defendant under the terms of the written agreement involved here, even if it be conceded that the transaction amounted to a sale of the property or to be of a character which, had it taken place within the 90 days within which the authority of the plaintiff and associates to sell was expressly circumscribed, would entitle them to compensation on the basis of 5 per cent. on the ascertained value of the property received by Fassler in the exchange.

Upon the foregoing considerations, an affirmance of the judgment and the order may rest, and therefore, and in further consideration of the fact that the court made no specific finding upon that issue, it is not necessary to consider the point urged here by the defendant that the terms of the agreement

were in no event performed by the plaintiff and his associates, for the reason that they did not sell the property or procure a purchaser ready, able, and willing to buy the same.

No other points are raised on this appeal. The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

STATE v. SECURITY SAV. BANK.

(Civ. 1518.)

(District Court of Appeal, First District, California. Jan. 26, 1915. Petition for Rehearing Dismissed by Stipulation Sept. 13, 1915.)

1. ESCHEAT ⟸3—PROPERTY SUBJECT TO ESCHEAT—"UNCLAIMED PROPERTY."

The state possesses the right and power to assume control of such property as shall have lain unclaimed for such a period of time as to raise the reasonable inference that it has been abandoned by its owner, and is either in danger of being lost to such owner, or is the proper subject of escheat, and such "unclaimed property" includes savings bank deposits for which no claimant is known, or the depositor cannot be found, where no withdrawals or deposits have been made for 20 years.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 3–5; Dec. Dig. ⟸3.]

2. CONSTITUTIONAL LAW ⟸296 — ESCHEAT ⟸2—UNCLAIMED DEPOSITS — REQUIRING PAYMENT INTO STATE TREASURY.

Bank Act (St. 1909, p. 87) § 15, as amended in 1913 (St. 1913, p. 145, § 16), requiring the president or managing officer of every bank to make and return to the superintendent of banks annually a sworn statement showing the names of depositors known to be dead or who have not made any further deposits or withdrawn any moneys for over 20 years, and providing that such deposits for which no claimant is known or the depositor cannot be found shall be deposited with the state treasurer, does not deny due process of law, so far as the bank's rights as a depositary are concerned, because of the lack of any provision for notice by the state prior to the exercise of its right to the delivery of the unclaimed deposits, as a bank is not entitled to any previous notice of the exercise by the state of its right to lay hold of the funds of depositors whenever in the interests of public policy the state assumes to exercise control over such funds, and moreover as the state's right to enforce payment into its treasury is predicated upon the bank's report, it is difficult to see what useful purpose would be served by any further notification to the bank.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825–838, 840–846; Dec. Dig. ⟸296; Escheat, Cent. Dig. § 2; Dec. Dig. ⟸2.]

3. CONSTITUTIONAL LAW ⟸296 — ESCHEAT ⟸2—UNCLAIMED DEPOSITS — REQUIRING PAYMENT INTO STATE TREASURY.

Bank Act (St. 1909, p. 87) § 15, as amended in 1913 (St. 1913, p. 145, § 16), provides for the payment into the state treasury of bank deposits where no claimant is known or the depositor cannot be found and no deposits or withdrawals have been made for 20 years, and provides that such deposit shall be subject to the same distribution as is provided for in section 1234 of the Code of Civil Procedure, and that the bank shall not be liable to any person for such deposits, and that any action brought by any person against the bank shall be defended by the Attorney General without cost to the bank. Code Civ. Proc. § 1234, provides, relative to the voluntary dissolution of corporations, that if the applicant is a savings and loan association and there is any unclaimed deposit or dividend in its hands belonging to unknown persons, the application must state the facts, and such facts must be stated in the notice of the application to be published by the clerk, and that if before the expiration of the time of publication any person files a claim to such deposit or dividend, the court must determine the claim, and, if it is established, order such money to be paid to him, and that deposits or dividends not so claimed, or as to which no claim shall be established, must be paid into the state treasury and be received, invested, accounted for, and paid out as is provided by law in the case of escheat estates. *Held*, that the lack of any provision in the Bank Act for notice to the depositors before requiring payment of unclaimed deposits to the state treasurer, does not result in a denial of due process of law to the depositor and leave the bank liable to the depositor and entitled to retain the deposit, as the Bank Act contemplates no change of ownership of the deposits, but deals with possession only, and leaves the matter of ownership to be determined by proceedings embracing such notice to depositors as satisfies the constitutional requirements as to due process of law, and when the state, from motives of public policy, seizes and temporarily sequestrates private property to await the inception or determination of a more formal proceeding affecting its title and ownership, neither the actual owner nor the immediate possessor can object that such seizure is acomplished without such notice as would constitute due process of law, and hence the fact that the property is in the custody of the law would be a perfect defense to the bank.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825–838, 840–846; Dec. Dig. ⟸296; Escheat, Cent. Dig. § 2; Dec. Dig. ⟸2.]

4. ESCHEAT ⟸8—UNCLAIMED DEPOSITS—REQUIRING PAYMENT INTO STATE TREASURY.

The bank cannot rely upon the possible detriment to the depositor resulting from any loss of interest as a defense to a proceeding to compel it to pay the deposit into the state treasury, as it is relieved from liability and placed in a position to defend against any suit by the depositor for the interest as well as the amount of the deposit.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 20–22; Dec. Dig. ⟸8.]

Original application by the State for a writ of mandate against the Security Savings Bank. Peremptory writ issued.

U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen., for the State. McCutchen, Olney & Willard, of San Francisco, for respondent. Francis J. Sullivan, of San Francisco, amicus curiæ.

RICHARDS, J. This is an original application for a writ of mandate, requiring the respondent, a savings bank corporation organized and doing business as such under the Constitution and laws of the state of California, and having its principal place of business in the city and county of San Francisco, to deposit with the state treasurer

the sum of $7,425.16, the same being the aggregate of a number of deposits in various sums which have remained unclaimed in said bank for more than 20 years, according to the verified statement of its officials made to the superintendent of banks during the month of January, 1914, in accordance with section 15 of the Bank Act of the state of California, as amended in 1913. The respondent opposes the issuance of the writ upon the ground of the asserted unconstitutionality of this section of the Bank Act.

Section 15 of the act as amended in 1913 in substance provides that, within 15 days after the 1st of January of each year, the president or managing officer of every bank must make and return to the superintendent of banks a sworn statement, showing the names of depositors known to be dead, or who have not made any further deposits or withdrawn any moneys during the preceding 20 years, together with the last-known place of residence of such depositors, and the amount of their deposits with the accrued interest, if any, thereon; and further provides that such deposits for which no claimant is known, or the depositor cannot be found, shall, together with the increment thereof, be deposited with the state treasurer in the same manner and subject to the same distribution as is provided for in section 1234 of the Code of Civil Procedure. The section also provides for the release from further liability to such depositors of all such banks as shall have paid the said deposits into the state treasury pursuant to the requirements of the section.

The chief contention of the respondent is that, since by the provisions of said section of the Bank Act the state may require banking institutions of the quality of respondent to pay into the state treasury the money of depositors which has been unclaimed by them for more than 20 years, without notice of any kind having been first given to the bank or to such depositors, it by so doing deprives such banks of a property right which they have in such deposits, by divesting them of the opportunity to earn such profits from such deposits as their possession would imply, and also by taking from them that which the depositor might demand of them at any time, and to which demand they could interpose no defense for the reason that the deposit had been removed from their custody without any such notice to the depositor as would constitute due process of law; and in this regard the respondent contends that the provision of the section which assumes to declare that the bank shall be no longer liable to its depositors for such deposits after their transfer to the state treasury, does not accomplish its avowed object, because the depositor, not having been given any such notice of the change of possession of such funds as would amount to due process of law, cannot be bound by this provision of the act.

[1] It may not be seriously disputed that the deposits which are the subjects of this proceeding, and to which the section of the act in question is intended to apply, are such as come within the designation of "unclaimed property," as that term is generally understood in law; neither can it be seriously contended, but on the contrary in this case it is freely conceded, that the state possesses the right and power to assume control of such property as shall have lain unclaimed for such a period of time as to raise the reasonable inference that it has been abandoned by its owner, and is either in danger of being entirely lost to such owner, or is the proper subject of escheat. In the exercise of this admitted and long-established right the Legislatures of most of our states have enacted laws embracing the procedure by which the state may assert its right of control over such property, and in so doing may not only terminate the right of its immediate possessor to the continued custody of such property, but may also put an end to its former ownership, and may even terminate the right of such absentee owner if perchance he should appear, before an escheat had been accomplished, to demand his property from the depositary to whom he had intrusted its possession. In construing and upholding enactments of this character courts have held with much uniformity that the depositary of such unclaimed property as is in question here is only entitled to insist that in the course of the procedure on the part of the estate for the escheat or other transfer of the ownership of unclaimed property, such notice shall be given to the depositary and the absentee or unknown owner as shall constitute due process of law. A fair example of such legislation and judicial construction will be found in the cases of Nelson v. Blinn, 197 Mass. 279, 83 N. E. 889, 15 L. R. A. (N. S.) 651, 125 Am. St. Rep. 364, 14 Ann. Cas. 147; Cunnius v. Reading School Dist., 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121; Malone v. Provident, etc., 201 Mass. 23, 86 N. E. 912; Provident, etc., v. Malone, 221 U. S. 660, 31 Sup. Ct. 661, 55 L. Ed. 899, 34 L. R. A. (N. S.) 1129.

[2] It is the contention of the respondent in the light of the foregoing course of legislation and of judicial construction in other states, that in each instance where the state has undertaken to lay hold upon the unclaimed property of absentees, and either administer upon it or work an escheat, the law has provided and the courts have required some sufficient form of notice to the depositary and the absentee owner as shall satisfy the constitutional requirement as to due process of law; and the respondent insists that in the section of the Bank Act under review in this proceeding no such notice, and in fact no notice whatever, is required to be given by the state prior to the exercise of its asserted right to the delivery of these

unclaimed deposits into the possession of the state treasury, and hence that the section of the Bank Act is obnoxious to the constitutional requirement as to due process of law.

With respect to the rights of the respondent arising solely out of its interest as a depositary of these unclaimed deposits, we do not think that this contention can be sustained. By the terms of the section under review the right of the state to enforce payment into its treasury of the moneys which make up the sum of the present demand is predicated upon the verified statement and report of the respondent already made to the proper state official, that it is possessed of these several sums of money, and that they have taken on the quality of unclaimed deposits defined in the act. This being so, it is difficult to see what useful purpose any further notification on the part of the state to turn over these deposits to its treasurer would subserve than that which has already been given by the terms of the statute, and acted upon by the respondent in making its verified statement in accordance therewith. But in addition to this, it has been definitely determined that a bank as a mere depositary is not entitled to previous notice of the exercise on the part of the state of its right to lay hold of the funds of depositors in its hands whenever, in the interests of public policy, the state assumes to exercise control over such funds. The state of California has for years exercised that right; and in the recently decided case of State Savings & Commercial Bank v. Anderson, 165 Cal. 437, 132 Pac. 755, L. R. A. 1915E, 675, the right and power of the state so to do in proper cases has been fully vindicated. In that case, involving the summary seizure by the superintendent of banks of the property and funds of a bank which had been found by such official to be in an unsafe or unsound condition, the same objection to the constitutionality of the section of the Bank Act in question there was presented as is now urged against the section of the same act in question here. In deciding that question Mr. Justice Lorrigan very clearly and convincingly showed that under our modern methods of business banks have ceased to be merely private agencies for the accommodation of their customers, but that by virtue of their charters as well as of the public nature of the patronage which they invite and receive, the banks of the present have become in a just sense trustees of the fiscal affairs of the people and of the state; and this being so, the business and property of such banks may be subjected to such reasonable regulation and control as the state, in the exercise of its police power, may see fit to impose; and that in the course of such control the state may, without any such notice as might under other circumstances be held to constitute due process of law, lay hold of the funds of depositors in the possession of banking institutions, and take the same into its own possession whenever a reasonable consideration of the public interest requires such action. In the foregoing case the superintendent of banks had taken possession of the funds of a bank in failing circumstances under the express terms of section 136 of the Bank Act; in so doing he was assuming to act in the interest of the depositors of such bank who might be unable adequately to protect themselves in private actions against losses which might follow upon the failure of the bank. In the case at bar the state is essaying to exercise the same right in relation to the unclaimed deposits of those who, through misfortune or unexplained absence extending over a long period of years, or who, by reason of death, have been rendered unable to exert a personal control over their deposits. We can perceive no difference as to the rights of the state in either case where the right of ownership of the deposit is in any likelihood of being lost either through the threatened failure of the bank on the one hand, or through the prolonged absence or possible death of the depositor upon the other. We think, therefore, that the contention of the respondent, in so far as the same is predicated solely upon its property right as a depositary, cannot be sustained.

[3] It is, however, further and more seriously contended on behalf of the respondent that the chief defect in this section of the Bank Act lies in the fact that it does not require such notice to be given to the depositors of the fund in question as would constitute as to each of them due process of law. The respondent does not go to the extent of seriously insisting that it is entitled to raise this objection on behalf of its absentee depositors; but its contention is that, since the depositors are, under this section of the act, required to be given no sort of notice prior to the change in the custodian of their deposit, they cannot be bound by the action of the state in that regard, and hence may at any time appear and demand their deposit from the bank and may sue it to recover the same; and that against such demands and suit the bank would have no defense, and might therefore be required to pay to the depositor the amount of his deposit which it had already been compelled to turn over to the state; and that in order to be placed in a position to defend against such demand or suit the respondent has a right to insist that the depositor shall have been given such notice of the contemplated transfer of his property as would constitute due process of law before the bank can be required to pay over the amount of such deposit to the state.

In the consideration of this question it is to be noted at the outset that the section of the Bank Act under review does not contemplate any change in the ownership of the funds in question. It purports to deal with possession only, and to leave the matter of

their ultimate ownership to be determined by such subsequent proceedings as are provided through the reference in the section to the provisions of section 1234 of the Code of Civil Procedure. When that section of the Code is examined it will be found to provide a procedure for the disposition of deposits in savings banks in process of liquidation, which embraces such notice to the owners of such deposits as would clearly satisfy the constitutional requirements as to due process of law, and that the procedure therein provided is adjustable to the conditions created by section 15 of the Bank Act. Reading section 15 of the Bank Act as a whole it must be evident that its only purpose and effect in providing for the summary taking over of unclaimed deposits by the state treasurer is to merely work a temporary change in their possession until such time as they may be claimed by their owners, or as the more ample procedure for their ultimate disposition outlined in section 1234, Code of Civil Procedure, can be set in motion; or, in other words, to place such unclaimed deposits in custodia legis until their ownership can be adjudicated by a proceeding taken upon such notice to all concerned as would amount to due process of law, and thus render the adjudication as to the ultimate control and ownership of the property in question binding upon all persons interested.

This view of the purpose and effect of section 15 of the Bank Act brings this case clearly within the principles laid down by the Supreme Court in the case of State Savings Bank v. Anderson, supra. When the state, from motives of public policy, enacts a law providing that private property may be summarily seized and temporarily sequestered to await the inception or determination of a more formal proceeding affecting the title and ownership of the property so taken, neither the immediate possessor nor the actual owner can be heard to urge the objection that the summary seizure of the property by properly constituted public authorities has been accomplished without such notice as would constitute due process of law. It follows that as to any action instituted by the owner of such property against his depositary during the temporary period that such funds are in the custody of the state treasurer pending the formal proceeding to determine their ultimate disposition provided for in section 1234, Code of Civil Procedure, the depositor could not maintain such suit against the depositary for such property, for the reason that against such action the latter would have the right to interpose the defense that the property was in custodia legis. It is apparently this very defense which is contemplated by the terms of the section in question, which state:

"That any bank which shall make any deposit with the state treasurer in conformity with the provisions of this section shall not thereafter be liable to any person for the same; and any action which may be brought by any person against any bank for money so deposited with the state treasurer shall be defended by the Attorney General without cost to such bank."

If these views are to be taken as a correct interpretation of the scope and effect of this section of the Bank Act, it necessarily follows that neither the bank nor the depositor can assert that the summary transfer of unclaimed deposits to the possession of the state treasurer, in contemplation of proceedings to be presently taken for the purpose of determining their ultimate disposition, has been accomplished without due process of law.

[4] The foregoing considerations also supply the answer to the suggestion of the respondent, that by the removal of these deposits from the possession of the bank the contractual right of the depositor to receive interest on his deposit has been impaired without due process of law. It does not appear that the depositors affected by this proceeding are entitled to receive any stated interest on their deposits; but, assuming that they are, the situation would not be changed, for if the bank is placed by the terms of this section relieving it from liability in a position to defend against the suit of the depositor for the amount of the deposit after the same has been paid over to the state, the defense would, of course, also extend to the incident of interest, and therefore the bank cannot, for the same reason, rely upon this possible detriment to the depositor as a defense to this proceeding. Malone v. Provident, etc., 201 Mass. 23, 86 N. E. 913.

Let a peremptory writ issue as prayed for.

We concur: LENNON, P. J.; KERRIGAN, J.

29 Cal. App. 197

TAFT et al. v. WASHINGTON. (Civ. 1384.)

(District Court of Appeal, Second District, California. Dec. 18, 1915.)

1. INJUNCTION ⊂⊃128—INJURY TO PROPERTY — SUFFICIENCY OF EVIDENCE — PARTITION WALL.

In an action by the owners of the south half of an improved lot against the life tenant of the north half of the lot, in which plaintiffs had the remainder, to enjoin the completion and maintenance of a partition wall, evidence *held* to sustain a finding that a part of the wall was located upon plaintiffs' side of the dividing line.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. ⊂⊃128.]

2. INJUNCTION ⊂⊃21—INCOMPLETE INJURY—POWER OF EQUITY.

In such action, the fact that the partition wall was complete before the service of any restraining order was no ground why its removal could not be compelled, as where an act sought to be enjoined is only partially completed, an injunction lies to restrain the threatened injury, and where suit is begun before the doing of the wrongful act and pending the suit the act is

done, the court is not thereby deprived of its jurisdiction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 19; Dec. Dig. ⊂⊃21.]

3. INJUNCTION ⊂⊃49 — INJURY OR TRESPASS TO PROPERTY.

A court of equity has power to compel a cessation of an irreparable trespass of a continuing nature, so that obstructions placed by defendant upon the plaintiff's property, such as a partition wall, interference with stairways, etc., might be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 102; Dec. Dig. ⊂⊃49.]

4. LIFE ESTATES ⊂⊃11—INJURY TO INHERITANCE.

Under Civ. Code, § 818, declaring that the owner of a life estate may use the land in the same manner as the owner of the fee simple, except that he must not injure the inheritance, the acts of a life tenant in tearing up or disconnecting drain pipes, etc., justified an injunction, as the threatened act if accomplished would constitute an injury to the inheritance.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 29, 30, 42; Dec. Dig. ⊂⊃11.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Ellen Huddleston Taft and another against Harriet Washington. Judgment for plaintiffs, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

John C. Stick, of Los Angeles, for appellant. Willis O. Tyler, of Los Angeles, for respondents.

CONREY, P. J. The plaintiffs are the owners of the south half of a lot which has a frontage of 60 feet and 6 inches on the west side of Spring street in the city of Los Angeles. The defendant is the owner of the north half of the lot for the term of her natural life, with remainder over to the plaintiffs. The entire frontage is covered by a two-story building, which was erected in the year 1885 by Biddy Mason, predecessor in title of the parties to this action. The lower story of the building is divided into three storerooms. The upper story contains a number of rooms to which access is obtained by a stairway located on the north side of the building. Plaintiffs alleged and the court has found that at the commencement of this action the defendant had under construction a wooden partition extending from front to rear of the middle storeroom through and near the center thereof and located partly on the south side of the true center line of the lot; also that the defendant threatened to tear up and disconnect certain sewer pipes and drain pipes which are located upon the north half of the premises and to destroy plaintiffs' access to the upper portion of the south half of the building by closing up the stairway; all of which was without the consent and was against the will of the plaintiffs. The judgment ordered the defendant to remove the said partition wall from plaintiffs' premises; that is to say, from the south half of the lot, and enjoined the defendant from tearing down or removing said pipes and drains or interfering with said stairway or committing any waste to the inheritance of the plaintiffs. From this judgment, and from an order denying her motion for a new trial, the defendant appeals.

[1] Appellant now insists that in sundry specified particulars the evidence is insufficient to justify the findings of fact. None of these objections can be sustained. Defendant's answer did not deny that the partition was completed after the filing of the complaint herein. She merely alleged that it was already completed before any injunction issued herein was served upon her. The evidence is sufficient to establish the fact that a portion of the partition was, as found by the court, located upon the plaintiffs' side of the dividing line. The testimony of the surveyor, Le Roy I. Weeks, shows that the distance from the exterior line of the north wall of the building to the center of the south wall thereof is coincident with the width of the lot as claimed by both parties. The record shows that before erecting her building Mrs. Mason made a party wall agreement with the owner of the lot adjoining her lot on the south which permitted her to erect a 16-inch wall, of which one-half would be on said adjoining lot. The fact that she did erect the building in accordance with that party wall agreement is sufficiently shown. For the defendant did not claim that the north wall of the building varies from the true north line of the lot, nor that the total width of the lot is other than the width alleged in the complaint. Therefore, the court was authorized to find in accordance with the testimony of Weeks with respect to the true location of the line of division between the south half of the property and the north half thereof. This line being established, appellant does not contend that a portion of the partition erected by her was not placed south of the line as thus located by the court.

[2] There is no merit in the contention that, because the partition wall was completed before the service of any restraining order, removal of the wall cannot be compelled.

"Where the act sought to be enjoined is only partially completed, an injunction will lie to restrain the completion of the threatened injury. And where suit is begun before the doing of the wrongful act and during the pendency of the suit the act is done by the defendant, the court will not thereby be deprived of its jurisdiction." High on Injunctions (4th Ed.) § 23.

The cases cited by appellant's counsel to support his proposition that wrongs already perpetrated cannot be corrected by injunction, all refer to restraining orders or injunctions pendente lite, the usual purpose of which is to preserve conditions as they are until after trial and judgment.

[3] There is no doubt that a court of equity

has power to compel cessation of a trespass irreparable in its character and of a continuing nature and that, in the exercise of such power, removal of obstructions placed by the defendant upon the plaintiffs' property may be enforced. Western, etc., Co. v. Knickerbocker, 103 Cal. 111, 37 Pac. 192; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; High on Injunctions (4th Ed.) § 708.

[4] The injunction granted by the judgment herein with respect to the tearing up and disconnecting of drain pipes, etc., does not necessarily depend upon any easement right which the plaintiffs may have to the use of those appurtenances. It is sufficiently justified by the fact that the threatened acts, if accomplished, would constitute an injury to the inheritance of the plaintiffs in the north half of the property. The defendant has only a life interest in that property and is not authorized to do any act to the injury of the inheritance. Civ. Code, § 818; Crescent City Wharf, etc., Co. v. Simpson, 77 Cal. 286, 19 Pac. 426.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 144

BORGES v. HILLMAN et al. (Civ. 1405.)

(District Court of Appeal, Third District, California. Dec. 11, 1915.)

1. JUDGMENT ⇐642 — CONCLUSIVENESS—ORDER OF APPELLATE COURT RESTING ON PRESUMPTION.

A decision on appeal affirming the appointment of a receiver, which decision, the record being such as to preclude a review of the merits, rested on the legal presumption of the regularity of the proceeding culminating in the order of appointment, involved a conclusive determination of the question of the propriety of the appointment, and was res adjudicata in the original plaintiff's action against the sureties on the bond of the original defendant given to secure a stay of execution of the order of appointment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1156; Dec. Dig. ⇐642.]

2. APPEAL AND ERROR ⇐1243—LIABILITIES ON BONDS—PARTY PLAINTIFF.

The plaintiff, in an action in which a receiver was appointed, the defendant therein having given a bond running to plaintiff to enable her to collect the rents of the realty in suit pending her appeal from the order appointing the receiver, could maintain an action against the sureties on such bond to recover for any damage resulting from the possession of the property and the collection of rents by the defendant, though the judgment in the main action had not become final when the action on the bond was brought so that the court had not discharged the receiver, who was not the proper party to sue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4796; Dec. Dig. ⇐1243.]

3. APPEAL AND ERROR ⇐1243—LIABILITIES ON BOND—TIME FOR BRINGING ACTION.

Under Code Civ. Proc. § 939, providing that an appeal may be taken from a final judgment within six months, and section 1049, providing that an action is pending from its commencement until the time for appeal has passed, an action against the sureties on a bond given to secure a stay of execution of an order appointing a receiver, and to enable defendant to collect the rents of the real property in suit pending appeal from the order, which bond bound the sureties to hold the plaintiff free from loss, if he obtained judgment in the main suit against the defendant therein, by reason of the collection of moneys by her as rents pending the appeal from the order, was prematurely brought within 6 months of judgment in the action in which the receiver was appointed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4796; Dec. Dig. ⇐1243.]

4. APPEAL AND ERROR ⇐1239—LIABILITIES ON BONDS—RIGHT OF ACTION.

Plaintiff, in an action in which a receiver was appointed and in which defendant therein gave bond to pay costs on appeal from such order, could maintain an action against the sureties on such bond before final judgment in the action in which the receiver was appointed, where the order appointing the receiver was affirmed on the appeal from it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4785, 4786; Dec. Dig. ⇐1239.]

5. EVIDENCE ⇐82 — PRESUMPTIONS — APPOINTMENT OF RECEIVER.

In the absence of a showing of an abuse of authority by the court in making an order appointing a receiver, the presumption, on appeal in another suit where the point is material, is that the appointment was proper in all respects.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. ⇐82.]

6. APPEAL AND ERROR ⇐1234 — APPEAL BOND—CONSTRUCTION.

A bond, given in a suit to declare a trust in realty, to secure defendant a stay of execution of an order appointing a receiver and to enable her to collect the rents of the property pending her appeal from such order, which bond provided that if defendant did not pay over rents received within 30 days after filing of the remittitur from the Supreme Court, judgment might be entered against the sureties on the bond for "said amount of said judgment," was intended, if final judgment on the merits was eventually obtained by plaintiff, to indemnify him against any damage which might result because the defendant was permitted to collect the rents pending determination of her appeal appointing the receiver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761–4777; Dec. Dig. ⇐1234.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Joseph F. Borges against E. C. Hillman and another. From a judgment for defendants on their demurrer, plaintiff appeals. Judgment affirmed.

Clarence N. Riggins, of Napa, for appellant. E. L. Webber, of Napa, for respondents.

HART, J. This action was brought by the plaintiff against the defendants as sureties upon a bond given to effectuate a stay pending an appeal from an order appointing a receiver made in a certain action wherein the plaintiff here was plaintiff and one Ida J. Dunham was the defendant. The court sustained the demurrer of the defendants and allowed the plaintiff 10 days within which to

amend the complaint. The plaintiff declined to amend and accordingly judgment passed for the defendants. The plaintiff brings this appeal here from said judgment.

The facts as stated in the complaint are substantially as follows: The plaintiff here instituted an action in the superior court of Napa county against said Ida J. Dunham for the purpose of obtaining a judgment adjudging and decreeing that he (said plaintiff) was the owner of a certain tract of land, embracing approximately 170 acres, said land being specifically described in the complaint, and that said Dunham "was holding the same, and had been holding said property ever since the 2d day of May, 1908, in trust, for the sole use and benefit of said plaintiff, and for an accounting of the rents and profits derived by her from said land since said date, and for judgment against her for any amount of money found by the court to be due plaintiff on account of said rents and profits derived by her from said lands."

After the filing of the complaint in said action of Borges v. Dunham, viz., on the 18th day of June, 1914, and at the trial of said action, but before the completion thereof, an order was made by the court before which it was pending appointing one Malcolm Brown as receiver in said action to receive the rents, issues, and profits of the real property described in the complaint in said action, and to hold the same during the pendency of said action, subject to the order of the court, and requiring said receiver to execute an undertaking, with two or more sureties, in the sum of $500, "to the effect that he would faithfully discharge the duties of receiver in said action, and obey the orders of the court therein."

On the 22d day of June, 1914, said Malcolm Brown qualified as such receiver by taking and subscribing the required oath and executing the required undertaking, and said oath and bond were filed in the office of the county clerk on the succeeding day. Brown thereupon entered upon the discharge of his duties as said receiver, "and," so the complaint alleges, "continued therein until the giving of the bond on appeal hereinafter set out, and during the time that he was acting as said receiver, and prior to the giving of said last-named bond, said Malcolm Brown collected the sum of $300, rents of the real property above described."

On the 23d day of July, 1914, said Ida J. Dunham took an appeal from the order appointing said receiver, and for the purpose of securing a stay of the execution of said order, and enabling her to collect the rents and income of and from said real property pending said appeal, and also for the purpose of obtaining an order from said court requiring said receiver to pay and turn over to her (Dunham) all moneys then in his possession and collected by him as such receiver as for rents and income of and from said property during his incumbency in that office, the defendants in this action, E. C. and H. F. Hillman, executed a bond or undertaking, which is in the following language:

"Whereas, the defendant in the above-entitled action has appealed to the Supreme Court of the state of California, from that certain order made and entered into against said defendant in said action, in the said superior court above mentioned, in favor of plaintiff in which said order one Malcolm Brown was appointed a receiver of the property involved in said action, with full power to collect all of the rents and income from said property, which said order was made and entered into by said court on or about the 18th day of June, 1914:

"Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, E. C. Hillman and H. F. Hillman, of the said county of Napa, state of California, do hereby jointly and severally undertake and promise, on the part of the said appellant, that the said appellant will pay all damages and costs which may be awarded against her on appeal or on a dismissal thereof, not exceeding $300 to which amount we acknowledge ourselves jointly and severally bound; and,

"Whereas, the appellant herein is desirous of collecting the rents, profits, and income from the property involved in the above-entitled action, and also of retaining that which has heretofore been collected by the receiver in the above-entitled cause, we, the undersigned, residents of the county of Napa, state of California, do in consideration thereof, and of the premises, jointly and severally promise and acknowledge ourselves jointly and severally bound in the sum of one thousand ($1,000.00) dollars, gold coin of the United States, that if the said order appealed from, or any part thereof be affirmed, or the appeal dismissed, or if the said appellant commit or suffer to be committed any waste thereon or in said real property involved in the above cause, that the appellant will pay in United States gold coin a reasonable amount for the value of the use and occupation of the property, together with all rents collected by said appellant during the occupancy of said premises by said appellant, and all damages and costs which may be awarded against the appellant herein upon this appeal. That if the said appellant does not make such payment within 30 days after the filing of the remittitur from the Supreme Court of the state of California, to which said appeal is taken, judgment may be entered upon the motion of the respondents, and in their favor, against the undersigned sureties, for the said amount of said judgment, together with the interest which may be due thereon, and the damages and costs which may be awarded against the appellant on appeal."

Upon the filing of said bond, the court made an order directing and requiring the receiver to turn over to said Dunham (the appellant in said action) all moneys in his possession as such receiver and so collected by him as rent growing out of said real property since his appointment as receiver, and further "instructing said receiver to refrain from collecting any further rents from said real property pending said appeal from said order, and the said appellant thereafter, and in consideration of the giving of said bond, collected the rents of said real property pending the final determination of said appeal, and prior to the making and entry of the judgment in said action as hereinafter alleged, and in consequence and consideration of the giving of said bond by these defendants, the said receiver paid to said appellant

the sum of $239 collected by him as rent of said real property since his appointment as said receiver, and the said appellant collected additional rents of said real property in the total sum, as plaintiff is informed and therefore alleges, of $600 making $839 in all."

On the 11th day of November, 1914, the action of the plaintiff here against Ida J. Dunham having been tried, judgment was rendered and entered adjudging that, since the 2d day of May, 1908, said Dunham held "and is holding" the land in dispute in trust, for the sole use and benefit of the said plaintiff, and awarding to the said plaintiff against said Dunham the sum of $2,379.62, on account of rents, issues, and profits coming into her possession from said real property, said sum including "the $239 so paid to Ida J. Dunham by said receiver and $300 of the $600 collected by her pending said appeal from said order appointing a receiver as above alleged. Thereafter, and on the 29th day of December, 1914, a judgment was duly made and entered in the Supreme Court of the state of California in the matter of said appeal from said order appointing said receiver, whereby said order was affirmed, and that the remittitur thereon was thereafter issued by the clerk of said Supreme Court, and was filed in the above-entitled superior court on the 1st day of February, 1915."

The demurrer objected to the complaint upon the grounds of misjoinder of parties defendant, the alleged incapacity of the plaintiff to maintain this action, that the court has no jurisdiction of the persons of the defendants, nor the subject of this action, for certain specified reasons, that the complaint is uncertain in specified particulars, and that there is a nonjoinder of parties defendant in that Malcolm Brown, as receiver, "is not made a party plaintiff to this action."

[1] Among the specific points made by the respondents in support of the judgment is that the court was without authority to appoint a receiver in the action of Borges v. Dunham, and that, therefore, the appellant cannot maintain the present action, because, as counsel states the proposition, "the order appointing a receiver was void, and being void the bond must fail." But a review of this question by this court in this action is foreclosed by the decision of the Supreme Court affirming the order appointing the receiver concerned here. Borges v. Dunham, etc., 169 Cal. 83, 145 Pac. 1011. While it is true that the record on appeal from said order was such as to preclude a review of the merits of the action of the court in making it, and the decision was therefore made to rest on the legal presumption of the due regularity of the proceeding culminating in the making of the order, yet the affirmance of the order involves a conclusive determination of the question and is consequently res adjudicata.

[2] The defendants further contend, however, that the plaintiff has no capacity to maintain this action, and that the same was prematurely brought. The first of these objections to the action is founded upon the proposition that, the judgment in the main action not having become final at the time the present action was instituted, and the court not having discharged the receiver, the latter is the proper and necessary party to bring and maintain this action, inasmuch as he is entitled, under the order appointing him the receiver, to the exclusive possession and custody of all the rents, issues, and profits accruing from the property in dispute in said action from the time he was so appointed.

But we are unable to perceive how the receiver may be held to be authorized to maintain an action on the undertaking here declared upon. The undertaking does not run to the receiver, but to the plaintiff. The action on the undertaking is not one to recover moneys from Mrs. Dunham, the defendant in the main action and the appellant from the order appointing a receiver, but its purpose is to recover for any damage resulting from the possession of the property and the collection of its rents, issues, and profits by Mrs. Dunham and against which damage the defendants here undertook by their bond to indemnify the plaintiff. We cannot perceive wherein the receiver could claim any damage against the defendants here by reason of their undertaking.

[3] We are of the opinion, however, that the point made by the defendants that this action was prematurely commenced is well taken.

This action was commenced on the 25th day of March, 1915, but at that time the judgment in the main action had not become final, said judgment having been entered on the 11th day of November, and, while it has not been made to appear whether or not an appeal has been taken therefrom, the right to appeal therefrom nevertheless existed for the period of 6 months from the time of the entry thereof, or, to be more specific, the time within which the defendant in said action was legally authorized to appeal from the judgment therein entered against her did not expire until the 12th day of May, 1915. Section 939, Code Civ. Proc. It follows that said action, within the contemplation of section 1049 of the Code of Civil Procedure, was still pending, after the entry of judgment therein, for at least the period of 6 months. The section just referred to provides:

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

It is obvious that a judgment rendered and entered in an action cannot become final so long as the action is pending within the meaning of the foregoing section. See Naftzger v. Gregg, 99 Cal. 83, 33 Pac. 757, 37 Am.

St. Rep. 23; In re Blythe's Estate, 99 Cal. 472, 34 Pac. 108; Story v. Story I. C. Co., 100 Cal. 41, 34 Pac. 675; Brown v. Campbell, 100 Cal. 635, 646, 35 Pac. 433, 38 Am. St. Rep. 314.

Now, the bond upon which the present action is founded, it will be noted, imposes upon the defendants two several and distinct obligations, viz.: The one whereby they have bound themselves in the sum of $300 to indemnify the plaintiff in this action for the costs on appeal, and the other, whereby they have bound themselves in the sum of $1,000 to hold the plaintiff free from loss, in the event that he should obtain judgment in the main action against the defendant therein, by reason of the moneys collected by the latter pending the appeal from the order as rents, issues, and profits growing out of the land. Whether this view of the undertaking be correct or not must depend, of course, upon the intention of the sureties, and this proposition must in turn be determined by a construction of the instrument.

[4, 5] While the relief asked by the plaintiff in this action is confined or limited by the complaint to the damage alleged to have been suffered by the plaintiff by reason of the rents, etc., coming into the hands of Mrs. Dunham pending the appeal from the order appointing a receiver, we may, nevertheless, express the opinion that the plaintiff is entitled to maintain an action in the proper forum upon the undertaking in so far as it obligates the defendants (sureties) to reimburse him for the costs on the appeal from said order. The receiver was appointed upon the application of the plaintiff, and, in the absence of a showing of an abuse of authority by the court in making the order of appointment, the presumption is that the appointment of a receiver was in all respects proper. The plaintiff was required, of course, to defend on the appeal from the order appointing the receiver the action of the trial court in that regard. He was necessarily the respondent in that appeal and, said order having been affirmed on appeal, he is entitled to be reimbursed by the appealing party—the party vanquished on the appeal—for the necessary or legal costs incurred by him in so defending the order.

[6] But, as stated, our conclusion is that this action upon that part of the undertaking referred to is premature, or, in other words, that the plaintiff was not, at the time of the commencement of the present action, legally authorized to maintain it. The conclusion thus declared is inspired by the conviction, based upon a construction of the undertaking by the light of all the circumstances surrounding its execution, that it was not the intention that the obligation of the undertaking upon which the plaintiff wholly relies for a recovery was to be discharged until there had been a judgment entered in favor of the plaintiff and the same had become final.

At the time of the execution of the undertaking the trial on the merits had not been completed, and consequently no judgment entered for the plaintiff. The issue submitted by the plaintiff by his complaint was whether the legal title to the land in dispute had been and was held by the defendant in trust for his benefit. The defendant answered the complaint denying specifically its allegations, and with her answer filed a cross-complaint in which she prayed for a decree quieting her title to the property described in the complaint. After issue joined, the plaintiff, upon notice duly given, applied to the trial court for an order for the appointment of a receiver to receive the rents, issues, and profits of the real property in controversy. The time for hearing the application was fixed for the day on which the action had been set down for trial, and, after taking some testimony, the court made the order appointing a receiver. Borges v. Dunham, 169 Cal. 83, 145 Pac. 1011. The question, then, at issue at the time the order for the appointment of a receiver was made, was whether the plaintiff was entitled to a cancellation of his deed to the property to the defendant and the property declared to be held in trust by the latter for the benefit of the former, or whether both the legal and equitable title to the property was in the defendant and she entitled to a decree quieting said title. It hence follows that the plaintiff, at the time of the appointment of the receiver and at the time of the execution of the undertaking, was not entitled to the possession of the property, nor to the rents, issues, and profits thereof.

Now, it will be noted that the undertaking, so far as it relates to the possession of the land and the collection of the rents, issues, and profits thereof by Mrs. Dunham, pending the decision on the appeal from the order appointing the receiver, provided, among other things, as follows:

"That if the said appellant does not make such payment within 30 days after the filing of the remittitur from the Supreme Court of the state of California, to which said appeal is taken, judgment may be entered upon the motion of the respondents, and in their favor, against the undersigned sureties for the said amount of said judgment, together with interest which may be due thereon, and the damages and costs which may be awarded against the appellant on appeal."

The meaning of the foregoing language is, it must be conceded, very obscure; but, considering that, at the time of the execution of the undertaking, there was pending no appeal the disallowance of which by the Supreme or appellate court would result in a judgment for any amount of money or a money judgment of any sort, we take it that what the sureties meant by that language is this: That they would not only guarantee the payment of the costs on appeal from the order appointing a receiver, but that, if a final judgment on the merits was eventually obtained by the plaintiff, they would in-

demnify him against any damage which might result to him by reason of the fact that, pending the determination of the appeal from the order, the defendant Mrs. Dunham was permitted to remain in possession of the property and to collect and retain the rents, issues, and profits thereof. This, it appears to us, is the correct interpretation of the language of the undertaking, above quoted, and of the intention of the sureties; for the only appeal actually pending when the undertaking was made and delivered was the appeal from the order appointing a receiver, and obviously there could result from said appeal no judgment other than one affirming or reversing the order, except in so far as the awarding of costs on said appeal may be treated as a judgment for an amount of money, and this we do not think can be truly said to be the case. Besides, as to the costs on said appeal, the undertaking, as before suggested, makes a separate and distinct provision.

The demurrer was, in our opinion, properly sustained, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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(172 Cal. 25)

DON v. PFISTER. (S. F. 7713.)

(Supreme Court of California. Feb. 2, 1916.)

1. ELECTIONS ⟸19 — PRIMARY ELECTIONS — POWER OF LEGISLATURE.

Under Const. art. 2, § 2½, declaring that the Legislature shall have power to enact laws relative to the election of delegates to conventions of political parties, the Legislature is authorized to make it a condition to voting in a primary election that the voter state in his affidavit of registration the name of the political party with which he intends to affiliate at the ensuing primary election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 14; Dec. Dig. ⟸19.]

2. ELECTIONS ⟸120 — PRIMARY LAW — CONSTRUCTION.

The primary act of June 16, 1913 (St. 1913, p. 1379), referred to and made the provisions of Pol. Code, § 1096, so far as consistent with the provisions of the act, applicable to primary elections. That section provided that electors should state in their affidavit of registration the name of the political party with which they intended to affiliate at the ensuing primary election. *Held*, that the fact that a subsequent Legislature struck out such provisions from section 1096 does not affect the primary law; the provisions having been incorporated in it by reference.

[Ed. Note.—For other cases, see Elections, Dec. Dig. ⟸120.]

In Bank. Original application by Eugene M. Don for a writ of mandate against Henry A. Pfister. Writ issued.

Thomas V. Cator, of San Francisco, for petitioner. Warren Olney, Jr., Cullinan & Hickey, Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

ANGELLOTTI, C. J. In this matter a peremptory writ of mandate in accord with the alternative writ heretofore granted was ordered issued at the close of the oral argument, the views of the court being very briefly expressed from the bench. That the ground of the decision may be understood, it is proper to very briefly state it in writing.

[1] The question presented was whether or not an elector is entitled to state in his affidavit of registration the name of the political party with which he intends to affiliate at the ensuing primary election, notwithstanding the amendment of section 1096, Political Code, at the regular legislative session of 1915 (St. 1915, p. 285, § 6), by striking from said section the provision that an elector may state this in such affidavit.

The question is one that must necessarily be decided in accord with the law as it now exists, entirely regardless of certain acts adopted at the recent extra session of the Legislature, which, by virtue of the referendum provisions of our Constitution, are not as yet effective, and which are still subject to be suspended until the next election by the filing of a petition for a referendum thereon.

It is conceded by all that the partisan portion of the primary act of June 16, 1913 (St. 1913, p. 1379), as it now exists, a valid subsisting law of the state, is practically rendered a nullity, if the amendment of section 1096 in 1915 deprived an elector of the right here sought to be exercised. No one could qualify for a party primary as required by the primary act, either to sign nominating petitions for candidates for party nominations, or to vote at a party primary. The primary act from beginning to end shows the absolute necessity for party registration in order to make it a workable system for party primaries at all, and learned counsel for respondent frankly admitted that the expressed design of its framers was that no one could participate in any of the party primary elections provided for thereby unless in his affidavit of registration he had stated the name of the political party or organization with which he intended to affiliate. This was the "test and condition" provided in the primary act upon which electors might participate in such a party primary, and that the Legislature had the right to prescribe such a test in the primary act itself cannot be doubted in view of the language of section 2½, article 2, of the Constitution.

[2] Under these circumstances, it is not surprising that the framers of such primary act should substantially provide therein, as they clearly had the right to do and as we think they have done, that electors should be allowed to register in such a way as to make them eligible to participate in the party primaries provided thereby. In our opinion they did this, in a way not novel at all in legislation, by referring to section 1096, Political Code, as it then stood, and practically making it a part of the primary act. The language is:

"And all the provisions of section 1096 of the Political Code, so far as they are consistent with the provisions of this act, are hereby made applicable to primary elections within the meaning of this act."

They had done the same thing in the primary act of 1911 (St. 1911, p. 769), and in a still earlier primary act when section 1096 contained no provision for statement of party affiliation, they had so expressly referred to section 1366a, Political Code, which contained such a provision. We are satisfied that it must be held that it was the intent to make this section, as it then stood, in so far at least as this matter so vital to the maintenance of the act is concerned, an integral part of the primary law itself for so long as such primary law required the registration to show party affiliation.

Conceding the power of the Legislature to legislate in this manner—i. e., by incorporating the provisions of some other statute by reference, as must be conceded—we have remaining simply the question of intent, and as to that we have already indicated our views. The case then is simply that presented in People v. S. B. Whipple (No. 2) 47 Cal. 592, where an act provided that township assessors shall have all the powers and perform all the duties of county assessors prescribed by the provisions of the general revenue act of 1861 (St. 1863–64, p. 243), and wherein it was held that the subsequent repeal of the act so referred to did not operate to defeat or curtail the scope of the act in which the reference was contained, "for the legal effect of such reference, in the first instance, is the same as though the act so referred to had been inserted therein in extenso." This is a principle well sustained by the authorities, and is applicable whenever the intent is apparent to make by reference another provision of law an actual part of the law under consideration. Section 1096, so far as essential to the maintenance of the party primary provisions of the primary act, was thus made an actual part of such act, and the Legislature could not subsequently affect such primary act by simply amending said section 1096, so as to eliminate party registration.

As stated from the bench, the decision of the court was based on this ground, as to which all participating agreed, although other grounds were stated by some of the justices in addition.

It follows that petitioner is entitled to the relief sought, and accordingly a peremptory writ of mandate was ordered issued.

I concur: SLOSS, J.

SHAW, J. I concur. I want to add to the opinion of the Chief Justice another ground on which I think the decision may rest. Section 1097 as amended in 1915 contains in subdivision 3 the same phrase that was contain-

ed in the section before its amendment, that "the affidavit of the party must show all the facts required to be stated." This means that, if there is any fact required to be stated by any other law, the affidavit must state it, although such fact is not expressly mentioned in the form given in section 1097. And inasmuch as the primary law of 1913, in almost every section, implies that the registration shall show the party affiliation of the voter, making it necessary to the operation of the primary law, I think the above-quoted phrase of the present section 1097 necessarily means, under the law as it now stands, that the registration affidavit must show the party affiliation.

HENSHAW, J. I concur in the foregoing. Viewed in the broadest and most liberal aspect, it is imperative that the writ should issue. The Constitution of this state (Const. art. 2, § 2½) makes recognition of the existence of political parties, declares for a primary law and empowers the Legislature to prescribe tests controlling the right to vote at such primary. It is not necessary here to consider the full import of this constitutional provision, whether it is not in itself a guaranty of partisan primaries, through which alone under our system of laws political parties, the existence of which is certainly guaranteed by the Constitution, can alone live. It is truly said that the intent of the Legislature expressed in its acts is to be considered in interpreting those acts. No doubt can be entertained of the legislative intent in passing the primary law of 1913. It provided a complete plan for registration declaring party affiliations, though there was no compulsion upon the elector to declare such an affiliation. There was upon the statute books at that time a registration law authorizing the elector to declare his party affiliation and compelling county clerks and registrars of voters to enter such declarations of party affiliation when made, to the very legitimate end that those and those only who belonged to a political party should, at the primary designed for the selection of its candidates, have a voice in that selection. There can be no doubt but that it made this registration law *as it then stood*, by distinct reference, a part of itself.

Equally no doubt can be entertained of the purpose of the Legislature in passing the primary law of 1915. Compelled to recognize the existence of political parties, so far as national officers are concerned, it proposed to and did do away with all party nominations for state offices. It was designed, and avowedly designed, to destroy all political parties so far as they operated upon state officers and affairs. In the accomplishment of this purpose the act of 1915 repealed the partisan primary law of 1913, and to harmonize legislation under its new proposed scheme of politics it struck out from section 1096 the provision touching the registration of the political party with which the elector was affiliated. Turning again to the intent of the Legislature, there is no room for doubt but that the law of 1915 was intended primarily and fundamentally to destroy party primaries and party nominations to state and county offices.

Under the guaranty of the Constitution the people of the state under the initiative and the referendum become the highest legislative body in the state. Under the initiative they may pass laws beyond the power of the Legislature to modify or repeal. Under the referendum they may perform the high legislative function of vetoing an act of the Legislature. We are thus not only entitled, but it is our duty, to consider the legislative intent of the people at a referendum election quite as much as the legislative intent of the Legislature itself. They took under consideration the question as to whether or not the primary law of 1915 should be permitted to remain upon the statute books. If their vote at the polls favored it, it became the law of the state. If their vote at the polls repudiated it, their repudiation was a declaration that the primary law of 1915 should be repealed, and the primary law of 1913 should be restored to full life. Such was not only the intent, but such was the necessary effect, of the act of the sovereign people at the polls in striking from the statute books the primary law of 1915.

What, then, stands in the way of the officers of the state giving effect to this plainly expressed will of the people solemnly registered at the polls? Nothing saving the specious argument that, because the people in the same referendum election did not veto the law of 1915 amending section 1096, it must be concluded that they desired that law to stand as amended, and, standing as amended, it will operate to subvert the whole partisan primary law of 1913, and thus undo everything which the people of the state thought they were doing when in terms they destroyed the primary law of 1915.

But what is the broad and complete answer to this argument? It is that the people plainly designed to restore to full life the primary law of 1913; that to restore this act on the statute books required partisan registration; that the primary law of 1913 makes specific reference to and adopts as part of itself section 1096, but section 1096 as so adopted is the section as it originally stood, calling for the registration by party affiliation; even if section 1096 had been totally repealed it would, under familiar principles and under all of the authorities, be the subject of reference to determine what was meant by the primary law of 1913 and to give that meaning due effect; that, therefore, section 1096 for the purposes of the primary law of 1913, and for registration thereunder, would remain in force, even though the section had been wholly eliminated from our statute books, and that such has always

been the rule of construction. People v. Whipple, 47 Cal. 591; Potter, Dwar. on Stats. pp. 190, 192; Reg. v. Merionethshirs, 6 Adol. & Ellis, 343; Rex v. Laxdale, 1 Burrows, 445; 2 Lewis, Sutherland, Stat. Construction (2d Ed.) §§ 405, 453, 489.

We concur: MELVIN, J.; LENNON, Judge pro tem.

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Ex parte DART. (Cr. 1913.)

(Supreme Court of California. Feb. 3, 1916.)

1. MUNICIPAL CORPORATIONS ⟹611—REGULATION OF CHARITIES—POLICE POWER.

The occupation of soliciting contributions for charitable purposes may be regulated by laws or ordinances providing for reasonable supervision of the persons engaged, and for the application or use of the contributions received to the purposes intended, to prevent unscrupulous persons from obtaining money or other things under the pretense that they are to be applied to charity, to prevent the wrongful diversion of such funds to other uses, and to secure them against waste.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1344–1349; Dec. Dig. ⟹611.]

2. MUNICIPAL CORPORATIONS ⟹594—REGULATION OF CHARITIES — CONSTITUTIONAL LAW.

City ordinances creating a Municipal Charities Commission and prohibiting begging in the public streets, while regulating the soliciting of contributions for charitable purposes, the last of which gave the commission arbitrary power to forbid any person from soliciting for charity regardless of his personal worth or fitness, not establishing any standard of character by which the commission should be guided in giving permits, merely requiring that it should find that the "object of said solicitation is worthy and meritorious," were unconstitutional so far as giving such arbitrary power, and in portions imposing a penalty upon any one soliciting contributions for charitable purposes without a permit and prohibiting the sale of any goods donated to charity without the solicitor first having obtained a similar permit.

[Ed. Note.—For other cases see Municipal Corporations, Cent. Dig. §§ 1316–1320, 1327, 1328; Dec. Dig. ⟹594.]

In Bank. Application for writ of habeas corpus by William J. Dart against Charles E. Sebastian, Chief of Police, and Ray L. Chesebro, Police Judge, of the City of Los Angeles. Applicant discharged from custody.

Gibson, Dunn & Crutcher and Edward E. Bacon, all of Los Angeles (Wm. A. Barnhill, of Los Angeles, of counsel), for petitioner. Warren L. Williams, City Prosecutor, and Samuel Barnes Smith, Deputy City Prosecutor, both of Los Angeles, opposed.

HENSHAW, J. The authorities of the city of Los Angeles adopted two ordinances. By one was created a Municipal Charities Commission, whose powers and duties were defined. Amongst those powers and duties are:

"(1) To investigate all charities dependent upon public appeal or general solicitation for support and to indorse such of them as meet actual needs of the community, attain a reasonable standard of efficiency and are so conducted as to insure the public of the wise use of the funds."

The second of these ordinances prohibits begging in the public streets or places in the city and regulates the soliciting of alms and contributions for charitable purposes. It provides as follows:

"Sec. 2. It shall be unlawful for any person, firm, corporation or association to solicit alms, food, clothing, money or contributions within the city of Los Angeles, without first securing a permit so to do from the Municipal Charities Commission of said city. Provided, however, that the provisions of this section shall not apply to properly accredited solicitors of established churches of said city soliciting for purely religious purposes, but it shall apply to the various institutional works carried on by said churches in like manner as other persons, firms, corporations and associations. The permit from the charities commission above referred to shall consist of a written certificate issued by the said commission certifying that the object of said solicitation is worthy and meritorious and authorizing the soliciting of gifts and donations therefor; said permits may be revoked by said commission at any time.

"Sec. 3. It shall be unlawful for any person to solicit or collect for any charitable or philanthropic organization, without first obtaining a written permit so to do from the Municipal Charities Commission; said permit shall be revocable at any time in the discretion of said commission, which may adopt such regulations regarding the soliciting and collecting of funds as its judgment may dictate, and it shall be obligatory upon the holders of such permits to abide by such rules and regulations.

"Sec. 4. It shall be unlawful for any person, firm, corporation or association to give or promote any entertainment, fair, bazaar or benefit in the name of charity or philanthropy, without first obtaining a written permit so to do, from the Municipal Charities Commission, said permit to be revocable at any time at the discretion of said commission.

"Sec. 5. It shall be unlawful for any person, firm, corporation or association to solicit funds within the city of Los Angeles for any ethical, evangelistic, religious, missionary or charitable purposes without having first obtained an indorsement certificate from the Municipal Charities Commission. Provided, however, that the provisions of this section shall not apply to established and recognized churches or other religious organizations in the city of Los Angeles.

"Sec. 6. It shall be unlawful for any person, firm, corporation or association to sell, or offer for sale, any clothing, household goods, or other goods, wares or merchandise which have been solicited or donated for charity or philanthropy without first obtaining a written permit so to do from the Municipal Charities Commission, said permit to be revocable at any time at the discretion of said commission."

Petitioner was arrested under two criminal complaints charging violations of these ordinances. By the first of these complaints he was accused of soliciting "alms, food, clothing, money and contributions * * * without first securing or having a permit or written certificate so to do from the Municipal Charities Commission." By the second of these complaints his crime was in "selling and offering for sale clothing, household goods and other goods, wares and merchan-

dise which had been solicited and donated for charity and philanthropy, without first obtaining or having a written permit so to do from the Municipal Charities Commission."

The following facts appear without controversy: The Salvation Army is a religious organization founded on and believing in the teachings of Christ. It has been established for 50 years. It has its churches and charitable organizations throughout the United States and other countries. Profoundly impressed with the Founder's sympathy for the poor and afflicted and with His teachings that, "Now abideth faith, hope and charity, these three, but the greatest of these is charity," and, "Now the end of the commandment is charity out of a pure heart," it has made its special field of religious work the relief of the destitute and the rescue of society's outcasts. It has found that it cannot lead the spirit of the weary and heavy burdened without first ministering to his physical necessities. While "man does not live by bread only," he cannot live at all without bread. Therefore the charitable organizations of the Salvation Army are vital, integral parts of its religious life and work. For 25 years it has prosecuted its religious and charitable work in the city of Los Angeles. It there maintains an "Industrial Home," where men out of employment are given food and lodging without charge, but are required, for their own self-respect and to the end that mere professional beggary be not fostered, to perform such labor as is within their power, being paid the value thereof. It maintains a "Rescue Home and Maternity Hospital," in which, without charge, food, lodgings, and hospital service are afforded needy married women and unfortunate girls. It maintains a "Young Woman's Boarding House," giving for an extremely low price to homeless girls and women clean, wholesome food and lodging and helpful moral influences. It maintains four other hotels and lodging houses where the destitute are housed and homed free of charge and where but a small charge is exacted from those able to pay. An average of 27 persons per night are given shelter in these hotels free of all charge. It also maintains nine stores where secondhand clothing, furniture, rags, paper, and junk of various kinds, contributed by the charitable, are sold at low prices. In these stores and in the renovatory work necessary to make many contributed articles salable, employment is given to the needy, who thus become self-sustaining and self-respecting. In the years of its labors the Salvation Army has acquired properties of much value in Los Angeles, all of which are used for one or another of the described purposes. It has alleviated suffering, and given relief and employment in thousands of cases. Its books of financial account are and always have been open to the inspection and examination of its contributors, and no one of those contributors has ever voiced any complaint touching the honesty and efficiency of the Army's administrative work.

After its creation, the charities commission, claiming the power so to do under the aforesaid ordinances, on or about the 6th day of October, 1913, demanded, in writing, of the Salvation Army, that it should, as a condition precedent to obtaining the indorsement or permit of the commission for carrying on or soliciting contributions for any of its above described charitable work in said city, be governed by a local board of managers, or trustees, all of whom should be residents of the city of Los Angeles, and representative Los Angeles citizens, and that all the property of the Salvation Army in the city should be conveyed to and held by such local board, and that the financial work of the Salvation Army in the city should be conducted by such local board; that no budgets for funds should be prepared and enforced on the Los Angeles workers for any purpose other than Los Angeles work; and that no funds should be sent out of Los Angeles for the use of the Salvation Army elsewhere, except by the direction of such local board, or of the Municipal Charities Commission; and that Christmas offerings, self-denial, harvest festival, and like accustomed contributions of the Salvation Army should not be used except for local purposes; and that all proceeds derived by the Salvation Army from the conduct of its aforesaid institutions in Los Angeles (whether self-sustaining or not) should be used exclusively for the extension of its work in the city, and not be subject to assessment by territorial (i. e., national) officers of the Salvation Army. Next, the charities commission exacted that title to all property of the Salvation Army in Los Angeles should be vested in a corporation, and this was done. Thereafter the Salvation Army and its corporation petitioned the charities commission for a permit allowing it to continue its charities, and its petition was denied. Always desirous of yielding obedience to the law, and of "rendering to Cæsar the things that are Cæsar's," the Salvation Army endeavored to comply with the exactions of the charities commission, but was unable to comply with some of them without impairing its efficiency and integrity as an organized society for religio-charitable work. Failing to secure the permit, the Salvation Army continued this work. The petitioner is one of its officers. In the performance of his duties as such officer, and not otherwise, he has been subjected to these arrests and charged with these crimes.

In setting forth the foregoing facts we are not unmindful of the limitations put on our inquiry under this writ. The validity of these ordinances is to be determined from their provisions, and the question of their validity or invalidity is all that concerns us here. Nevertheless, and assuming for the moment the validity of the ordinances, these

facts are highly instructive as illustrating the extent of the power conferred and the manner of its exercise. Here is a great and living charity doing good to thousands of the needy and heavy-laden of Los Angeles, struck dead because it does not make over the management of its affairs to a local board of "representative citizens" and cannot agree that it will dispense the bounty which it receives exclusively for local purposes. Charity is not only to begin at home, but to end at home saving as under "permit" it may be suffered to go abroad. The quality of Mercy (and so necessarily of Charity), we are told

> —"is not strained;
> It droppeth as the gentle rain from Heaven
> Upon the place beneath."

But in Los Angeles it is to be strained and drop as from a sprinkling pot in the guiding hand of the charities commission. But this exemplification of the use of the power is not, of course, an argument against the existence of the power itself. Conceding the existence of the power, if in any instance an illegal exercise of it has been made, that fact will constitute a defense to a prosecution, but will not be effective to destroy the validity of the grant of power itself. The basic question still remains: May a private charitable association, order, or organization be denied the right to fulfill the purposes of its existence saving under a "permit" from the authorities? We here use the term "private charity" as meaning one not supported in whole or in part by state or municipal funds. Over the latter class manifestly the power of regulation and control is great, if not plenary.

Certain features of these ordinances at once strike the reader. Money may be freely sent abroad by any "established church" for the uplift of the soul of the Senegambian, and this is very well; but no penny can be sent to Belgium, to Poland, to Serbia to still the wailing of the children or allay the anguish of the women except under a "permit" from the charities commission. Nay, more, in the city of Los Angeles itself its needy childhood goes unfed and unclothed, its dependent womanhood unprotected and uncared for by organized charities except they have a "permit." Surely here, if anywhere, is

> "The organized charity, scrimped and iced
> In the name of a cautious, statistical Christ."

Respondent argues that charitable institutions soliciting contributions from the general public thus secure public trust funds, and that it is quite within governmental powers for the state or its municipal agencies to regulate the collection and disposition of such trust funds. It is freely conceded, indeed it is proclaimed, that reasonable regulations may be adopted touching and to a limited extent controlling the operation of charitable institutions dependent in whole or in part on public beneficence. But respondent fails to perceive or at least to discuss the distinction, as broad as the temperate zone, between a law imposing reasonable regulations to effectuate these ends on all such charitable institutions, and a law which makes the right to solicit at all, and thus the right of a given charity to exist dependent on the arbitrary will of a charities commission. Again, let us illustrate. Respondent in its brief thus defines the power of the charities commission:

> "The Municipal Charities Commission is delegated power to indorse (which means grant permits to charitable institutions under which alone they are entitled to live) such charitable institutions as meet the actual needs of the community, attain a reasonable standard of efficiency and are so conducted as to insure the public in the wise use of funds."

This language taken from the first of the ordinances above quoted sounds reasonable. But as interpreted by the Municipal Charities Commission, what does it mean? In their own language it is this: Such a charity is "one that will execute every trust for charity with the least possible delay, with the greatest possible efficiency and with the least possible deduction for expense." Here is a mark set, and that mark is the absolute perfection of human endeavor. No tolerance, no charity is shown by this commission of charities, for any human effort, however self-sacrificing and efficient, that does not attain human perfection. Charities in Los Angeles must reach a pitch of perfection unattained by any other human institution, or in the view of the Municipal Charities Commission they are unfit to live.

But let us eliminate from consideration these constructions put by the Municipal Charities Commission on their own powers, which are but delegated powers, and meet the question of the existence of this power at its source. Can the municipal authorities of a city arbitrarily say what person or what institution may or may not engage in charitable work dependent wholly or in part upon voluntary contributions from the public? Unhesitatingly we answer that this cannot be done, that it constitutes an attempt to use the police power in an arbitrary, unreasonable, and oppressive manner. It necessarily contains an assertion of the power to prohibit and suppress vocations and occupations which, entirely aside from their religious character, are from a worldly point of view in and of themselves not only harmless but positively beneficial to humanity. The power to pass reasonable regulations in such a case bears no relationship to the power to prohibit or suppress. Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75; In re Johnston, 137 Cal. 115, 69 Pac. 973; Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674.

Such charitable work is not to be confounded with beggary, which imports per-

sonal gain. Most often those who devote themselves to such charities live lives of self-denial and self-abnegation for the sake of others. And the utmost limit of reasonable regulation in the matter is reached by acts protecting the public from charlatans and imposters, insuring knowledge on the part of the donors of the purposes to which their contributions may be put, coupled with adequate safeguards against malversation as to the funds received. But this falls far short of the law here under review, which permits such charitable work to be carried on only by (again to quote respondent) "trustees satisfactory to the Municipal Charities Commission."

But in further support of the argument that the charities commission or the municipal council may thus forbid a man from devoting his life to this form of self-denial and good works, it is said that neither the Constitution of the United States nor the Constitution of this state guarantees him the right so to do as they guarantee him the free exercise of his religion. They do not. Neither do they guarantee to a man the right to love, to show mercy, to forgive his enemies, or to walk in the path of rectitude. The existence of some human rights is taken for granted in both of those august instruments. We have heard one Chief Executive of this nation declare that he construed the Constitution as conferring on his department all powers not expressly withheld. The construction has not as yet met with favor from the jurisconsults. As little accord can be given to a construction which denies to the individual any right not expressly reserved and preserved to him. But if driven to authority to support this declaration, we can at least point out that the Declaration of Independence recognizes the right of all mankind to pursue happiness. When that pursuit takes the innocent and admirable form of effort to better the lot of the poor and oppressed, whether happiness be found solely in the consciousness of the doing of kindly deeds, or whether it be found in the conviction that one is thereby following the precepts of a Divine Teacher, in either case it lies not within the ordained powers of our government, national, state, or municipal, to say that such a vocation shall not be followed, such a life shall not be led.

So far we have dealt with the question in what, for lack of a better word, we may term its secular aspect only. From this point of view our remarks and conclusion apply equally to all charities, whether temporal or religious.

But there is another aspect of the question clearly presented and as clearly demanding consideration. This is the religious aspect. The petition shows that the charities of the Salvation Army are a vital part of its religious life work. One need not write as a theologian in expressing as we do the most profound veneration for religion as embodying the highest ethical concepts of a people and as satisfying their spiritual yearning for a life finer than this earthly one. The two religions exercising the most potent influence in shaping the material and spiritual destinies of the white-skinned races are the Jewish and the Christian. To these, as to all others, perfect freedom of exercise is constitutionally guaranteed. In both of these religions charity is the central word. It is enjoined, not as a good thing, or a wise thing, or as a kindly thing only, but as a fundamental part of the religion itself. Says the Jewish faith:

"On three things the world is stayed; on the Thorah (the law) and on worship and on the bestowal of kindness."

"Now the end of the commandment is charity out of a pure heart," says Paul to Timothy.

"Charity is the scope of all God's commands," preaches Chrysostom.

"All perfection of the Christian life is to be attained according to charity," declares Thomas Aquinas.

Does it need more, does it need so much, to show that in these religions the bestowal of charity, the devotion of life to charity, are a part of the religion itself? And does it demand discussion to establish so plain a truth as that touching religion there is a doubtful zone which legislation should be most reluctant to enter? The founders of the nation recognized it when they placed the great guaranty of religious liberty in the Constitution of a free people, and it is for every court to see that that liberty is not encroached upon and that freedom gnawed and impaired by any experimental legislation however well meant. So when legislation does enter that uncertain domain, the fact that it is there must bring to it condemnation. In accordance with the dictate of the Constitution itself, the doubt will be resolved in favor of religious liberty. And it will be found better in the long run that the free exercise of religion be preserved in its integrity, better for the nation, better for charity itself which owes so much to religion, even if the efficiency of religious charities be not up to the standard of perfection set by the Municipal Charities Commission. If under that standard 75 cents of every dollar would go to the objects of charity, while under the less efficient methods in vogue but 50 cents of each dollar actually reaches the beneficiaries, it is not to be forgotten that there will be many millions fewer of these dollars to be distributed in charity if the activities of the religious are hampered, thwarted, and stayed.

Wherefore the prisoner is discharged from custody.

We concur: MELVIN, J.; LORIGAN, J.

SHAW, J. (concurring). [1] The occupation of soliciting contributions to charitable

purposes is clearly so far subject to the police power that it may be regulated by laws or ordinances providing for a reasonable supervision over the persons engaged therein and for the application and use of the contributions received to the purposes intended, in order to prevent unscrupulous persons from obtaining money or other things under the pretense that they were to be applied to charity, and to prevent the wrongful diversion of such funds to other uses, or to secure them against waste. Measures reasonably tending to secure these ends are unquestionably valid.

[2] If the ordinances in question here were reasonably appropriate for the attainment of these objects, there could be no valid objection to them based on the ground that they deprived persons of liberty or unduly restricted them in the pursuit of happiness. But they do not merely empower the Municipal Charities Commission to inquire or examine into the character of persons soliciting for charity and withhold permits from all who do not come within fixed standards of character and fitness. They give the commission absolute and arbitrary power to forbid any person from soliciting for charity, regardless of his personal character, worth, or fitness. No standard of character or fitness is set by which the commission is to be guided in giving or withholding permits. The only thing required is that the commission shall find that the "object of said solicitation is worthy and meritorious." Persons of the highest character desiring to solicit for a worthy cause might be refused a permit for no reason except the arbitrary will of the commission. Every person has the right, under our Constitution, and perhaps without its guaranty, to solicit contributions for a worthy charitable purpose, provided he acts in good faith and honestly applies them to that purpose. The ordinances give the commission power to deprive persons of that right without cause or reason. To the extent that they give this arbitrary power they are contrary to the Constitution and void. They come within the principles stated by the Supreme Court of the United States in Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, and by this court in Ex parte Sing Lee, 96 Cal. 359, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218; Los Angeles v. Hollywood Ass'n, 124 Cal. 349, 57 Pac. 153, 71 Am. St. Rep. 75; Schaezlein v. Cabaniss, 135 Cal. 469, 67 Pac. 755, 56 L. R. A. 733, 87 Am. St. Rep. 122; and Hewitt v. Board, 148 Cal. 593, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750.

In the Yick Wo Case, referring to ordinances prohibiting laundries in wooden buildings except by permission from the board of supervisors, the court said:

"They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. * * * It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform." 118 U. S. 366, 368, 6 Sup. Ct. 1069, 1070 (30 L. Ed. 220).

And in Los Angeles v. Hollywood, supra, the court said:

"There is a wide difference between regulation and prohibition—between regulatory provisions as a condition imposed for the exercise of a lawful occupation, and making the right itself to depend upon the unrestrained will of the municipality. * * * If the business be lawful, and having no injurious tendency, they cannot say who shall and who shall not exercise the right itself. Under the guise of regulating a business, the municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business."

The proper method of regulating a lawful business is indicated in Hewitt v. Board, supra, as follows:

"The right of the physician to be secure in his privilege of practicing his profession is thus made to depend, not upon any definition which the law furnishes him as to what shall constitute 'grossly improbable statements,' but upon the determination of the board after the statement is made and simply upon its opinion of its improbability. No definite standard is furnished by the law under this provision whereby a physician with any safety can advertise his medical business, nor is there any definite rule declared whereby after such advertisement is had the board of medical examiners shall be controlled in determining its probability or improbability. The physician is not advised what statements he may make which will not be deemed 'grossly improbable' by the board. No rule is provided whereby he can tell whether the publication he makes will bring him within the ban of the provision or not. * * * If a physician's license is to be revoked for 'grossly improbable statements,' if he is to be thereby deprived of his means of livelihood, of his right to practice a profession which it has taken him years of study and a large expenditure of money to qualify himself for, on the ground that he has made 'grossly improbable statements' in advertising his medical business, it is requisite that the statute authorizing such revocation define what shall constitute such statements so that the physician may know in advance the penalty he incurs in making them." 148 Cal. 595, 84 Pac. 41, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750.

Other methods of regulation may also be allowable; but a law or ordinance by or under which a lawful occupation, in itself, when properly conducted, in no wise injurious to persons, property, or the public interest, may be absolutely prohibited at the dictation of any official body without other cause than its own will or desire, is beyond the legislative power, and to that extent void.

There is a class of cases upon which the respondent relies as contravening the above-

stated principles, such, for example, as Ex parte Fiske, 72 Cal. 127, 13 Pac. 310, In re Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529, and Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. It will be found, however, that these cases relate to things which in their nature are or may be injurious to public health, safety, comfort, or welfare, and that they do not infringe upon the principles above stated with regard to the regulation of occupations which are both lawful and innocuous. In the Flaherty Case the distinction is stated. After holding that an ordinance forbidding the beating of drums upon the streets without a permit from the president of the board of trustees was valid, the court, referring to other cases which seemed to conflict with the decision, and which are similar to the case at bar, said:

"But upon closer examination they will be found to go upon a distinction or principle, whether sound or not, that is not applicable to the case at bar. They are based upon the theory that the lawful inherent rights of men cannot be entirely suppressed or destroyed by statute or ordinance, but can only be regulated, and that all regulations of such rights must be uniform." 105 Cal. 565, 38 Pac. 983, 27 L. R. A. 529.

And again:

"At all events, the cases referred to deal with a right. But the proposition that a man has a natural, ingrained, inviolate, common-law, or constitutional right to beat a drum on the traveled streets of a city has no foundation in reason or authority. As therefore it is not a right that may not be entirely suppressed, it may be regulated as the lawmaking power may determine," and that, "as it could be suppressed, no one could be heard to complain of an ordinance regulating it because thereby special privileges accrued to particular persons." 105 Cal. 566, 38 Pac. 983, 27 L. R. A. 529.

The distinction between cases like Ex parte Fiske and the present case is that in this case the right which the commission has power absolutely to take away is a lawful and innocent occupation which the Legislature cannot entirely suppress and as to which its functions are merely to regulate its conduct and prevent abuses. There are other cases relating to ordinances which, after prohibiting certain things, delegate to some officer or board the power to decide whether or not a given person or subject comes within the terms of the prohibition. These are not in conflict with the principles above stated, nor are they applicable to this case. For these reasons, I am of the opinion that the portion of the ordinance in question imposing a penalty upon any one who solicits contributions for charitable purposes without a permit from the commission is void. The section of the ordinance prohibiting the sale of any goods donated to charity without first obtaining a similar permit is invalid for like reasons.

I concur in the judgment discharging the prisoner.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLOR, J.

(172 Cal. 15)

WOOD v. LOS ANGELES RY. CORP.

(L. A. 3649.)

(Supreme Court of California. Feb. 2, 1916.)

1. STREET RAILROADS ⇐98 — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — LEAVING PLACE OF SAFETY.

Plaintiff, while crossing a street at a crossing, passed in front of a team and wagon, and when beyond them saw a street car having the right of way coming towards her, rounding a curve, and stepped back. The front end of the car passed her in safety as it got beyond the curve, and she then walked between the car and the wagon, and was hit by the rear end of the car as it was rounding the curve. *Held* that, while persons suddenly placed in danger will not be held for lack of judgment under excitement and fear, nevertheless plaintiff's conduct in walking towards the danger instead of seeking safety in the opposite direction or standing still justified a finding of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204–208; Dec. Dig. ⇐98.]

2. STREET RAILROADS ⇐103—NEGLIGENCE—MOTORMAN'S KNOWLEDGE OF DANGER.

Under such circumstances it was not the duty of the motorman to watch plaintiff after the front end of the car passed safely beyond her and the team, and therefore he could not be held to have knowledge of the danger assumed by her in walking between the team and the car toward the rear end.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. ⇐103.]

3. NEGLIGENCE ⇐138—INSTRUCTIONS—BURDEN OF PROOF.

In an action for injuries against a corporation, an instruction that charges plaintiff with the burden of proving by a preponderance of the evidence defendant's negligence and its proximate cause of the injury is not open to objection that it admits of an inference that such negligence must be proven by acts other than those of defendant's servants.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 354–370; Dec. Dig. ⇐138.]

4. TRIAL ⇐296—INSTRUCTIONS AS A WHOLE —PROXIMATE CAUSE.

Where an instruction does not sufficiently charge on the subject of the proximate cause of an injury, the deficiency is correct if included in subsequent instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec.Dig. ⇐296.]

5. TRIAL ⇐191—INSTRUCTIONS—ASSUMPTION OF FACTS—"TO THE REAR."

In an action for injuries against a street railroad company, it appearing that the front end of the car after it had rounded a curve passed safely beyond plaintiff, who was standing on the street crossing between the car and a team and wagon, an instruction charging that the motorman was not bound to assume that the wagon "to the rear" of the car would be carelessly driven to plaintiff's danger is not open to objection that it assumed that the wagon was behind the car; the instruction meaning merely that the wagon was towards the rear of the car.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431, 435; Dec. Dig. ⇐191.

For other definitions, see Words and Phrases, First Series, Rear.]

6. STREET RAILROADS ⇐118—NEGLIGENCE—APPREHENSION OF DANGER—INSTRUCTIONS.

In such action an instruction charging that, "If * * * you find * * * that the said

motorman had no reason to apprehend any danger to said plaintiff," etc., is not open to the objection that the words quoted left to the decision of the motorman himself, and not to the jury, the question of his cause for apprehension of danger; for the instruction is directed to the belief of the jurors, and not to that of the motorman.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258–269; Dec. Dig. ⟸ 118.]

7. STREET RAILROADS ⟸118—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In such case an instruction charging that, if plaintiff was in a safe position when the front of the car passed her, and then changed her position and was struck by the rear end, by reason of the change, she could not recover, such instruction is not open to the objection that it told the jury that, if she was in a position of safety and remained in such position and was struck by the car, she could not recover.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258–269; Dec. Dig. ⟸ 118.]

8. TRIAL ⟸253 — INSTRUCTIONS — IGNORING EVIDENCE.

In such case, where the instructions in general do not require the jury to find that defendant's negligence was the sole cause of plaintiff's dangerous position before they gave judgment in her favor, a single instruction charging that she must show not only that she occupied a dangerous position, but that such position was caused by defendant's negligence, is not open to the objection that it ignored her danger from the team and wagon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. ⟸ 253.]

9. STREET RAILROADS ⟸113—NEGLIGENCE—EVIDENCE—IMMATERIALITY.

In a pedestrian's action against a street railway company for injuries, where plaintiff was struck by the rear end of a car rounding a curve while she was walking between the car and a team and wagon, after she had left a place of safety on the street crossing, testimony of a traffic officer that the team and wagon had the right of way *held* immaterial.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 229–238; Dec. Dig. ⟸ 113.]

10. NEGLIGENCE ⟸100—GROSS NEGLIGENCE — CONTRIBUTORY NEGLIGENCE AS A DEFENSE.

Contributory negligence may be available as a defense to a claim founded upon gross negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 85; Dec. Dig. ⟸ 100.]

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by Carolyne Wood against the Los Angeles Railway Corporation. From an order denying plaintiff a new trial, she appeals. Affirmed.

Tanner, Taft & Odell, Tanner, Odell, Odell & Taft, and S. W. Odell, all of Los Angeles, for appellant. Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondent.

MELVIN, J. Action for personal injuries by Carolyne Wood, who, while attempting to cross West Ninth street, in the city of Los Angeles, was struck by an electric car belonging to the defendant corporation. The case was tried before a jury, and a verdict for defendant was given. Plaintiff moved unsuccessfully for a new trial, and she has appealed from the order denying said motion.

Appellant insists that the verdict was not justified by the evidence, and she attacks numerous instructions as being so erroneous that the jurors were misled greatly to her prejudice. Error is also predicated upon the refusal of the court to give certain offered instructions.

The accident occurred at or near the corner of Spring and West Ninth streets. Defendant operates cars upon double tracks extending along Ninth street and curving into Spring street, extending thence north from Ninth along Spring street. The car in question, which is about 40 feet long, had traveled south on Spring street and was turning into Ninth. It was on the right-hand track, that is the westerly track on Spring street and the northerly track on Ninth street. According to plaintiff's own testimony, she was going north on Spring street and she attempted to cross Ninth street. Just before crossing she saw a team coming from the east, that is, from Spring street into Ninth street. She started to cross in front of the team, which was attached to a heavy wagon. Then for the first time she saw a car coming around the curve at a rapid rate.

"I then turned," she testified, "and thought I would go back onto the sidewalk, and the team had gotten so it was directly back of me and was prancing. * * * It was advancing perhaps a little."

When she started across the street Mrs. Wood was west of the curve and opposite the straight part of the track on Ninth street. The front end of the car passed without striking her. When she was struck the back part of the car hit her, and she was opposite the curved portion of the track. When the car approached she went east. She said:

"The wagon was about stopped when I first saw the street car, with the horses just prancing, if not stopped, moving very slowly. The horses were nearly to me when I first saw the car. I was headed north. I hadn't turned at that time to walk towards the curve. The position of the wagon was back of me; south of me. I was going north. The horses were a little east and a little south of my position when I first saw the car. The team, I guess, was three or four feet away from me. When I first saw the car about two feet—I don't think over two feet—about two feet east and three or four feet south of me. * * * I was opposite the straight part of the track, west of the curve at that time. The car was coming rather fast around the curve. * * * I stepped back before the front end of the car got to me, towards the south. The car's front end passed me. Then I started again and turned and walked east towards the rear end. I don't know whether after I started, walking towards the rear end of the car, the team advanced. The rear end of the car swung around and hit me. I faced the wagon; I turned and faced the wagon. My back was towards the car. It struck me along the left side. * * * I don't know whether

that wagon stopped or went right along. * * * The car didn't hit the wagon at all."

Officer Bach, the policeman in charge of the traffic at that place, testified:

"I blew one blast of the whistle for the traffic to go east and west. That gives the West Ninth street car the right of way through there, and there was a gravel team going there with a pair of mules, and the car came down, and the front end threw the mules over one side, and they started up that side, and I looked around just in time to see this woman step in between them. When the back end come around she got caught in there; she couldn't get out. The horses kept going, and the car was going, so she didn't have any chance to get out, and I saw her roll around and fall down on the ground."

He also said:

"When I saw the plaintiff, she was standing on track No. B, as marked on the diagram, the track that the cars going east on Ninth and north on Spring street run. The next minute I saw her step in between the wagon and the car facing me, and the moment she stepped in between them I started right there, because I saw that she was going to be hit."

The motorman testified that upon receiving the proper signal he started the car around the curve. A wagon coming from East Ninth street across Spring street and about to enter West Ninth street got within about eight feet of him as he was making the curve, and then turned out to the left. When the front end of the car rounded the curve the motorman saw Mrs. Wood on the crossing. She was on the south track, and the fender of the car passed about four feet from her. He was making the curve slowly (at the rate of about three or four miles an hour), but the car was moving faster than the wagon. Just as the car turned the curve he received a signal (three bells) and stopped the car immediately. He looked around to see what was the matter, and observed the injured woman.

[1] Appellant's counsel contend that the motorman was negligent, in that, seeing the plaintiff on the curve and the prancing mules near by, he did not foresee an accident and stop his car instantly. The trouble with this contention is that he did not see her on the curve. She and he both testified that when the front end of the car passed her she was at the crossing opposite the straight track. The motorman testified that the team turned off to the left after coming near to the front end of the car at the beginning of the turn into Ninth street, and it does not appear that he saw the team or the wagon afterwards. The plaintiff, the conductor, and indeed all of the witnesses agree that when plaintiff was struck she was between the car and either the mules or the wagon. As the car was 42 feet long, and the team and wagon together less than half that length, obviously the motorman could not, without leaving his post, observe the mules nor the peril of the plaintiff just before the accident, nor could he see that Mrs. Wood had moved from her position opposite the straight tracks and had gone to a place near the curve where the rear end of the car in rounding the curve would strike her. While it is true that courts will not hold persons suddenly placed in peril to a nice selection of a place of safety nor blame them for lack of judgment under the stress of excitement and fear, nevertheless we cannot say that the jurors were not justified in believing that plaintiff was guilty of contributory negligence in running towards the prancing mules and the wagon, which was almost at rest, and placing herself between the swinging car on the curve and the team or the wagon, instead of seeking safety in the opposite direction or by standing still.

[2] It nowhere appears that the motorman ever was in a position to observe that Mrs. Wood was in peril from the prancing animals. It was not the duty of the motorman to keep watch of pedestrians after the forward end of the car had passed them safely. In a case similar to this the Supreme Court of Kentucky said:

"This court has in a long line of cases held that it is the duty of those in charge of a street car to keep a lookout so as to avoid injuring those who may be crossing or upon the street in front of the moving car. But this rule has never been so extended as to require the employés in charge of the car to keep a lookout at corners and curves so as to prevent others using the street from colliding with the rear end of the car." Louisville Ry. Co. v. Ray, 124 S. W. 314.

The same rule substantially is stated in Riddle v. Forty-Second St., etc., Ry. Co., 173 N. Y. 331, 66 N. E. 22; Waters v. United Traction Co., 114 App. Div. 275, 99 N. Y. Sup. 763; Widmer v. West End St. Ry. Co., 158 Mass. 53, 32 N. E. 899 (a case very similar in its facts to the one at bar); Garvey v. Rhode Island Co., 26 R. I. 80, 58 Atl. 456; Hayden v. Fair Haven & W. R. Co., 76 Conn. 357, 56 Atl. 613; and South Covington, etc., Ry. Co. v. Besse, 108 S. W. 848, 16 L. R. A. (N. S.) 890. In Hamlin v. Pacific Electric Ry. Co., 150 Cal. 783, 89 Pac. 1109, this court approved an instruction involving hypothetically a state of facts somewhat analogous to those which existed in this case. The jurors were told that if, when about a block away from the point of the accident, the motorman saw the plaintiff riding his bicycle parallel with the track and far enough away for the car to pass him in safety, and if, after giving warning, the motorman caused the front end of the car to be propelled safely past plaintiff, then the motorman was not negligent if the plaintiff altered his position with reference to the track so that the back step struck him. These cases furnish ample authority, if authority were needed, to sanction the ruling of the superior court that the verdict was supported by the evidence. The rule which permits a plaintiff who has negligently assumed a place of danger to recover damages depends upon actual knowledge of the danger by the person who inflicts the injury. Bennichsen v. Market St. Ry. Co., 149 Cal. 20, 84 Pac. 420; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15,

63 L. R. A. 238, 98 Am. St. Rep. 85; Herbert v. Southern Pacific Co., 121 Cal. 232, 53 Pac. 651; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 754, 134 Pac. 709; Tucker v. United Railroads (S. F. No. 6279) 154 Pac. 835, opinion filed January 17, 1916.

[3] The criticisms of the instructions are without substantial merit. An attack is made upon an instruction by which the jury was told in plain and direct language that the burden was on the plaintiff to prove the alleged negligence by a preponderance of the evidence. It was almost a verbatim copy of an instruction approved in Patterson v. San Francisco, etc., Ry. Co., 147 Cal. 182, 81 Pac. 531. It is said that the instruction was misleading because the jury might infer from it that plaintiff was required to produce other proof of negligence than the acts of the defendant's servant himself. There is nothing in the language of the instruction to justify such fear. It merely states a well-known rule in well-chosen and well-approved language. The same unmerited criticism is directed to another instruction by which the jurors were told that the burden was upon plaintiff to prove by a preponderance of evidence both defendant's negligence and the fact that it contributed directly or proximately to the injury.

[4] Nor was the jury misled because this instruction failed to consider the possible negligence of the driver of the mule team as one of the proximate causes. The jury was elsewhere fully charged on the subject of the concurring negligence of joint tort-feasors in an instruction offered by plaintiff.

[5] The jury was told that, where a street railway car is being operated with ordinary care, and the front end of it passes a pedestrian on the street, the motorman is not bound to assume that another vehicle to the rear of said car will be so carelessly driven as to crowd the pedestrian into the rear or any portion of said car. This instruction does not improperly assume that the wagon was behind the car if we interpret the expression "to the rear" as "toward the rear." The language is susceptible of such interpretation, and, as all of the evidence showed that the wagon was towards the rear of the street car at the time of the accident, the jury doubtless so understood it.

It was not error to instruct the jurors that, if they found that the front end of the car passed plaintiff in safety, and that afterwards she moved, and "either walked so close to the car that it struck her, or else that a team to the rear both of the plaintiff and of the car was driven in such a manner as to compel the plaintiff to walk in close to the track and hem her in between the team and the rear of the car, and she was struck as a result thereof," then and in that event plaintiff could not recover. This was in consonance with the rule declared in the Hamlin Case.

[6] One of the instructions, the giving of which is specified as error by plaintiff, was as follows:

"If from the evidence in this case you find that the plaintiff started to cross Ninth street, and that the front end of defendant's said car passed the said plaintiff, and that at the time it passed the said plaintiff the mule team was to the east of said plaintiff and to the east of the motorman, and that the said motorman had no reason to apprehend any danger to said plaintiff, and you thereafter find that the said rear end of the said car struck plaintiff, either by her voluntarily walking so close as to be in danger of being struck by the same, or by the mule team being carelessly driven so as to compel her to walk towards the car, then I charge you that the plaintiff cannot recover herein, and your verdict must be for the defendant."

Counsel say that the words "that said motorman had no reason to apprehend any danger to plaintiff" left to the judgment of the motorman, and not to the jury, a decision whether he apprehended danger or not. The instruction may not be properly so interpreted. The whole instruction has reference to the belief of the jurors and not that of the motorman. It simply means that, if from what the motorman knew and saw under the circumstances assumed by the instruction he had no reason to apprehend danger to the plaintiff, he could not be held responsible for her injuries. Of course, the decision regarding what he actually knew and saw was for the jurors upon full consideration of the evidence, and this prerogative was not taken from them by the instruction.

[7] Defendant's proposed instruction No. 11 given by the court was as follows:

"If from the evidence in this case you find that, as the front end of the defendant's car reached a point opposite where plaintiff was standing in the street, the said plaintiff was in a position of safety, and that she either remained in said position or stepped to the south and allowed the front end of the said car to pass her, and if you further find that at that time a mule team was behind the said plaintiff and behind the said motorman in charge of said car, and that plaintiff then turned and walked between the wagon and the end of the car towards the curve of the track, and was struck as a result thereof, then the court charges you that the plaintiff cannot recover herein, and your verdict must be for the defendant."

Appellant's counsel say that it was absurd to tell the jury that, if plaintiff "was in a position of safety and remained in said position," and was struck by the car, she could not recover. But the instruction has no such meaning or effect. The words "she either remained in said position or stepped to the south" clearly refer to the moment when she "allowed the front end of the car to pass her."

[8] Defendant's instruction No. 13 told the jury that it was not enough for plaintiff to show that she was in a dangerous position when crossing Ninth street, but "she must show that the dangerous position was caused by the negligence of the defendant." This instruction is attacked because it ignores her peril from the other vehicle and the prane-

ing mules. But the instructions did not require the jury to find that the negligence of the defendant was the sole cause of Mrs. Wood's dangerous position before they could give judgment in her favor. It simply charged that, if she was not placed in any danger by reason of defendant's negligence, she could not recover. That is to say, defendant's act or omission must have had some causal connection with plaintiff's danger before said corporation could become liable. The correctness of this rule can scarcely be questioned.

But there would be little profit in following further in detail appellant's many criticisms regarding the instructions. We have examined the court's charge as a whole, and find that the jury was fairly and correctly instructed regarding the law applicable to the evidence.

[9] The police officer, Bach, who described the approach of the wagon drawn by mules and the attempt to drive the animals into Ninth street just as the car was turning into that thoroughfare, said: "I thought they [meaning the mules and wagon] should have had the right of way." The court struck out this testimony, and properly. It was not shown that the failure to give the team the right of way had anything to do with the accident. Therefore the testimony was entirely immaterial.

[10] It is argued that:

"So gross was the neglect of the motorman in failing to stop his car when he saw the plaintiff in a position of extreme danger * * * contributory negligence cannot be imputed to the plaintiff, even though she walked toward the rear end of the car in an effort to escape and thereby came in contact with the car when it swung around the corner."

Waniorek v. United Railroads, 17 Cal. App. 121, 118 Pac. 947, is cited in support of the argument.

In the first place, it was not shown, as we have seen, that the motorman saw Mrs. Wood in a position of great peril; in the second place, contributory negligence may be available as a defense to a claim founded upon gross negligence (Sego v. Southern Pacific Co., 137 Cal. 407, 70 Pac. 279; Tucker v. United Railroads, supra); and, finally, the citation does not justify the argument. The case of Waniorek v. United Railroads was one in which the evidence showed that plaintiff, who was a passenger on an electric car, was frightened by the blowing up and burning of a "controller," caused by the negligence of the corporation. He jumped from the car and was injured. The court refused to give an instruction to the effect that, if an ordinarily prudent person, under like circumstances, would have done as plaintiff did then, he was not guilty of contributory negligence in leaping from the car. This refusal was held error, but the District Court of Appeal quoted with approval from Thompson on Negligence the declaration that the rule is based upon estoppel and "proceeds upon the theory that the misconduct of the carrier has produced the erroneous action of the passenger, and that it does not therefore lie in the mouth of the carrier to defend an action for damages on the ground of such erroneous action thereby taking advantage of his own wrong." The facts of the two cases are so strikingly dissimilar that the Waniorek Case is of no value as an authority in deciding this appeal.

The order denying appellant's motion for a new trial is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

171 Cal. 795

STEIL v. SUN INS. OFFICE OF LONDON. SAME v. LONDON ASSUR. CORP. SAME v. NORTHERN ASSUR. CO. (S. F. 6752.)

(Supreme Court of California. Jan. 31, 1916.)

1. APPEAL AND ERROR ⇐867—REVIEW—MATTERS REVIEWABLE.

Where the trial court, in granting a new trial, stated in its order that it was denied so far as the sufficiency of the evidence was concerned, that ground is excluded from consideration on appeal, but the appellate court may review any other ground, though new trial was denied on such ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476–3486; Dec. Dig. ⇐867.]

2. APPEAL AND ERROR ⇐854—REVIEW—ORDERS.

Though the trial court granted a new trial on an erroneous ground, yet if the new trial was properly granted, its action will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408–3424, 3427–3430; Dec. Dig. ⇐854.]

3. INSURANCE ⇐329 — FIRE POLICIES — ACTIONS.

Where a fire policy provided that it should become void if the hazard should be increased by any means within the control or knowledge of the insured, or if any change other than by death of the insured takes place in the interest, title, or possession, the reference to possession refers to the person having possession, rather than the location of the property, and a change in location does not avoid the policy under that provision.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 823, 824; Dec. Dig. ⇐329.]

4. INSURANCE ⇐327—FIRE POLICIES—CONSTRUCTION.

Where a fire policy declared that the goods were insured while located and contained in a described building and not elsewhere, it does not cover a loss of the goods by fire while they were out of the building; but, as the insured is not prohibited from removing the goods, a removal merely suspends the policy, which may be revived upon return of the goods to the building.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 792, 793; Dec. Dig. ⇐327.]

5. INSURANCE ⇐388—FIRE POLICIES—ESTOPPEL.

A fire policy insured goods while in a described building and not elsewhere. The insured removed them, notifying the insurer's agents of that fact, and they made no objection. *Held* that while ordinarily an insurer's failure to act on obtaining knowledge of facts which avoid or forfeit a policy operates as a waiver, the mere

failure of insured's agents to object to the removal does not operate as a waiver and extend the insurance to the new location, there being no prohibition against removal and a removal temporarily suspending a policy; hence to render the insurer liable there must have been some acts creating an estoppel or waiver.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. ⊂⊃388.]

6. INSURANCE ⊂⊃654 — FIRE POLICIES — ACTIONS.

Where the insured claimed that the insurer did not object to his removal of the goods covered to another building and consented that the policy apply to such premises, though there was no indorsement on the policy, evidence that the hazard was less at the new premises is admissible on the question whether the insurer had consented to a continuation of the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677, 1680, 1681, 1683–1685; Dec. Dig. ⊂⊃654.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Actions by Henry Steil against the Sun Insurance Office of London, the London Assurance Corporation, and the Northern Assurance Company, which were consolidated. There were verdicts for plaintiff, and, defendants being granted a new trial, plaintiff appeals, the causes being consolidated. Order affirmed.

Peter F. Dunne, C. W. Durbrow, and C. H. Wilson, all of San Francisco, for appellant. T. C. Van Ness, T. C. Van Ness, Jr., Chickering & Gregory, and Winfield Dorn, all of San Francisco, for respondents.

SHAW, J. Henry Steil had three policies of insurance covering goods situated in the Chronicle building in San Francisco, one issued by Sun Insurance Office of London, one by London Assurance Corporation, and the third by Northern Assurance Company. In January, 1906, he removed the goods to the Shreve building. He claims that this was done with the knowledge and consent of each of said companies, and that they agreed that the removal should not terminate the insurance provided by the policies. On April 19, 1906, the goods were destroyed by the great fire of that date. The companies refused to pay the loss, and thereupon he began three actions, entitled as above, against the respective companies, to recover the amounts due by the respective policies. These actions were consolidated for the purposes of the trial, the issues being practically identical in character. There was a trial by jury, and a verdict and judgment for the plaintiff in each case. Thereupon the defendants, respectively, moved for a new trial. The motion was granted. The plaintiff appealed from the order in each case. By agreement of the parties and with the consent of this court the appeals have also been consolidated, and are presented by a single transcript embracing the record in all the cases.

The order granting a new trial states that the court finds that the evidence was sufficient to justify the verdict, that the new trial was granted because the court was of the opinion that it had erred in giving two instructions to the jury set out in full in the order, and that it was denied with respect to all other grounds presented in support of the motion. The instructions referred to are as follows:

"(1) If you find from the evidence in this case that the assured notified, or caused to be notified, the defendants, or any of them, of the change of location of his goods, wares, and merchandise from the Chronicle building to the Shreve building, and that said defendant or defendants so notified remained silent and failed to object and cancel or rescind the contract of insurance and return the unearned premium, then I charge you that said defendant or defendants so notified, failing in this regard, is estopped from denying that its policy of insurance was in force and covered the goods, wares, and merchandise of the plaintiff in the Shreve building at the time of the destruction of the same by fire on the 18th day of April, 1906.

"(2) I charge you that an insurance company waives or is estopped from asserting a violation of the terms of an insurance contract such as is involved in a change of location of the assured property, if the company, on being notified of such violation or change of location, remains silent and fails to object or fails to declare a forfeiture or cancel or rescind the contract within a reasonable time, returning the unearned premium."

[1] Where the trial court, in granting a new trial, states in the order that it is denied so far as the sufficiency of the evidence is concerned, that particular ground is excluded from our consideration upon appeal from such order. With respect to any other ground advanced in support of the motion, however, the decision of the court below that the new trial was refused with respect to any one of them is not binding upon this court and, upon appeal, we may consider such question.

[2] If we find that the court below erred in granting the new trial, so far as the grounds upon which that court based the order are concerned, but conclude that the new trial should have been granted because of some other ruling on a question of law, which the trial court believed was not erroneous, we will affirm the order. Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Shanklin v. Hall, 100 Cal. 28, 34 Pac. 636; Thompson v. California, etc., Co., 148 Cal. 38, 82 Pac. 367; Weisser v. S. P. Co., 148 Cal. 428, 83 Pac. 439, 7 Ann. Cas. 636; Bresee v. Los Angeles Traction Co., 149 Cal. 134, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; Gordon v. Roberts, 162 Cal. 508, 123 Pac. 288. The respondents claim that there were such other rulings. The main questions, however, are those involved in the instructions aforesaid. A preliminary statement of the facts and of the law relating to them is necessary.

[3] The policies are all in the same form, and we will speak of them as if there were but one. In what may be termed the "insurance clause," the policy declares that the

company insures the goods "while located and contained as described herein, and not elsewhere," the place described being the Chronicle building. The description of the goods was immediately followed by the qualifying phrase, "all while contained in the Chronicle building." The policy provided that it could be canceled at any time "at the request of the insured, or by the company by giving five days' notice of such cancellation," and that in case of such cancellation the unearned premium should be returned on the surrender of the policy. It further provided that the policy should become void "if the hazard be increased by any means within the control or knowledge of the insured, * * * or if any change, other than by the death of the insured, takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard)," and the usual clause that no agent of the company had power to waive any provision of the policy, except by indorsement on the policy or by writing attached thereto. We think the above-quoted passage, relating to a change of "possession" of the goods, refers to the person having the possession, rather than to the location of the property, and it does not make the policy void where the only change relating to the possession is a mere change in the location of the goods by removal to another building.

About two months before the removal of Steil to the Shreve building a fire occurred in the Chronicle building which damaged his goods. This loss and the amount thereof due from each of the defendants was in process of adjustment at the time of the removal. The evidence on the question whether Steil notified the defendant companies of his removal to the Shreve building of the goods covered by the policy is in sharp conflict. That for the plaintiff tended to show that he had presented the policies to the defendants for the purpose of having the consent of the companies to the removal indorsed thereon, that owing to the pending settlement of the previous loss, he declined to leave the policies with the companies to have such indorsement made, and that he was thereupon informed by the agents of each of the defendants that it would be all right and that the goods were covered in the Shreve building, as before the removal. The facts that none of the companies have objected to the removal, or have given notice that the goods were not covered in the new place, are not disputed. It was to this condition of the evidence that the above instructions were addressed.

[4] As above stated, there is no provision in the policy that the removal of the goods should operate to annul it. The provision in the insurance clause that the goods were insured while contained in the Chronicle building, and not elsewhere, coupled with the qualified description, operated to relieve the company of further obligation, upon the removal of the goods from said building, with respect to the goods so removed. The qualification was a part of the description of the things insured. They were not merely the goods, but were the goods while contained in the Chronicle building. A loss of the goods by fire while they were out of the building would not be a loss covered by the policy, and the insured would not be liable therefor. Mawhinney v. Southern I. Co., 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87; Benicia A. Works v. Germania I. Co., 97 Cal. 468, 32 Pac. 512; Slinkard v. Manchester, etc., Co., 122 Cal. 595, 55 Pac. 417. This language of the insurance clause did not constitute a warranty, either express or implied, by Steil, that he would not remove the goods. The company had no occasion to demand of Steil a warranty against removal. Such removal would not increase its obligation, but would relieve it therefrom. The insurance clause completely protected it against a loss occurring to the goods in any other place. The language does not imply a warranty. Its effect is merely that the goods were insured only while kept in the building designated. There being no condition or covenant against removal, the result would be that while such removal would, for the time being, terminate the risk incurred by the company, it would not avoid the policy. If the goods were subsequently returned, the company would be liable, as before, for a loss occurring to them while in the building.

[5] In order to continue the insurance upon the goods, or, in other words, to carry it to the goods in the new location, something more was required than a mere notification by the insured to the insurer of the fact that the goods were, or were about to be, removed. That fact alone would only suspend the insurance risk. The insurer must be informed, or be given good cause to believe, that the party insured desired to have the insurance on the goods continued in the new place, that he wished a modification of the policy to make it cover the goods in the new location, and must then, by positive act, or by failure to act, cause the insured to believe that the insurer consented to such transfer or modification, and that the goods were covered by the policy. Something in the nature of a new agreement, either express, or implied from conduct or words, or created by estoppel, was necessary. The instructions informed the jury that a notification of removal, followed by silence and failure to cancel the policy and return the unearned premium, would operate to estop the insurer from denying that it had consented to the removal and had agreed that the policy should cover the goods notwithstanding such removal. They should have contained the additional premise that the assured, upon such notification, requested that the policy be transferred to the new location, or that the insurance be continued notwithstanding the removal, or something to indicate that the notification was given under circumstances

which would have given the insurer reasonable cause to believe that the assured desired or expected the matter to be so adjusted. The evidence concerning the notification referred to all indicated that such desire and expectation existed and was made known to the assured, but the instructions omitted all reference thereto. In this respect they were defective, incomplete, and possibly misleading.

It is stated in the briefs that the instructions were based on a passage from Cooley's Briefs on Insurance (vol. 3, p. 2665) regarding "the effect of an insurer's failure to act on obtaining knowledge of facts which either avoid or forfeit a policy," and saying:

"The weight of authority supports the proposition that an insurance company waives or is estopped to assert a violation of the terms of an insurance contract if the company, on being notified of the violation, remains silent and fails to object or to declare a forfeiture, or cancel or rescind the contract, within a reasonable time. This rule is, no doubt, in most cases based on the theory that it is a breach of good faith on the part of an insurance company to remain silent and inactive on notice of a breach, and to retain the unearned premiums, and so lead the insured to believe that his insurance contract is regarded as valid notwithstanding the breach."

This rule is doubtless applicable in all cases where the facts brought to the insurer's knowledge show some violation of the terms of the policy which, either by law or because of some provision of the policy itself, operates to avoid or forfeit the policy. As we have shown, the removal of the goods neither forfeited nor avoided the policy, and was not a violation of any of its express provisions. Some cases are cited which it is claimed support the position that a mere knowledge of removal, under such a policy, requires prompt action by the insurer by way of rescission or cancellation and return of the unearned premium, if it does not consent to the removal and to a continuation of the insurance in the new location. These are Pollock v. German Co., 127 Mich. 460, 86 N. W. 1017; Williamsburg v. Cary, 83 Ill. 453; Ohio, etc., Co. v. Burget, 65 Ohio St. 119, 61 N. E. 712, 55 L. R. A. 825, 87 Am. St. Rep. 596; McIntyre v. Liverpool, etc., Co., 131 Mo. App. 88, 110 S. W. 604; Shutts v. Milwaukee, etc., Co., 159 Mo. App. 436, 141 S. W. 15; Henschel v. Oregon, etc., Co., 4 Wash. 476, 30 Pac. 735, 31 Pac. 332, 765; and Maryland, etc., Co. v. Gusdorf, 43 Md. 506. An examination of the opinions in these cases shows that they did not involve instructions so bare of detail as those here given. In each of them the law was predicated upon a statement of facts which included a request, express or implied, by the assured to continue the insurance described in the policy, notwithstanding the removal of the goods insured to a place not covered by the terms of the policy. In the Ohio case, the policy provided that a removal of the goods without the consent of the insurer would forfeit the insurance. They are therefore not authority for the proposition that bare knowledge, or a mere notice of the fact of removal, followed by silence and inaction, will estop the company and carry the insurance to the new place. We are of the opinion that the court below was correct in its conclusion that these instructions do not fully state the law. We cannot say that its order was an abuse of discretion.

[6] It was not error to admit evidence that the Shreve building was a less hazardous location than the Chronicle building. It was material upon the disputed question whether or not the companies' agents had consented to continue the risk in the new place, showing that it was not against their interest, and, consequently, that it was more probable that they would consent than if the risk had been thereby increased. It tended to corroborate the testimony of the plaintiff's witnesses as to such consent. There are no other points that require notice.

The order is affirmed.

We concur: SLOSS, J.; LAWLER, J.

172 Cal. 1

RECTOR v. LEWIS et al. (L. A. 3642.)

(Supreme Court of California. Jan. 31, 1916.)

1. VENDOR AND PURCHASER ⊂⊃89 — CONTRACTS—RESCISSION—DELAY.

Where no time was fixed for performance by plaintiff of certain agreements with reference to the exchange of lands, unexplained delay from April 10th to June 11th warranted defendants in rescinding.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 148, 149, 151, 156; Dec. Dig. ⊂⊃89.]

2. SPECIFIC PERFORMANCE ⊂⊃130—JURISDICTION—RELIEF TO DEFENDANTS.

Where plaintiff filed suit for specific performance of a contract for the exchange of lands, he could not complain that a court of equity, having taken jurisdiction, granted relief to defendants, who cross-complained, asserting rescission.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 424, 425; Dec. Dig. ⊂⊃130.]

3. VENDOR AND PURCHASER ⊂⊃89 — CONTRACTS—RESCISSION.

Where defendants rescinded a contract for the exchange of lands and personalty on the ground of plaintiff's delay in performance, their right to rescind is not affected because it was agreed that defendants should pay plaintiff a small sum of money in respect to some of the personal property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 148, 149, 151, 156; Dec. Dig. ⊂⊃89.]

4. APPEAL AND ERROR ⊂⊃1073 — REVIEW — HARMLESS ERROR.

In such case the rendition of a judgment in favor of defendants, where an accounting was provided for, was harmless, though defendants were bound to make a payment to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240–4247; Dec. Dig. ⊂⊃1073.]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by J. L. Rector against Wellington J. Lewis and another, who cross-complained. From a judgmet for defendants and an order denying new trial, plaintiff appeals. Affirmed.

Smith, Miller & Phelps and M. M. Meyers, all of Los Angeles, for appellant. Geo. L. Sanders, of Los Angeles, for respondents.

MELVIN, J. Plaintiff sued for specific performance of an alleged contract for the exchange of real property. Defendants answered, pleading a rescission of the contract after breach thereof by the plaintiff, and by cross-complaint averred that plaintiff was wrongfully withholding their property from them. They prayed for restitution of the premises, for an award by way of damages, and for rent. The defendants were successful both in their defense and in their action upon the cross-complaint. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The important findings requiring discussion on this appeal were to the effect that plaintiff had not surrendered to defendants or to either of them the property which was to be exchanged for the realty which is the subject of this suit; that by means of misrepresentation plaintiff had obtained entrance upon the property of defendants in Los Angeles county on February 15, 1912, and that, on the 17th day of the same month, by threats and intimidation, he had compelled them to yield possession of the premises to him, a possession still retained by him at the time of the action; that after frequent vain demands upon plaintiff for performance of the contract defendants rescinded it on the 11th day of June, 1912; that plaintiff during his occupancy had made certain improvements on the land which were equal to the value of the use thereof exclusive of the crops grown thereon; and that up to the time of the receipt by him of the notice of recission of the contract plaintiff had not attempted in good faith to carry out the terms of the agreement with defendants. An interlocutory decree was given following these findings and ordering an accounting between the parties with reference to the personal property.

The contract was evidenced by two certain writings. By the first of these W. J. Lewis agreed to transfer the land in question, located in Los Angeles county, together with all the personal property thereon (except certain named chattels) for $15,000, the consideration being certain lands in Nebraska, subject to an existing lease continuing from March 1, 1912. The land in Nebraska was to be subject to two mortgages of $1,000 each, and the property in California to a mortgage of $3,000. The closing paragraph of this written instrument was as follows:

"Time being the essence of this agreement, it is hereby agreed by both parties hereto that said Lewis is to look at the Nebraska land within 30 days, and upon his approval within that period of time all papers appertaining to both parties' lands are to be placed in escrow with Los Angeles Abstract & Trust Company, 325 So. Hill St., Los Angeles, Cal., which company will deliver to each party the certificates of title and complete the deal for all concerned.

"W. J. Lewis.
"Beulah V. Lewis.
"J. L. Rector."

This agreement was dated January 11, 1912. The court found that on January 23, 1912, the defendants placed in escrow all of the documents so required to be deposited by them according to the agreement.

On April 10, 1912, the plaintiff and defendant, W. J. Lewis, signed the following writing:

"It is agreed that the adjustment of all matters pertaining to personal property which should have been left on place sold by Mr. W. J. Lewis to Mr. J. L. Rector leaves a balance due of $10.00 from Mr. Lewis to Mr. Rector. Mr. Rector agrees to procure for Mr. Lewis a written lease of a certain 240 acres in Nebraska and turn same over to Mr. Lewis, said lease to be duly executed by M. S. Johnson, G. I. Johnson, and Charles Johnson, lease running from March 1, 1912, to March 1, 1913, Mr. Lewis to be entitled to interests of Mr. Rector in and to all crops on any of the Nebraska land included in the transaction as of the date of Jan. 23/12."

On June 5, 1912, by a formal letter the defendants offered to complete the transaction by delivering to Rector a proper grant deed to the property belonging to them, together with a certificate of title and all other papers to be by them delivered. The closing paragraph of this letter was as follows:

"And we hereby demand that you carry out your part of said escrow agreement immediately and without any further delay upon your part."

The letter of rescission signed by both defendants and dated June 11, 1912, was based upon the failure of plaintiff to carry out the terms and conditions of the escrow agreement.

Appellant's first contention is that, as no time was specified in the second writing within which he was to secure a tenant and execute the transfer of the property in Nebraska, he was entitled to a reasonable time for doing those things, and that the time allowed was, under the circumstances, most unreasonable. He calls attention to the fact that on July 8, 1912, he tendered to defendants warranty deeds to the Nebraska property from himself and wife, abstracts of title, insurance policies, and two leases, one between himself and one Sheffield, dated February 15, 1912, and another signed by himself and G. I., M. S., and C. C. Johnson, dated June 1, 1912, for a portion of the land in Nebraska. It appears that one of the leases—that signed by Sheffield—was not contemplated in the agreement of April 10, 1912. Therefore, under appellant's own theory, the belated offer does not fill the exact measure of the two agreements.

[1] But upon broader principles we cannot

say that the chancellor erred in determining that the delay from April 10, 1912 (the date of the supplemental agreement), to June 11th of the same year (the date of the rescission) was unreasonable and that such delay, coupled with the other facts and circumstances, supported a finding that Mr. Rector had not, prior to June 11, 1912, attempted in good faith to carry out the terms of the contract. It was in evidence that appellant, without giving anything in return had, on February 17, 1912, by threats and intimidation, compelled defendants to yield possession of their property to him. The court found that the testimony on this point was true. It was also in evidence that respondents wrote numerous letters to Mr. Rector requesting compliance on his part with the contract, but that no results were obtained. These circumstances might well have justified the court in the finding of lack of good faith.

[2-4] The judgment of restitution was fully in accord with the pleading and proof of the cross-complaint. Having invoked the jurisdiction of a court of equity, and that court having determined that he is not entitled to specific performance of the contract of exchange, the appellant may not well complain that his dispossession of the land was unwarranted. He reminds us that there were other things to be done besides the passing of deeds between him and Mr. and Mrs. Lewis and instances the circumstance that the agreement of modification recites the obligation on the part of the respondents to pay $10 due on "the adjustment of all matters pertaining to personal property." Respondents were not obligated to pay the $10 as a prerequisite to rescission of the contract or to the maintaining of their suit by cross-complaint. This money was to be paid as part of the consummation of the transfer of the property. It was not an independent debt or a partial payment on the contract which Mr. and Mrs. Lewis were bound to restore before they could seek equity. It was in evidence that Mr. Rector had given the respondents absolutely nothing in return for the use of the land prior to the rescission of the contract. Therefore the item of $10 must have been merely an estimated charge which would accrue upon the final consummation of the agreement to exchange the two parcels of land. In any view of the matter appellant will not be harmed because there is to be an accounting between the parties to this suit.

Appellant attacks the cross-complaint as insufficient because in itself it did not present facts sufficient to constitute a cause of action against the plaintiff. It is conceded by respondents that such facts must be pleaded in a cross-complaint, but appellant's counsel do not point out the particulars in which the pleading is vulnerable. They content themselves with the general statement that sufficient facts are not alleged. They do not give their reasons for their belief that the cross-complaint should be ignored. We have examined it, and agree with the learned judge of the superior court who overruled plaintiff's demurrer to the cross-complaint. Under the circumstances we do not feel called upon to give in detail our reasons for such agreement.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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GINTY et al. v. OCEAN SHORE R. CO. et al.

(S. F. 7080.)

(Supreme Court of California. Feb. 3, 1916. Rehearing Denied March 2, 1916.)

1. RAILROADS ⟸195 — FORECLOSURE OF TRUST DEED—PURCHASE BY BONDHOLDERS—REORGANIZATION COMMITTEE — CHANGE OF PLAN.

Defendant, a railroad company, had issued bonds secured by deed of trust. Default having been made in the payment of interest on the bonds, the trustee declared both principal and interest due, as was provided for in the deed of trust, and instituted foreclosure proceedings. Under a provision in the trust deed that the bonds might be used to buy in the property on foreclosure, the bondholders appointed a committee with whom the bonds were deposited under an agreement whereby the committee, in its discretion, could purchase the property at the sale and reorganize the railway on any plan deemed practicable "and to do anything they may deem to be for the best interests of the bondholders." The property having been so purchased, the committee announced a definite plan for the organization of a new corporation with a capital stock of $9,000,000, with provisions for bond issues to meet all outstanding obligations and to be issued to the previous bondholders in discharge of the original bonds. The scheme having proved impracticable, and the property being in immediate danger of resale by new lienholders, the committee adopted and put in execution a new plan whereby a new corporation was organized, with a capital stock equaling the amount of the original bond issue; the committee conveying all the property of the old company to the new corporation for the latter's agreement to issue its stock to those whom the committee might name, and causing the issuance of the stock to the old bondholders in amounts identical with the face value of their holdings. This action was brought by several original bondholders to enforce the committee's first plan as a trust and to have the second reorganization declared void on the ground that the committee's first plan became a fixed and irrevocable trust upon its declaration. *Held* that, upon the failure of the first plan, the second reorganization was valid under the committee's authority to do anything it might deem to be for the best interests of the bondholders.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 656–658, 660; Dec. Dig. ⟸195.]

2. RAILROADS ⟸195—BONDHOLDERS' SUIT—COMPLAINT—AMENDMENT.

Where a party plaintiff to such action had not deposited any bonds with the committee or signed the agreement, it appearing that she had bought her bonds at a pledgee's sale, the bonds having been pledged by the committee under a special agreement with a bank, from which she bought, her motion for leave to amend, so as to set up her purchase of the bonds, was properly denied, where such amend-

ment did not allege that the bonds had ever been deposited by the pledgee bank or by her with the committee.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 650–658, 660; Dec. Dig. ⟸195.]

3. RAILROADS ⟸195—REORGANIZING RAILROAD—BONDHOLDERS' SUIT—PARTIES PLAINTIFF—"PARTY SIMILARLY SITUATED."

In a bondholders' suit to enforce a railway reorganization agreement and to prevent the reorganization committee from changing the plan of reorganization, a bondholder, who had not signed the agreement or deposited her bonds with the committee in conformity therewith, but who had purchased her bonds at a pledgee's sale of bonds which the committee had pledged to a bank, was not a proper party plaintiff to such action, since she was not "a party similarly situated" with the other plaintiffs within Code Civ. Proc. § 382, providing for joinder of parties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 650–658, 660; Dec. Dig. ⟸195.]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by John Ginty and others against the Ocean Shore Railroad Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Morrison, Dunne & Brobeck, Edward Lynch, and Stratton, Kaufman & Torchiana, all of San Francisco, for appellants. W. W. Kaufman, of San Francisco, specially appearing for appellant Folger. J. Howard Smith, in pro per. Edward J. McCutchen and A. Crawford Greene, both of San Francisco (McCutchen, Olney & Willard, of San Francisco, of counsel), for respondents.

HENSHAW, J. This action was brought to enforce a trust, and in enforcing it to have declared void the reorganization of the Ocean Shore Railway Company into the Ocean Shore Railroad Company, defendant. Added as defendants to the corporation are the members of the reorganization committee, the trustees who effectuated that reorganization. John Ginty, plaintiff, is or was a bondholder of the Ocean Shore Railway Company. After the commencement of this action he was joined by other bondholders in seeking the relief indicated. The court in equity found against all of the contentions of the plaintiffs and gave its decree for defendants. From that decree this appeal has been taken and all of the evidence is presented for consideration. This brief indication of the nature and result of the action it is necessary to follow with a detailed statement of fact.

The Ocean Shore Railway Company was organized as a railroad corporation under the laws of the state of California. It purposed to construct, build, and operate a railroad extending along the Ocean Shore from San Francisco to Santa Cruz. It was capitalized for $5,000,000, and all of its capital stock was subscribed; the stock owners having paid on their holdings approximately $2,250,000. It had also issued its bonds in the sum of $5,000,000 under a deed of trust executed to the Mercantile Trust Company of San Francisco. These bonds had been sold to and were owned by many persons. In November, 1909, the company defaulted in the payment of interest upon its bond coupons, and again defaulted on May 1, 1910. The Mercantile Trust Company, pursuant to the provisions of the deed of trust, then declared the principal and interest of the bonds to be due, and on June 7, 1910, gave notice of sale in accordance with the provisions of the trust deed empowering it so to do. Prior to this date (in December, 1909), a creditors' bill was filed by the Baldwin Locomotive Works in the federal Circuit Court against the railway company. Answer thereto was filed and a receiver was appointed by the court. He took charge of the railroad property on that date. Following the notice of sale so given by the Mercantile Trust Company, the stockholders and creditors of the company (other than the bondholders) caused the Mercantile Trust Company to be made a party to the action in the federal court. It obtained from that court authority to proceed with its sale under terms and conditions expressed in the court's order. At this time the financial and physical condition of the railway company and of those interested in it was, roughly stated, as follows: At the time when the sale was effectuated there was chargeable against the property the comparatively small sum of $135,000, representing the expenditures of the receiver. The stockholders had paid in about $2,250,000 upon their subscriptions of $5,000,000 capital stock. There was owing to the bondholders $5,000,000, and there was owing to other creditors about $2,250,000, approximately $500,000 of which was unsecured. The distance between San Francisco and Santa Cruz by way of the railroad is 83 miles. Part of the road outward from the two termini had been constructed, but there was an uncompleted gap of 26 miles. The road was unprofitable, in the sense that its earnings could not make a fair, or indeed any, return upon the money invested in it.

Under the terms of the trust deed, the bondholders were empowered to use their bonds on the sale of the properties in payment of the purchase price. The usual procedure in such cases followed. The bondholders were called together to enable them in combination to use the purchasing power of their bonds effectively and to take steps looking to the reorganization of the road, in the event that the organized bondholders should become the purchasers. On July 22, 1910, at a meeting of the bondholders a committee of five was selected to represent the body. The members of that committee are the defendants in this case, saving that upon the original committee was A. C. Kains, whose place was later taken by Walter S. Martin.

On July 29, 1910, the committee approved the form of an agreement under which the bondholders of the railway company should be called upon to deposit their bonds with the committee. On August 1st following, this agreement was sent by the committee to every bondholder of the Ocean Shore Railway Company, with an explanatory letter. This agreement of July 29th, as it was called and may for convenience be called, is one of the important documents in the controversy, and therefore requires further exposition. Its importance arises from the facts that it was the first and only document signed by the depositing bondholders and (standing alone) defines in full the powers and trusts upon which the committee acted for the bondholders. It declares its purpose to be the purchase of the properties of the railway company by and on behalf of the bondholders. Under it the depositing bondholders were to place their bonds with the Union Trust Company, "there to remain for a period of nine months from this date unless sooner withdrawn and used in accordance with the terms of this agreement." When bonds to the face value of $2,500,000 or upwards had been deposited, then such deposited bonds could be used by the committee in its discretion "for the purpose of applying the same upon the purchase price of the property of said Ocean Shore Railway Company so to be sold." Furthermore, it expressly authorized the committee "to proceed with a reorganization of the said Ocean Shore Railway on any plan deemed practicable and to do anything they may deem to be for the best interests of" the bondholders. Expenses incurred or disbursements made by the committee "shall be repaid to them ratably," the committee, however, serving without compensation. And finally it was provided that:

"There shall be no personal liability or responsibility attached to the signers of this instrument,—that is to say there shall be nothing hereby implied or obligated by signature other than the power of the disposition of the bonds alone, said bonds only being held for any expenditures and not the owners thereof."

The sale sanctioned and ordered by the federal court fixed the minimum selling price at $1,035,000, but required the payment upon the fall of the hammer of $166,000 cash in payment of preferred liens under the receiver's certificates. It was incumbent upon the committee, therefore, to be prepared to pay on the sale that amount of cash. Moreover, under the terms of the deed of trust, the bondholders who did not deposit would be entitled to be paid in cash on their bonds an amount equal to the amount credited upon the deposited bonds which were used in the purchase of the properties, and it was distinctly declared in the agreement of July 29th that only the bonds of the depositing bondholders should be liable for all necessary expenditures. It was important to the committee then to secure the deposit of as many bonds as possible, as every bond deposited decreased proportionately the amount which would have to be paid in money to the non-depositing bondholders. (This narrative must here be interrupted to direct attention to the fact that November 3, 1910, becomes a date of consequence in this consideration because upon that date the committee adopted a plan of reorganization, which appellants contend absolutely concluded and bound them in all their future proceedings, and which plan of organization admittedly is not the plan which the committee finally put into effect.) The problems confronting the committee were: First, to secure money sufficient for the cash payment to be made on the sale; and, second, to secure the deposit of as many bonds as possible. Without the money they could do nothing, and to the securing of this the committee first bent its efforts. They estimated that, besides the $166,000 payable under the court's order, about $50,000 more would be immediately required for the care and preservation of the railway properties. No bank or other financial institution would advance any money upon the security of the deposited bonds, and as a last expedient the members of the committee secured an agreement, called the "Underwriter's Agreement," whereby their friends pledged their personal credit in stated amounts aggregating $500,000, agreeing to pay the committee their respective proportions of this amount to enable it to meet the expenses necessarily incurred in the purchase and reorganization of the road. The five members of the committee personally pledged themselves in this agreement to the sum of $130,000. This Underwriter's Agreement was assigned by the committee to the Union Trust Company of San Francisco, and upon its security that institution advanced to the committee amounts aggregating $250,000, agreeing that if necessary it would make further advancements up to $400,000. Additionally the committee was called upon to pledge and did pledge as security for this loan all of the bonds which had been deposited, and finally a deed of trust to all the properties which it purchased at the sale. Thus by these efforts the committee overcame its immediate financial difficulties. Touching its second problem, that of securing the bonds, prior to November 3d bonds to the amount of $2,695,000 had been deposited. By January 17, 1911, the date of the sale, a total of $4,785,000 worth of bonds out of the entire $5,000,000 issue had been deposited, all of the depositors signing, and signing only the agreement of July 29th.

Besides the exigency of these matters to which we have adverted and which were vital to the accomplishment of the committee's design of purchasing and reorganizing, the equities of others were from time to time pressed upon the attention of the committee. Thus in September, 1910, the prin-

cipal stockholders of the railway company appeared before the committee and suggested that "some recognition be given to stockholders and unsecured creditors." Again, on September 14th, the stockholders appearing before the committee expressed the hope that "some agreement could be made by which the claims of stockholders and unsecured creditors as well as those of the bondholders might be recognized." At a meeting of September 21st the firm of Lilly & Heins, claiming to be preferred creditors, appeared and requested that the committee agree to put in a protective bid for the property of at least $3,000,000. The minutes show that the creditors "were told that, while there was a moral equity in their claims, no plan of reorganization had yet been adopted and the committee was not in a position to make any promises." Plans of reorganization were proposed and considered. On September 3d such a proposed plan was prepared by Mr. Bradley of the committee. On September 23d another such plan was tendered by Mr. Martin, who subsequently succeeded Mr. Kains on the committee. On September 30th a plan similar to that proposed by Mr. Martin was adopted by the committee. On this date Mr. Bradley of the committee stated:

"That in view of the approaching date of sale he considered it proper to formally present a plan that had been informally discussed by the committee, and that he would recommend to the approval of the committee the following plan of reorganization, in the event of the bondholders purchasing the road."

After discussion the committee "resolved the foregoing proposed plan for reorganization of the Ocean Shore Railway Company be adopted as the plan of this committee." Finally, on November 3d, the committee in like manner adopted another plan, which the appellants in the court below and here contend defined and circumscribed the committee's powers and limited its activities to the effectuation of the adopted plan, with such modifications and with such modifications only as might be necessary to accomplish the main purposes, but not permitting any radical departure from those expressed purposes. The minutes show that this plan, like the plan of September 30th, was adopted. It in terms provided for the organization of a corporation with a capital stock of $9,000,000 and a bonded indebtedness of $9,000,000. Of this bonded indebtedness of $9,000,000, there was to be $3,500,000 of first mortgage bonds; $3,300,000 of these bonds were to be used to complete and equip the road. The remaining $200,000 of these bonds were to be deposited in the United States Circuit Court to secure and pay the preferred claims of creditors. A second mortgage bond issue of $5,500,000 was to be made, $5,000,000 of this being used to take up by way of exchange the outstanding $5,000,000 of first mortgage bonds, and the remaining $500,000 of these bonds were to be used to pay delinquent interest on the first mortgage bonds, and should this sum of $500,000 not be sufficient for the purpose the old bondholders were to accept common stock at par in payment of the deficiency. Still further, $500,000 preferred stock was to be issued and used to pay the claims of unsecured creditors, estimated at that time to be $425,000. Finally, the $8,500,000 worth of common stock was to be issued and was to be disposed of as follows: $425,000 of it was to be given as a bonus to those persons providing the money enabling the committee to finance the cash bid secured by the Underwriter's Agreement; $2,875,000 was to go as a bonus to aid in selling the first mortgage bonds; $1,375,000 was to pay coupons upon the second mortgage bonds; and the final $3,825,000 of this common stock was to be prorated amongst the stockholders of the old company. Finally the plan provided:

"It is understood that the committee reserves to itself and shall have the right to change any of the provisions of this proposed plan to meet conditions as they arise, and the committee shall be the sole judge of the necessity and propriety thereof within the meaning of this clause."

A sale was so had upon January 17, 1911. The properties were purchased by the committee for the amount fixed in the court's order, the committee being the only bidder at the sale. On February 1, 1911, the sale was confirmed. On February 9, 1911, the committee executed a declaration of trust which set forth in full the agreement of July 29th, and declared that the committee held the properties purchased under that agreement.

From this time forth the committee busied itself actively in the matter of reorganization. But the undisputed testimony is that all the overtures of the members of the committee looking to reorganization upon or along the lines of the plan of November 3d were utterly rejected by the financiers to whom they were submitted. They said: "Ridiculous! We cannot consider it at all." No outside capital could be allured into the enterprise. And if confirmation be needed to the abundance of direct testimony establishing this, it is found in the fact that, when the reorganization was effected by creating a corporation capitalized for $5,000,000, the bondholders receiving stock in proportion to their bond holdings, an effort was made by this committee to place $700,000 bonds of this corporation—a corporation owning all of the property of the road, free from debt—and the committee with its best efforts was able to secure subscriptions for only about one-quarter of the proposed issue. Having earnestly and unsuccessfully attempted to effect the reorganization in accordance with the plan of November 3d, the committee then endeavored to sell the property. But all efforts to this end were equally unsuccessful. These efforts continued through the spring and summer of 1911. By September, 1911, the committee had become convinced that no inducements which they could offer would secure

the investment of capital in the reorganization and rehabilitation of the road, and thereupon the members were confronted with a new situation fraught with danger to the interests which they represented. The indebtedness to the Union Trust Company, to which reference has been made, which was secured by the Underwriter's Agreement, by the pledge of the bonds and by a deed of trust covering all the purchased properties, fell due on September 17th. The trust company had positively declined to grant further extensions of time. There was urgent need of work upon the road itself to prevent damage from the approaching winter storms and to keep it up even to its imperfect condition of service. Indebtedness for necessary equipment had been incurred by the committee. The underwriters had announced that if they should be compelled to pay the trust company under their agreement they would immediately foreclose the lien which they had upon the properties of the road. A sale under this lien foreclosure would have swept away all the bondholders' rights without equity of redemption. From the date of the purchase the road had been operated by the committee, and the members of the committee had incurred personal responsibility and liability therefor. The situation, as summed up by defendant Moore of the committee, was this:

"We simply were up against it; with the underwriters withdrawing; the bank not only not lending us more money, but notifying us to pay; we had no money, and our condition was desperate."

Something had to be done, and the committee then proceeded with the organization of the Ocean Shore Railroad Company, the defendant in this suit. It was capitalized for $5,000,000, divided into 50,000 shares of the par value of $100 each. The committee conveyed all the property of the old railway company to the new corporation, receiving in return the agreement of the new corporation to issue its stock to those whom the committee might name. The committee directed the issuance of this stock to the old bondholders in amounts identical with the face value of their bond holdings. This was in December, 1911. On December 29th the committee executed a power of attorney to J. W. Crosby, authorizing him on behalf of the depositing bondholders to accept the shares of stock in the new corporation which were apportioned to these bondholders. Before doing this, in November, the committee passed a resolution declaring that it had found the plan of November 3d to be impracticable and that it was the sense of the committee that it "should proceed to effect the most practicable and expeditious reorganization at the present time." The organization which we have last outlined is the organization which the members of the committee insist was not only the most practicable and expeditious reorganization, but absolutely the only reorganization which would preserve the bondholders' rights, and this by reason of the fact that the bondholders in purchasing the property through their committee had become the real owners of it, holding title (saving for the trusteeship in the committee) in the awkward and unmanageable condition of ownership in common. As such owners, the property being impressed with a public duty, it was incumbent on them to see that by its operation it performed the purpose of its existence. It was useless for the committee to attempt to convey in severalty to each bondholder his proportionate share of the title. The simple, direct, expeditious, and only practicable course open to them was that which they adopted—that of organizing a corporation, capitalized for the exact amount of the bondholders' securities, and conveying to each stockholder in the form of stock the proportionate interest which he had in the properties. Thus was effectuated a legal and convenient means by which the bondholders themselves could operate the properties, or dispose of them, as they saw fit. In this connection the court found:

"That if said committee had conveyed to each bondholder who had deposited his bonds with said committee, and which said bonds had been used in effecting the purchase of said properties, an undivided proportionate interest in the properties so acquired, the properties themselves would have been unmanageable, their value would have been destroyed, the franchises purchased by said committee could not have been availed of, and the interest of all said bondholders in said properties would have been entirely lost and destroyed; that it would have been impossible to have borrowed money for their operation or improvement; and that the Union Trust Company of San Francisco would have proceeded, as it at that time threatened to do to sell said properties, and to thus shut out and absolutely foreclose the rights of said bondholders in and to the said properties. That it was a fact that, unless money had been secured to pay said indebtedness to it, or assurances given to Union Trust Company of San Francisco that said indebtedness would be paid, said Union Trust Company would have sold, and that it then threatened to sell, unless said payment was made, all said properties, and the rights of those who had deposited their bonds with said committee, in and to the said properties, would have been destroyed and rendered valueless. That said sale would not have been made subject to any redemption."

There was pressing need for the payment of some of the indebtedness above mentioned. To meet this, a bond issue of the new corporation of $700,000 was authorized. It was hoped that the old bondholders themselves would take up this issue. The necessity of raising this money was explained to them, as was also the whole plan of reorganization. The old bondholders would not subscribe for the new bonds. The most earnest efforts of the committee succeeded in securing the wholly inadequate subscription of $280,000.

Again, the committee had failed and was still confronted with the danger of foreclosure by the Union Trust Company or by the underwriters, and on January 18, 1912, the new corporation levied an assessment of

$10 per share upon its stock. The assessment became delinquent on February 26, 1912. The sale day was March 18, 1912. Meetings of the depositing bondholders were held from time to time, when all of these matters were fully discussed and all the difficulties laid before them. Such meetings were held on December 1, 1911; February 23, 1912; and March 12, 1912. At none of these meetings did any bondholder raise any objection to this reorganization. Discussion was had as to the practicability of raising the money by a new bond issue substituted for the assessment. Discussion was had as to whether the assessment might not be reduced to $5 per share. The minutes declare that "the sense of the meeting was practically unanimous that the assessment should stand."

On March 16, 1912, two days before the sale day of the delinquent stock of the new corporation, this action was brought; the principal contention of plaintiffs being, as heretofore outlined, that the agreement of July 29th is to be construed with the approved proposed plan of November 3d, and that the duties of the committee were therefore limited to an effort to put the plan of November 3d in operation, that the trust so declared became fixed and irrevocable, and if for any reason the trust could not be performed it became the duty of the trustees either to surrender their trust to the bondholders, or go into a court of equity and obtain their discharge.

We are now nearly, but not quite, in a position to discuss this main contention. Certain matters preliminary to the main consideration must first be treated and disposed of. At the outset, it is to be noted that the only rights involved in this case are the rights of the plaintiff bondholders, who alone are concerned in this litigation. Thus, assuming for the moment that appellants' construction of the written instrument is the true one, we are here in no way concerned with the rights of the stockholders or general or preferred creditors under the agreement of November 3d. If that agreement be a contract for their benefit (Civ. Code, § 1559), no one of them here appears to enforce his rights. The same is true of representations made by the committee to certain bondholders, which representations, it is asserted, confirm the agreement of November 3d and make it irrevocable. If this be true, it did so only so far as those particular bondholders are concerned, and no one of these bondholders is here complaining. As to these plaintiffs, not parties to, and, so far as the record is concerned, not even aware of, any of these stipulations, the representations or agreements were res inter alios acta. Still further it is to be pointed out that touching these plaintiffs and appellants themselves they are the owners of bonds aggregating $404,000 face value. Four of the appellants, whose bonds aggregate $117,400 face value, never deposited their bonds at all, and therefore can by no possibility have any rights in this litigation. Thus bondowners of but $272,900 face value of the bonds may be heard to complain. Of this amount $224,400 face value of the bonds were deposited under the signed agreement of July 29th before November 3, 1910, and therefore before the November 3d agreement came into existence. But $48,500 of these bonds were deposited after November 3d, and of these the owners of $27,500 worth accepted stock in the new railroad corporation defendant, and thus ratified the committee's acts and that reorganization. And there is no word of evidence disclosing that the bondholders to the small amount who deposited their bonds after November 3d, and who in doing so signed and signed only the agreement of July 29th, ever knew of the existence of the proposed plan of November 3d. And, finally, it is but proper to add that, while appellants contend that the result of the committee's abandonment of the plan of November 3d and of the reorganization actually effected by the committee was to work a fraud upon them, this fraud is in its nature a resultant rather than a designed fraud. The members of the committee were for the most part bondholders and stockholders. They were men of business prominence and financial standing. They gave their time without compensation and worked with unflagging zeal to bring about a happy solution of the business complications put under their charge. In the plan which they finally adopted and effectuated they entered and shared upon precisely the same terms as did all of the other bondholders. Their good faith is unquestionable, and indeed by the appellants is unquestioned. The dispute between the litigants thus arises wholly out of different constructions put upon the committee's powers.

[1] Thus we come again to the principal question in the case—the construction of those powers as between the complaining bondholders and their committee. No question arises, nor can arise, over the right of assenting bondholders to confer upon such reorganization committee substantially unlimited powers with unlimited discretion in the exercise of them. The bondholder "may go further and agree in advance that his bonds shall be subjected to any plan of reorganization which the committee may adopt." Colonial Trust Co. v. Wallace (C. C.) 183 Fed. 897. This is precisely what was done by the declaration of July 29th, which constituted the one and sole written authority to the committee signed by the bondholders themselves. Appellants contend that the agreement of July 29th must be construed with the approval of the proposed plan of November 3d, and to the doing of this there cannot be the slightest objection. But when appellants

seek by their construction of the two agreements read together to have it said that the trust imposed in the committee became fixed, inelastic, and unchangeable, they do violence to the language as well as to the spirit expressed in the agreement of July 29th. That agreement was drawn, as appears from the face of it and from the evidence touching its execution, with the design to confer upon the committee plenary powers, the bondholders recognizing the magnitude of the difficulties, and being more than willing to trust to the business ability and good faith of the members of the committee. Taking the two instruments together, what do they not mean? They do not mean, as appellants contend, that all of the important provisions of the agreement of July 29th touching the committee's rights and powers have been stricken out and eliminated, and that the committee was thus limited to the single effort of endeavoring to carry out the agreement of November 3d. Reading the two agreements together and fairly construing them, they amounted, at least, so far as these bondholders plaintiffs are concerned, to nothing more than an agreement upon the part of the committee that it would first use its best endeavors to see whether an organization could be effected upon the plans and lines laid down in the November 3d agreement, with such departures therefrom as might be necessary to the accomplishment of this end; but that, failing of ability to do this thing, there was still in reserve their broad powers to effectuate any other organization which in their judgment seemed to be best and for the best interest of the bondholders.

So the learned judge of the lower court construed this agreement, and in so construing it we think he was wholly right. There ceases to be, therefore, the slightest occasion for the review of the authorities, which, nevertheless, have been duly considered by this court. This is not the case of an agreement between bondholders and stockholders to the attempted exclusion of the rights of creditors who must be recognized if the stockholders are to be recognized. The bondholders have the unquestioned right, without regard to any of the equities of the stockholders or creditors, to foreclose their lien and bid in the properties. Miller v. Dodge, 28 Misc. Rep. 640, 59 N. Y. Supp. 1074; Farmers' Loan & Trust Co. v. G. B. & M. Railroad Co. (C. C.) 6 Fed. 110. Moreover, as we have said before, neither the stockholders nor the creditors are here complaining. Nor yet is a reorganization whereby the old bondholders become the stockholders of the new railroad at all unusual. Indeed, it is declared by the Supreme Court of the United States to be the best way of effecting such reorganization, "that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required." Shaw v. Railroad Co., 100 U. S. 612, 25 L. Ed. 757. See, also, White v. Wood, 13 N. Y. Supp. 631;[1] Gates v. Boston & N. Y. Airline Ry. Co., 53 Conn. 333, 5 Atl. 695; Somerset Ry. v. Pierce, 88 Me. 86, 33 Atl. 773. The cases cited and relied upon by appellants are quite unimpeachable in logic and law, but they are cases which deal with the rights of creditors when the bondholders and stockholders have combined upon a reorganization to the exclusion of the creditors, or where the bondholders have agreed upon a plan of reorganization which defines the powers of the bondholders' committee and under which alone that committee can act, or, finally, where the reorganization agreement is to be formulated thereafter, with a reserved right to the depositing bondholders to withdraw from the agreement and take back their bonds, if within a limited time after the submission of the plan they are dissatisfied with it. None of those cases touches the situation here presented, where the matter of the reorganization was wholly intrusted to the judgment of the committee.

[2] What has been said concludes our review of the principal case. One further matter, however, remains to be considered. Clara E. L. Folger was a party to the amended complaint, which alleged ownership by her of bonds of the face value of $76,000. Mrs. Folger had not deposited any bonds or signed any agreement. They were deposited by her husband, who is not a party to this proceeding, and the agreement of July 29th was signed by him. It was asserted that on August 28, 1912, Mrs. Folger purchased at the pledgee's sale 500 bonds which had been held in pledge by the Wells Fargo Nevada National Bank of San Francisco. These bonds had been deposited with the committee by that bank pursuant to the agreement of July 29th and to a special agreement entered into between the bank and the committee. During the trial Mrs. Folger asked leave to amend and set up the purchase of these bonds. At the conclusion of the trial the court denied the motion. Mrs. Folger's proposed amendment did not allege that the 500 bonds referred to had ever been deposited by the bank or by Mrs. Folger with the committee. This in itself justified the court's refusal in permitting the amendment.

[3] But, moreover, if it be contended that Mrs. Folger in purchasing at the pledgee's sale acquired the alleged rights growing out of a special agreement of the committee with the bank, then it is manifest that the cause of action upon which Mrs. Folger relies is not the cause of action set forth by the plaintiffs, and that Mrs. Folger's sole redress would be by her own independent action; that she is not "a party similarly situated"

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 59 Hun, 619.

with the other plaintiffs, within the meaning of section 382 of the Code of Civil Procedure. The leave to amend was therefore properly denied.

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

(171 Cal. 790)

SALTER v. IVES et al. (L. A. 3620.)

(Supreme Court of California. Jan. 31, 1916.)

1. FRAUDS, STATUTE OF ⟸116—AUTHORITY OF AGENT.

In view of Civ. Code, §§ 1624, 2309, and Code Civ. Proc. §§ 1971, 1973, which provide that the leasing of real property for a period of more than one year must be by a conveyance or instrument in writing subscribed by the owner or by his lawful agent authorized in writing, the written authorization from the owner, to be sufficient to permit the agent to enter into a binding contract of lease, must express within its terms the intention of the owner to confer upon the agent complete authority to do so.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 251–260; Dec. Dig. ⟸116.]

2. PRINCIPAL AND AGENT ⟸103—POWER TO EXECUTE INSTRUMENTS.

The mere employment by the owner of an agent to sell or lease his property is usually insufficient as a grant of power to execute a binding conveyance or lease.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278–293, 353–359, 367; Dec. Dig. ⟸103.]

3. CONTRACTS ⟸169 — CONSTRUCTION — EXTRINSIC CIRCUMSTANCES.

In view of Civ. Code, §§ 1625, 1637–1639, which provide that when a contract has been reduced to writing the intention of the parties is to be ascertained from the writing alone, if possible, "surrounding circumstances" are to be considered only where the terms of a contract are such as to make the intention of the parties uncertain.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. ⟸169.]

4. PRINCIPAL AND AGENT ⟸100—AUTHORITY TO MAKE LEASE—"NEGOTIATE."

The words "we hereby authorize you to negotiate a lease," do not authorize the agent to execute a lease in the name of the owner, but merely empowers him to procure a tenant for the property.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 262–273, 345, 364, 368–373; Dec. Dig. ⟸100.

For other definitions, see Words and Phrases, First and Second Series, Negotiate.]

Department 2. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Amanda M. Salter against Fred F. Ives (sued herein as Fred S. Ives) and others, in which the defendant named interposed a cross-complaint. Judgment for the plaintiff, and defendant named appeals. Affirmed.

Tracy Chatfield Becker, of Los Angeles (Herbert J. Goudge, of Los Angeles, of counsel), for appellant. Karl E. Steinhauer, Willis I. Morrison, and Hunsaker & Britt, all of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued to quiet title to certain property in the city of Los Angeles. Defendant Ives answered, asserting that he had obtained a lease of the property from one Toombs who, as he alleged, was duly authorized to make such contract by the plaintiff. Ives also by cross-complaint sought specific performance of this alleged lease. The court sustained a demurrer to the amended answer and cross-complaint of Ives, and upon his failure to amend further, judgment was entered by default. From that judgment defendant and cross-complainant appeals.

The only question involved in this appeal is whether or not Toombs was authorized to execute a lease for the property. The writing on which appellant depends was signed by Mrs. Salter. The opening paragraph was as follows:

"April 26th, 1912.

"Mr. F. L. Toombs, 620 S. Hill St., Los Angeles, Cal.—Dear Sir: We hereby authorize you to negotiate a lease on the south fifty feet of lot eight, Ord's survey, block twenty-five, Los Angeles, state of California, on the following terms, to wit."

Then follow the terms including the construction of a building, the amount of rent, the duration of the lease, etc. The concluding portion of the contract is as follows:

"In consideration of your efforts in negotiating said lease, I hereby agree, that in case you or others associated with you, shall secure a tenant on the above-named terms, you or your assigns shall be entitled to a commission of $6,000 which I agree to pay out of the first year's rental. If the first year's rental be payable in advance, then the commission shall be payable immediately in cash. If, however, the rental, according to the terms of the lease shall be payable monthly, then I agree to pay the commission at the rate of $500 per month. It is strictly understood that this is not an exclusive contract. This contract is good for six months and only six months.

"[Signed] Mrs. A. M. Salter."

[1] The appellant cheerfully concedes at the outset (as indeed he must) that the written authorization from the owner, in order that it may be sufficient to permit the agent to enter into a binding contract of lease must express within its terms the intention of the owner to confer upon the agent complete authority so to do. Sections 1624 and 2309, Civ. Code; sections 1971 and 1973, Code Civ. Proc.

[2] It is also conceded that the mere employment by the owner of an agent to sell or lease his real property will usually be held insufficient as a grant of power to execute a binding conveyance or lease. That these concessions embody the law on the subject there can be no doubt. Speaking of the power of an agent to sell or lease realty, the District Court of Appeal used the following language in the opinion in Church v. Collins, 18 Cal. App. 748, 124 Pac. 552:

"If such authority is intended to be conferred, the language used in conferring it should be so clear, distinct, and certain in its meaning to

that end as to leave no room for doubting that such is its purpose."

See, also, Duffy v. Hobson, 40 Cal. 244, 6 Am. Rep. 617; Armstrong v. Lowe, 76 Cal. 617, 18 Pac. 758; Grant v. Ede, 85 Cal. 419, 24 Pac. 890, 20 Am. St. Rep. 237; Stemler v. Bass, 153 Cal. 791, 96 Pac. 809.

Appellant's contentions are, in brief, first, that the language of the contract, particularly the expression "we hereby authorize you to negotiate a lease," confers on the agent the power to enter into a contract of lease on behalf of his principal; and, second, that the pleading of surrounding circumstances such as Mrs. Salter's intention to leave the State and her absence from California during nearly all of the period of six months limited by the terms of the contract of agency, as well as the fact that she was anxious to lease the premises in question, compel the interpretation of that agreement which he wishes us to give to it.

[3] There is no force in his second point because "surrounding circumstances" are only considered when the terms of a contract are such as to make the intention of the parties to it uncertain. Civ. Code, §§ 1625, 1637, 1638, and 1639. If we adopt respondent's view that there is no uncertainty, then the surrounding circumstances are not pertinent (Hawley v. Brumagim, 33 Cal. 398; Pierce v. Merrill, 128 Cal. 472, 61 Pac. 64, 79 Am. St. Rep. 56); and if we concede the existence of ambiguity or uncertainty, the agreement must be ineffective because of the rule announced in such cases as Church v. Collins, supra, that the language itself must be free from doubt. Unless, therefore, the power to execute a lease was clearly conferred by plaintiff by the terms of the agreement itself upon Toombs, the judgment in this case must be affirmed.

That the power to lease was not conferred upon the agent we are certain. Appellant's counsel argue learnedly that there is a vast difference between the expressions "to negotiate a lease" and "to negotiate for a lease"; that if the contract had been one merely employing Toombs to procure a tenant for the premises, the latter expression would have been used; and that the verb "to negotiate" means "to bargain," "to arrange for a sale," "to transfer for a valuable consideration." Conceding that the word "negotiate" may in some connections be construed to involve the sale or transfer of some property right, we are furnished with no authority holding that in contracts for the sale or renting of real estate it has ever been so interpreted. In Oullahan v. Baldwin, 100 Cal. 651, at page 655, 35 Pac. 310, at page 312, the contract under consideration was one by which the brokers were authorized "to negotiate a sale" of certain property. This court used this language:

"The brokers were simply authorized to negotiate a sale. Their contract was completed and their commissions earned when they produced a purchaser within the five days, ready, willing, and able to purchase upon the terms stated in the contract of employment."

In Lindley v. Keim, 54 N. J. Eq. 423, 34 Atl. 1073, the court adopted this language of Mr. Vice Chancellor Pitney (now a Justice of the Supreme Court of the United States):

"The mere employment of an ordinary real estate broker to effect a sale of a parcel of land, even though the price and terms be prescribed, does not amount to giving present authority to such broker to conclude a binding contract for the same. Moreover, such authority is not usually to be inferred from the use by the principal and broker in that connection of the terms 'for sale' or 'to sell' and the like. Those words in that connection usually mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms."

The term "negotiate" in an agreement somewhat similar to this has been construed to mean "conversation in arranging the terms of a contract" (Northrop v. Diggs, 128 Mo. App. 223, 106 S. W. 1123), and in the state of Washington it has been held that one empowered by a writing "to make and negotiate a sale" of real property may neither give an effective deed nor execute a contract for a deed to one desiring to purchase the land (Carstens v. McReavy, 1 Wash. 361, 25 Pac. 471).

[4] The contract upon which defendant and cross-complainant seeks to build his case is clearly an ordinary agreement empowering an agent to procure a tenant and engaging to compensate him in the event of his success. It is absolutely lacking in authorization to consummate a lease in the name of the owner.

Neither Rutenberg v. Main, 47 Cal. 213, nor Bacon v. Davis, 9 Cal. App. 83, 98 Pac. 71, is in conflict with anything contained in this opinion. In the former, as was said of it in Stemler v. Bass, supra:

"It clearly appeared that it was intended by the owner to clothe the agent with authority to do generally whatever was necessary to make the proposed sale binding upon the principal."

And in the latter, as the court said in Church v. Collins, supra:

"The agreement in that case expressly and specifically conferred upon the agent 'the exclusive right to sell for me, in my name and receipt for deposit thereon' the land described in said agreement."

In the contract here under review there was not even an exclusive agency and there was no authorization for the doing of anything in the name of the owner of the property.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

172 Cal. 6

McEWEN v. OCCIDENTAL LIFE INS. CO.
(L. A. 3611.)

(Supreme Court of California. Jan. 31, 1916.)

1. JUDGES ⇐51—CHANGE OF JUDGE—AFFIDAVIT—DISCLAIMER OF BIAS AND PREJUDICE—CONCLUSIONS.

A motion to strike from the trial judge's affidavit, as conclusions, statements wherein he disclaimed the bias and prejudice on which plaintiff sought a change of judge, was properly denied.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. ⇐51.]

2. JUDGES ⇐51—CHANGE OF JUDGE—AFFIDAVITS—DISCLAIMER OF JUDGE.

An affidavit of the trial judge disclaiming the bias and prejudice for which plaintiff sought a change of judge to hear defendant's motion for new trial was sufficient to overcome plaintiff's slight showing of bias and prejudice, which consisted principally of a showing that the judge expressed dissatisfaction with the verdict, and during the trial had made various rulings adverse to plaintiff.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. ⇐51.]

3. APPEAL AND ERROR ⇐1051 — HARMLESS ERROR — BIAS AND PREJUDICE — ADMISSION OF AFFIDAVIT—CHANGE OF JUDGE.

Where the judge's affidavit disclaiming bias and prejudice was sufficient to overcome a showing made by plaintiff in proceedings under Code Civ. Proc. § 170, to secure a change of judge to hear defendant's motion for new trial, the admission of the affidavit of the official court reporter, from which it appeared that the judge stated that, instead of letting the case go to the jury, he should have directed a verdict for defendant, if error, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. ⇐1051.]

4. JUDGES ⇐49 — CHANGE OF JUDGE — GROUNDS—ERRONEOUS RULINGS.

Erroneous rulings against a litigant, even when numerous and continuous, furnish no ground for a change of judge on account of bias or prejudice to hear a motion for new trial, especially where they are subject to review.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188; Dec. Dig. ⇐49.]

5. JUDGES ⇐49—CHANGE OF JUDGE—BIAS—EXPRESSION OF OPINION.

The trial judge's statement on receiving the verdict that he did not see how the jury could have reached such verdict did not show bias or prejudice entitling plaintiff to a change of judge to hear defendant's motion for new trial, where it appeared that such statement was based on the judge's actual observation of the witnesses and his consideration of the evidence.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188; Dec. Dig. ⇐49.]

6. JUDGES ⇐49—CHANGE OF JUDGE—BIAS—CHANGE OF OPINION.

That the statement of the trial judge on receiving a verdict for plaintiff that he did not see how the jury could have reached such a verdict was inconsistent with his previous action in refusing a directed verdict for defendant and submitting the case to the jury did not show bias or prejudice entitling plaintiff to a change of judge to hear the motion for new trial.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188; Dec. Dig. ⇐49.]

7. NEW TRIAL ⇐128 — SPECIFICATION OF GROUND—SUFFICIENCY OF EVIDENCE.

In an action on an accident policy, a specification of a ground of a motion for new trial complied with the requirements of Code Civ. Proc. § 659, requiring such specifications, where it stated that there was no evidence tending to prove that insured's death was not due to the concurrence of nephritis and rheumatism with the effects of his fall, and then stated, "but, on the contrary, the evidence proves by an overwhelming preponderance that, if the said fall * * * contributed * * * to the death, * * * it served merely to accelerate * * * the diseases, * * * and, at most, concurred with said diseases in bringing about such death."

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257–262; Dec. Dig. ⇐128.]

8. NEW TRIAL ⇐128—SPECIFICATION OF GROUND—SUFFICIENCY OF EVIDENCE.

In an action on an accident insurance policy, a specification of a ground for new trial that there was no evidence tending to prove that insured and plaintiff had fulfilled the conditions of the policy, but that, on the contrary, insured had made a specified false warranty, and that plaintiff refused to permit an autopsy of his body, sufficiently showed defendant's theory and the evidence to which it was desired to call the court's attention, though it be conceded that the burden was on defendant to negative the warranties, and it failed to do so.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257–262; Dec. Dig. ⇐128.]

9. INSURANCE ⇐646—ACTION ON POLICY—DEFENSE—BURDEN OF PROOF.

Where, in an action on an accident insurance policy, the execution and delivery of the policy were admitted, the burden was on the defendant to sustain the contentions made by it in its answer that statements made by insured by way of warranty were false.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645–1668; Dec. Dig. ⇐646.]

10. APPEAL AND ERROR ⇐302 — GROUNDS FOR NEW TRIAL — DEFECTS IN SPECIFICATIONS.

Defects in the specifications of ground for new trial will not preclude the Supreme Court from considering the case on appeal where the adverse party had not been injured by such defects.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744–1752; Dec. Dig. ⇐302.]

11. NEW TRIAL ⇐70—GROUNDS—SUFFICIENCY OF EVIDENCE.

In an action on an accident insurance policy wherein defendant contended that insured died, not as a result of an accident, but from rheumatism and nephritis, *held*, that an order granting a new trial because the evidence was not sufficient to support a verdict for plaintiff was warranted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. ⇐70.]

12. APPEAL AND ERROR ⇐843—REVIEW—IMMATERIAL MATTERS—EVIDENCE.

Where, on appeal from an order granting a new trial after verdict for plaintiff in an action on an accident insurance policy, the evidence furnished by plaintiff herself was such that the granting of the new trial was not an abuse of discretion, and it did not appear that the court was influenced by a physician's certificate assigning rheumatism and nephritis as the cause of insured's death, it was unnecessary for the Supreme Court to consider the admissibility of the certificate in evidence or the constitutionality of the statute making such a cer-

tificate prima facie evidence of the cause of death.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. ⟸ 843.]

13. Appeal and Error ⟸977—Documentary Ruling—Granting of New Trial.

The granting of a new trial cannot be disturbed on appeal in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. ⟸ 977.]

14. Appeal and Error ⟸1015—Granting of New Trial—Review.

Where an order granting a new trial is in general terms, it will be affirmed on appeal if it can be sustained on any of the assigned grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876; Dec. Dig. ⟸ 1015.]

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Rachel A. McEwen against the Occidental Life Insurance Company, a corporation. Verdict for plaintiff. From orders granting a new trial, refusing to transfer the motion for new trial to another judge, and denying motions to strike out affidavits, plaintiff appeals. Affirmed.

See, also, 20 Cal. App. 477, 129 Pac. 598.

Murphey & Poplin, of Los Angeles, for appellant. J. W. McKinley, Benjamin E. Page, and A. W. Ashburn, Jr., all of Los Angeles, for respondent.

MELVIN, J. Plaintiff, who is the widow of Charles R. McEwen, brought this action upon an accident insurance policy upon the theory that deceased met his death by reason of an accidental fall. The defense was that the insured died, not as the result of accident, but of rheumatism and nephritis. The verdict was in favor of the plaintiff. Defendant moved for a new trial upon the minutes of the court. The notice of intention to make the motion specifies insufficiency of the evidence to justify the verdict, that the verdict was against law, and errors of law occurring at the trial and excepted to. The motion was granted. Plaintiff appeals from the order granting the motion for a new trial, and also from an order denying her motion to transfer the motion for a new trial and the cause to another department or to call in another judge. There are also appeals from orders denying motions to strike out parts of the affidavit of the judge, and all of that of E. C. Thompson.

We will first consider the motion by which it was sought to disqualify the judge of the superior court to hear the motion for a new trial. The affidavits of the plaintiff and her daughter alleged, in substance, that the case was tried originally before the Hon. J. P. Wood in January, 1911, and that at the close of plaintiff's testimony defendant's motion for a nonsuit was granted; that thereafter plaintiff made a motion for a new trial and to set aside the judgment of nonsuit, which was granted; that upon defendant's appeal this ruling was upheld by the District Court of Appeal (20 Cal. App. 477, 129 Pac. 598); that after the first trial Mrs. McEwen believed Judge Wood to be prejudiced against her; that she so informed her attorneys, and told them that she was willing to make an affidavit to that effect; that they persuaded her not to do so and to allow the cause to remain in Judge Wood's department for trial without protest on her part; that when the verdict was returned and was read by the judge the following occurred:

"That affiant was looking at the judge when he was reading the paper, and saw the expression on his face; that she noticed that he changed color and appeared to be very angry, and before the verdict was read aloud he turned to one of the attorneys for the defendant and said: 'I will entertain a motion for new trial upon the minutes of the court at any convenient time. I do not see how the jury could possibly have reached this verdict.' And affiant further understood him to say, although he used a lower tone of voice, 'And I will grant a new trial,' but with relation to the last remark of the court, owing to the low voice which he used, she is not altogether certain that he made the remark, but she believes that he did."

The affidavit of Mrs. McEwen also contained the following language:

"To further show that said judge is prejudiced and biased against her, affiant says that on the trial she noticed that generally on any objections made by counsel for defendant that said judge decided against plaintiff in nearly every important particular, that on the trial, among other things, he allowed former physicians of the deceased to testify to certain matters over the objection of plaintiff's counsel that the same was privileged, but that after the case was closed and just before reading the instructions, without any motion on the part of plaintiff's attorney, he struck out the said evidence, as having been improperly allowed before the jury, but allowed the certificate of death which was made by one of the physicians who attended deceased before his death to remain, and which had been objected to by her counsel as privileged and hearsay."

Judge Wood made and filed an affidavit denying any bias or prejudice against the plaintiff or her cause of action, and denying also that he had said as alleged in Mrs. McEwen's affidavit that he would grant defendant's motion for a new trial. He did say upon receipt of the verdict:

"I do not see how the jury could possibly have reached this verdict."

Mr. Thompson, the official court reporter, made an affidavit regarding the proceedings on the motion for transfer of the cause under section 170, Code of Civil Procedure. It appeared from this affidavit, among other things, that the judge stated his belief that, instead of letting the case go to the jury, he should have directed a verdict in favor of the defendant.

[1-3] The affidavit of the judge was entirely pertinent, and the motion to strike out, as

conclusions, those parts in which he disclaimed bias and prejudice, was properly denied, because his state of mind was the very matter in dispute, and he was in a better position to know his own feelings toward the plaintiff than any one else. Besides, it was his duty, if he could do so, to negative the allegations of prejudice under oath in the form of an affidavit, reciting his mental attitude. Keating v. Keating, 169 Cal. 759, 147 Pac. 974. This affidavit was in itself sufficient to overcome the very meager showing made by the plaintiff in her effort to establish prejudice on the part of the judge. It makes little difference therefore whether Mr. Thompson's affidavit was, strictly speaking, admissible or not.

[4, 5] Plaintiff's affidavit shows that after ruling against her in the first trial Judge Wood granted her motion for a new trial, that an appeal was taken by her opponent, and that she prevailed over that opponent in the Court of Appeal. We fail to see how these facts indicated any bias or prejudice on the part of the judge. On the contrary, they evidenced a desire to do justice which caused the judge frankly to admit that his ruling in granting the nonsuit was incorrect. Next we find that the plaintiff feared she would not be fairly treated on the second trial; but her state of mind is not evidence. She complains that the judge generally decided against her on objections made by her counsel, but she does not show, nor even assert, that such rulings were not generally justified. Three of the four rulings of which she makes specific complaint seem to have been reversed by the court of its own motion. We refer to those by which the privileged communications made by deceased to three physicians were first admitted, and then stricken out. Surely these things do not indicate prejudice. On the contrary, they exhibit a desire on the part of the court to be fair. Erroneous rulings against a litigant, even when numerous and continuous form no ground for a charge of bias or prejudice, especially when they are subject to review. Estudillo v. Security Loan, etc., Co., 158 Cal. 66, 109 Pac. 884; Burke v. Mayall, 10 Minn. 287 (Gil. 226); State v. Bohan, 19 Kan. 28; Stahl v. Schwartz, 67 Wash. 25, 120 Pac. 856; Bell v. Bell, 18 Idaho, 636, 111 Pac. 1074; State v. Barnett, 98 S. C. 422, 82 S. E. 795. Nor are a judge's expressions of opinion uttered in what he conceives to be the discharge of his judicial duty evidence of bias or prejudice. State v. Bohan, supra; State v. Crilly, 69 Kan. 802, 77 Pac. 701; Ex parte Fairbank Co. (D. C.) 194 Fed. 978; Epstein v. United States, 196 Fed. 354, 116 C. C. A. 174.

The vexation of the judge and his remark that he did not see how the jury could possibly have reached such a verdict does not show prejudice against Mrs. McEwen. These things indicated, perhaps, that he had formed an opinion regarding the legal questions which had been presented in the case and in reference to the sufficiency of plaintiff's proof. Such conviction in the mind of the judge, based upon his actual observation of the witnesses, the hearing of their testimony, and his knowledge of the law applicable to such cases does not amount to that prejudice against a litigant which the statute contemplates as a basis for change of venue. Western Bank of Scotland v. Tallman, 15 Wis. 92.

[6] Appellant argues that the demeanor of the judge at the time when the verdict was returned was inconsistent with the previous submission of the case to the jury after denying a motion for a directed verdict in favor of defendant. But such inconsistency (if inconsistency it be) does not prove prejudice. It merely indicates that upon maturer consideration of the case than the court had given at the time of the submission thereof to the jury the judge deemed it his duty, under his oath, to grant a new trial. The showing of prejudice was very slight, and, in our opinion, it was met so fully by the affidavit of Judge Wood that there can be no doubt of the justness and propriety of the court's action in denying the motion made by plaintiff under section 170, Code of Civil Procedure. The subject of alleged disqualification of a judge has recently received so full and careful consideration in the matter of the Estate of Friedman, 153 Pac. 918, that we need not review it anew with any degree of elaboration. Judge Wood's suggestion that a motion for a new trial should be made upon the minutes of the court was no more sinister in this case than was Judge Graham's remark to Mr. Woodworth in one of the proceedings in the Friedman estate that counsel "should not appeal" from a certain order. If Judge Wood displayed annoyance at what seemed to him the misconception by the jury of the effect or weight of the evidence, he merely showed what almost every judge of a trial court has felt at times; yet such feeling with reference to the insufficiency of the case presented by one of the litigants is not the prejudice which the statute makes the basis for its removal to another court. Frequently the possession of such a feeling is a proof of the legal learning and the sense of justice of the presiding jurist who harbors it.

[7] Counsel for appellant insists that specifications of insufficiency of evidence numbered VII, IX, X, XI, and XII are improper, because they relate to matters for proof of which the burden was upon defendant, and because the affirmative statements in the specifications as to what the evidence showed are mere conclusions. The seventh specification recites that there was no evidence proving or tending to prove that Mr. McEwen's death was not due to the concurrence of nephritis and rheumatism with the effects of his fall, if any. It then concludes as follows:

"But, on the contrary, the evidence proves by an overwhelming preponderance that, if the said fall suffered by the said McEwen contributed in any manner or degree to the death of said McEwen, it served merely to accelerate the progress of the diseases from which the said McEwen was then, suffering, and the last stages of which were then approaching, to wit, nephritis and rheumatism, and, at most, concurred with said diseases in bringing about said death."

This, we think, sufficiently directed the attention of the court and the adverse party to the particular point on which the evidence was claimed to be insufficient, and thus measured up to the requirements of section 659, Code of Civil Procedure.

[8-10] The ninth specification is to the effect that there is no evidence proving or tending to prove that Charles R. McEwen and plaintiff fulfilled the conditions of the policy, but that, on the contrary, he made a certain quoted warranty which was false, and she refused to permit an autopsy upon his body after death. It may be that, under the pleadings the burden was on the defendant to negative the warranties in the policy, and that it failed to do so, but this specification and the others which are attached sufficiently show defendant's theory and the evidence which it was desired to call to the court's attention. It is our opinion that, the execution and delivery of the policy being admitted, the burden was upon the defendant to show the falsity of statements of Mr. McEwen made by way of warranty; such statements having been attacked by the answer. If the defendant failed, as appellant asserts, and no such proof was made, we must assume that the court granted the motion for some other reason. There are other specifications the form of which appellant does not attack. For example, the eighth specification is, in substance, that there was no evidence overcoming the prima facie case established by the certificate of death attributing the decease of Mr. McEwen to rheumatism with nephritis as a contributory cause. We cannot see that the opposite party was injured by the alleged defects in some of the specifications, and for that reason we will not refuse to consider the case on appeal. American Type, etc., Co. v. Packer, 130 Cal. 461, 62 Pac. 744; In re Yoakam, 103 Cal. 503, 37 Pac. 485; Abbott v. Jack, 136 Cal. 513, 69 Pac. 257; Seymour v. Oelrichs, 156 Cal. 789, 106 Pac. 88, 134 Am. St. Rep. 154.

[11] Without reviewing the testimony very extensively, we may say that Mr. McEwen had been confined to the house with a serious illness for a number of days. Dr. Ferbert was in attendance. The condition of the patient was such that he required the constant nursing of his wife or his daughter. On the night of the fall his daughter had persuaded her mother to take some rest, and she, the daughter, was taking care of the patient. During the night Mr. McEwen wished to go to the bathroom. He arose from a recumbent position and sat on the edge of the bed with his feet upon the floor. He then sent his daughter to summon her mother from a room across the hall, and during the absence of the former from the apartment of the sick man he fell. When his wife and daughter arrived in his room they found Mr. McEwen with his head doubled under his shoulder in a limp manner. He was unconscious. They placed him on the bed, and he became conscious in a few minutes. He complained of a pain in his neck. He grew worse, and died about 24 hours afterward. All of these facts appear from the testimony of plaintiff's witnesses. Dr. Phillp, called by the plaintiff, testified that he examined the body of Mr. McEwen after death. He found an abrasion on the outer part of the left arm—"a scraping of the epidermis," as he described it. He also testified as follows:

"And I turned the body over, and saw what we call ecchymosis or discoloration of the skin over the neck and back of the left shoulder extending down the back a short distance. It was a deep purple discoloration, fading off. I didn't see any other marks or discolorations on the body. I looked over the body to see whether there were others or not. In my opinion, that bruise or discoloration was caused before death, because there was a faint bruise still about the scrape on the arm, and the ecchymosis or discoloration was apparently fresh and localized."

He further stated that it was possible for a healthy person to be struck a blow on the shoulder or neck which would not break any bones, but would cause death. On cross-examination he said that such a thing was possible, but not probable. He had been asked a hypothetical question on direct examination based upon a statement of some of the circumstances in evidence, but would not venture to say what the cause of death would be in view of such circumstances. On cross-examination he said:

"From the matters stated in the hypothetical question asked me I believe it is impossible to tell or determine the cause of death. The only possible way to determine it would be by an autopsy."

Other physicians testified that the post mortem conditions did not result from a blow or fall, and that there was a swelling of the leg which might be a symptom of nephritis, or a diseased condition of the heart or liver. Unquestionably there was no autopsy. Upon this evidence the court might well have concluded that there was no sufficient showing to support the burden of proof which was upon plaintiff.

[12-14] Appellant attacks the ruling whereby the certificate made by Dr. Ferbert and assigning rheumatism and nephritis as the causes of death was admitted in evidence. It is not necessary for us to go into this matter nor to discuss the constitutionality of the statute which makes such a certificate prima facie evidence of the cause of death. There is no showing that the court depended upon the certificate of Dr. Ferbert in reaching the conclusion that the motion for a new trial

should be granted. Without the certificate and upon the evidence furnished by plaintiff herself there was ample scope for the exercise of that wide discretion which is committed to a trial court in granting or denying a motion for a new trial. Unless there has been an abuse of discretion, the action of that court is conclusive. The order was in general terms, and it must be affirmed if it can be sustained upon any of the assigned grounds. Gordon v. Roberts, 162 Cal. 508, 123 Pac. 288; Condee v. Gyger, 126 Cal. 547, 59 Pac. 26; Empire Investment Co. v. Mort, 169 Cal. 736, 147 Pac. 960.

Clearly the court was guilty of no abuse of discretion in granting the motion for a new trial.

The orders from which plaintiff appeals are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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MOSS et al. v. SMITH et al. (S. F. 6412.)

(Supreme Court of California. Jan. 29, 1916.)

1. CORPORATIONS ⟸326—CREATION OF EXCESSIVE DEBT — LIABILITY OF DIRECTORS — PUNITIVE STATUTE.

Civ. Code, § 309, making participating directors jointly and severally liable to the corporation and to creditors thereof to the full amount of a debt created beyond the subscribed capital stock, though it be conceded to be remedial so far as the creditor is concerned, is highly punitive so far as concerns the directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1443, 1460½, 1469, 1498; Dec. Dig. ⟸326.]

2. CORPORATIONS ⟸326 — CREATION OF EXCESSIVE DEBT—LIABILITY OF DIRECTORS—PUNITIVE STATUTE.

That an action brought by a creditor under such statute may be treated as in the nature of a creditor's bill brought on behalf of the plaintiff creditor and all others, and that it thus addresses itself to the equitable side of the court, does not prevent the statute from being punitive in nature.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1443, 1460½, 1469, 1498; Dec. Dig. ⟸326.]

3. CORPORATIONS ⟸326—CREATION OF EXCESSIVE DEBT—LIABILITY OF DIRECTORS—REPEAL OF STATUTES.

Civ. Code, § 309, making the participating directors liable for debts contracted in excess of the amount of the capital stock, in so far as it affected an action brought thereunder by a creditor on behalf of himself and other creditors, judgment in such action being entered April 15, 1912, was repealed by the Public Utilities Act, effective March 23, 1912 (St. 1911, p. 18), which covers the same subject-matter and prescribes a monetary penalty against the corporation, rather than against the directors, and makes the directors guilty of a felony, instead of a misdemeanor, but contains no clause saving pending litigation or inchoate rights.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1443, 1460½, 1469, 1498; Dec. Dig. ⟸326.]

4. CORPORATIONS ⟸326 — DIRECTORS — ACTIONS—REPEAL OF STATUTE.

Under Pol. Code, § 327, providing that any statute may be repealed at any time except when otherwise provided therein, and that persons acting under any statute are deemed to have acted in contemplation of this power of repeal, the Legislature could, by repealing the statute, destroy that right of action against directors creating an excessive debt, which is conferred on creditors by Civ. Code, § 309.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1443, 1460½, 1469, 1498; Dec. Dig. ⟸326.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by H. A. Moss against C. C. Moore and others, wherein J. F. Bradford and J. Howard Smith intervened. From a judgment sustaining demurrers to the complaints, plaintiff and Bradford appeal. Affirmed.

Schlesinger & Shaw and Edwin H. Williams, all of San Francisco, for appellants. Garrett W. McEnerney, Alfred Sutro, and Corbet & Selby, and J. Howard Smith, all of San Francisco, for respondents. Corbet & Selby, of San Francisco, for respondent Moore. Pillsbury, Madison & Sutro, of San Francisco, for respondent Pillsbury. Morrison, Dunne & Brobeck, of San Francisco, for respondent Martin.

HENSHAW, J. The plaintiff, H. A. Moss, brought this action against the defendants, directors of the Ocean Shore Railway Company, based upon the provisions of section 309 of the Civil Code. He averred that the Ocean Shore Railway Company had a capital stock of $5,000,000 all of which had been subscribed for and issued, and all of which was held and owned by divers persons; that the Ocean Shore Railway Company had issued and sold $5,000,000 of its bonds, equal to the total amount of its capital stock and of its subscribed capital stock, and owed $5,000,000 indebtedness on account of this bond issue; that plaintiff is the owner of eight of these bonds of the par value of $1,000 each; that, while the Ocean Shore Railway Company thus had outstanding debts represented by its notes and bonds in the sum of $5,000,000, the defendants became directors of the company, and as such directors created debts of the corporation in the amount of upwards of $2,000,000 more; that all of this $7,000,000 indebtedness is due and unpaid; that the corporation became and is insolvent; that this action is brought by plaintiff as a creditor of the corporation on his own behalf and on behalf of all the creditors of the Ocean Shore Railway Company. The prayer is for a joint and several judgment against these defendants to the amount of $8,000, the indebtedness due plaintiff, with interest; further, that defendants be ordered to pay $2,000,000 into court for the purpose of satisfying the claims of the other creditors. J. F. Bradford and J. Howard Smith by leave of court filed their complaints in intervention, which complaints in intervention are in all particulars essential to this consideration identical with

the complaint of the plaintiff, Moss. General and special demurrers were interposed to all of these complaints, and these demurrers were sustained. Plaintiff and intervener, declining to amend, take their appeal from the judgment which followed the sustaining of the demurrers.

Several legal propositions of consequence are argued by the litigants. It is proper to refer to them, but, for reasons which will hereinafter appear, it is unnecessary to decide all of them. The first of these legal disputes arises over the construction of the statute (Civ. Code, § 309) which makes the participating directors "jointly and severally liable to the corporation, and to the creditors thereof, to the full amount of * * * the debt contracted." By appellants it is contended that the language of the law itself and the decisions of the courts upon similar laws establish this right of action in any creditor of the corporation. Not only, it is urged, does the law make no distinction between the creditors, but, in giving the right of action to "the creditors," by force of its own language gives it to all of them, and this construction gains further assurance from the fact that the same right of action is given to the corporation; that the recovery therefore is in the nature of a recovery of a trust fund into the treasury of the corporation for the benefit, not of a selected class of creditors, but for the benefit of all the creditors. In support of this view are cited, with others, the cases of Low v. Buchanan, 94 Ill. 76; Woolverton v. Taylor, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521; National Bank v. Dillingham, 147 N. Y. 603, 42 N. E. 338, 49 Am. St. Rep. 692; Thacher v. King, 156 Mass. 490, 31 N. E. 648; Green v. Whitehead, 5 Pa. Dist. R. 613; Hornor v. Henning, 93 U. S. 228, 23 L. Ed. 879; and finally our own cases of Winchester v. Mabury, 122 Cal. 525, 55 Pac. 393, and Winchester v. Howard, 136 Cal. 441, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153. Our own cases dealt with the provision of law found in section 3, art. 12, of our Constitution, making directors of corporations jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated. These decisions declared that the remedy in such an action for the enforcement of this constitutional provision is by a bill in equity in which all the creditors of the corporation are entitled to be represented, precisely as in the judgment recovered all are entitled to share, and appellants argue upon principle that the same construction should be given to the section of the Code upon which this action is based. By respondents it is contended that the very plain meaning of the section is that the directors shall be liable only to the persons in whose favor such debts were contracted, and reference is made to the first edition of Thompson Commentaries on Corporations, and that learned author's discussion in Cyc., where, for example, he says:

"Sec. 4265. Most of the statutes simply make the directors contracting such excessive debts liable therefor to the creditors of the company, meaning, of course, to the persons in whose favor such debts were contracted. In some cases it is not distinctly so expressed; but in such cases the implication, of course, is that they are liable to those creditors, because, when it is said that a man is liable for a debt, the meaning is that he is liable to the person to whom the debt is due." Thompson's Com. on Corp.

"Most of the statutes in terms make the directors liable to creditors, meaning, it must be assumed, to a creditor in favor of whom such excessive indebtedness was contracted." 10 Cyc. 879.

Further it is argued that Hornor v. Henning and other cases limit with scrupulous care the language of their opinions, and declare only "that this liability constitutes a fund for the benefit of all the creditors who are entitled to share in it," and that those only are entitled to share who have actually suffered or who may be thought actually to have suffered by reason of the incurring of the excess indebtedness; that is to say the creditors of such excessive indebtedness. This view it is said was the interpretation put upon Hornor v. Henning by Mr. Justice Lurton, but recently of the United States Supreme Court, in Allison v. Coal Creek, etc., Co., 87 Tenn. 60, 9 S. W. 226, and this construction has been adhered to in Moulton v. Connell, etc., Co., 93 Tenn. 377, 27 S. W. 672, and Trademan Publishing Co. v. Knoxville, etc., Co., 95 Tenn. 634, 32 S. W. 1097, 31 L. R. A. 593, 49 Am. St. Rep. 943. This is the first of the legal propositions, interesting in itself, whose decision is unnecessary to this adjudication. For the purposes of this discussion and decision only, the question will be resolved in favor of appellants' contention.

The next is the contention of respondents that section 456 of the Civil Code contains a specific grant of power, with the result that the limitation upon incurring indebtedness declared in section 309 does not apply to that kind of a railroad indebtedness authorized by section 456, so that a corporation which has incurred the bonded indebtedness authorized by section 456 for the purposes of construction, etc., may still incur the indebtedness contemplated by 309 up to the amount of the "subscribed capital stock." In opposition to this appellants insist that section 456 does not contain a grant of power to incur indebtedness independent of and in excess of that limited by section 309, but that the two sections are to be considered together and harmonized. So doing, it is plain, so appellants argue, that the primary purpose and object of section 456 was to confer power upon public corporations which, without statutory authority, they lacked, namely, the power to mortgage their property and franchises, a power which, because of the public duties imposed upon those corpora-

tions, they did not possess at common law, and do not now possess without statutory authority. 3 Thompson, Corp. (2d Ed.) § 2534; Eliott, Railroads, § 67; 3 Cook on Corp. (7th Ed.) § 780. In Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225, and Boyd v. Heron, 125 Cal. 453, 58 Pac. 64, the construction of these two sections, it is said, is distinctly laid down in harmony with appellants' contention. Here again we have but indicated the controversy, and pass it over without decision, saving that for the purposes of this case only further discussion will be had under the view most favorable to appellants, namely, that the law limits the total indebtedness of a corporation to the amount of its capital stock.

[1, 2] The next controverted proposition between these parties litigant is over the nature and character of section 309. Is it in its nature penal, or is it in its nature remedial? This question demands somewhat more detailed consideration than we have felt it necessary to give to the foregoing propositions, and yet again it should be said that, for reasons which will plainly appear, even the determination of this question is not vital to the decision of this case. Respondents' argument upon the nature of this statute may be summarized as follows: Of two permissible constructions of a statute, that which avoids a penalty will be preferred to the other which exacts it. Ukiah Guaranty Co. v. Curry, 148 Cal. 256, 82 Pac. 1048. This statute is susceptible of construction as a remedial statute, but, if so, under a remedial statute all that is permitted is compensation to make good a loss; that this, in truth, is the construction put upon the exact language of section 309, which was adopted in precise words as the law of South Dakota. The Supreme Court of Vermont, having occasion to discuss and construe the South Dakota statute, thus declares:

"That statute clearly is not penal either in its letter or intent, but it grants a right of action to private persons who have suffered pecuniary injury in consequence of certain officers of corporations violating the statute to recover damages of those officers, the extent of whose liability is the amount of the pecuniary loss sustained by such private persons—creditors of the corporation." Farr v. Briggs, 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930.

If this construction is the sound one, and is to prevail, then the demurrers were properly sustained, and appellants' appeals are lost; for it is certain that their complaints do not charge, nor attempt to charge, upon any specific loss or damage sustained by plaintiff and intervener by reason of the corporate indebtedness in excess of the capital stock which these directors created. Needless to say, appellants therefore combat this construction of the statute, and, while insisting that it is remedial in character, also insist that proof of loss growing out of the contracts, or of damage to the creditors arising therefrom, is not at all essential to the maintenance of the action; that the action is in equity, and therefore could not be for the enforcement of a penalty or forfeiture, which equity abhors; consequently there can be no penalty or forfeiture within the meaning of the law; that the law is remedial, and is to be interpreted as creating a fund for the benefit of the corporation and its creditors growing out of the dereliction of duty of the directors who are thus made, as it were, sureties for these debts; that the penalty is prescribed by section 566 of the Penal Code. Once more, though for the purposes of this decision only, adopting the view of appellants, that this action will lie without a pleading of special loss and damage to plaintiff growing out of the violation of section 309, nevertheless it must be added that the moment the element of compensation for loss is eliminated the statute itself becomes highly penal in its nature, and the argument of appellants that it may still be considered purely as a remedial statute is without force. The fact that the action may be treated as in the nature of a creditors' bill brought on behalf of plaintiff creditor and all others, and that it thus addresses itself to the equitable side of the court, has not the slightest weight in determining the nature of the statute, and no more weight has the invocation of the familiar maxim that equity abhors penalties and forfeitures. The question might have been of consequence in the older administration of jurisprudence where the courts of law and equity were wholly separated, but it ceases to be of consequence under our system, and even under the English system since its Reformed Judicature Act has come into effect. All redress and relief is administered in one forum and by one judicial officer. If as chancellor he revolts at enforcing a legal penalty, he will doff his chancellor's robes and lay aside his great seal, and donning the judicial ermine will enforce the penalty (with or without his jury as the case may be), resuming the regalia of his chancellorship for the purpose of making equitable disposition of the fund. So that, if in truth this statute does exact a penalty, no embarrassment will be found in the court's enforcing it. And that this statute becomes highly penal in character the moment there is eliminated from it the consideration of compensation for loss is at once apparent. What is meant by a statutory penalty was defined in Los Angeles v. Ballerino, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329, to be:

"One which an individual is allowed to recover against a wrongdoer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained."

Section 14 of the general corporation law of 1850 (St. 1850, p. 348) is, for the purpose of this consideration, substantially the same as section 309 of the present Civil Code. It declared:

"The total amount of the debts which any incorporated company shall owe, shall not at

any time exceed the amount of the capital stock actually paid in; and in case of any excess, the directors, under whose administration the same may have happened, except those who have caused their dissent therefrom to be entered at large on the minutes of the said directors at the time, and except those who were not present when the same did happen, shall, in their individual and private capacities, jointly and severally be liable for such excess to the said corporation, and in the event of its dissolution, to any of the creditors thereof to the full amount of such excess."

In Irvine v. McKeon, 23 Cal. 472, this court said:

"This statute provides for making one person individually liable for the debts of another. * * * Like other statutes which create a forfeiture or impose a penalty, it is to be strictly construed."

The fact that a statute may have a remedial phase is not at all inconsistent with its being of highly punitive character. The decisions holding that under statutes similar to ours the recovery is not strictly a penalty have to do with the technical definitions of penalty, and with the statutes of limitations governing actions to enforce penalties. Willcox v. Edwards, 162 Cal. 455, 461, 123 Pac. 276, Ann. Cas. 1913C, 1392. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, upon which appellants rely as supporting their contention that section 309 is a remedial, and not a penal, statute, is explained by Judge Gilbert in Patterson v. Thompson (C. C.) 86 Fed. 85, who shows that the question before the Supreme Court was solely whether such statutes are penal laws in the sense in which the word is used in international law. The same statute under consideration in Huntington v. Attrill was again before the Supreme Court of the United States in Park Bank v. Remsen, 158 U. S. 337, 15 Sup. Ct. 891, 39 L. Ed. 1008, and it was distinctly declared to be in its nature a penal statute, as had previously been held in Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038. But that this statute is of a highly penal character the moment it is construed as making the directors liable for the full amount of the excess debts which they may have authorized, regardless of loss or damage which may have been occasioned by their acts, does not we think call for lengthy discussion. The directors of an oil company which has exhausted its capacity to incur debts enter into a contract on behalf of the corporation for the digging of an oil well for $50,000. Upon success or nonsuccess depends the future of the corporation. If the well "comes in," the corporation immediately becomes solvent and prosperous. If it is a "dry hole," the corporation is bankrupt. The venture saves the life of the corporation. Oil is discovered, and prosperity follows. Yet, under the terms of this act, as construed by appellants, the corporation itself may recover from these directors the contract price of $50,000, and even the well borer need not look to the corporation for the payment of the debt, but may enforce the directors' liability, and this in a case in which not only no loss has been incurred, but where the excessive contract has proved of incalculable value to the corporation itself. Examples need not be multiplied. We have pointed out that Irvine v. McKeon, supra, judicially declares the penal nature of this statute. Moore v. Lent, 81 Cal. 502, 22 Pac. 875, dealing with the same statute, quotes Irvine v. McKeon approvingly, and declares:

"While such laws are to be commended, as in the interest of creditors and fair dealing, they are penal in their nature, and should be strictly construed."

Many other courts have adopted the same view of their own similar enactments. Patterson v. Thompson (C. C.) 86 Fed. 85; Huntington v. Attrill, supra; Park Bank v. Remsen, supra; Chase v. Curtis, supra; Brown v. Clow, 158 Ind. 403, 62 N. E. 1006; Savage v. Shaw, 195 Mass. 574, 81 N. E. 303, 122 Am. St. Rep. 272, 12 Ann. Cas. 806. See same case, 12 Ann. Cas. 806, where it is noted that the majority of jurisdictions hold such statutes to be penal. While the soundness of this court's decision in Irvine v. McKeon has been declared in Steam Engine Co. v. Hubbard, 101 U. S. 188, 25 L. Ed. 786; Snell v. Bradbury, 139 Cal. 379, 73 Pac. 150; Sav. & Loan Soc. v. McKoon, 120 Cal. 177, 52 Pac. 305; Moore v. Lent, supra; Mitchell v. Hotchkiss, 48 Conn. 9, 40 Am. Rep. 146; State Sav. Bank v. Johnson, 18 Mont. 440, 45 Pac. 662, 33 L. R. A. 552, 56 Am. St. Rep. 591; and Savage v. Shaw, 195 Mass. 571, 81 N. E. 303, 122 Am. St. Rep. 272, 12 Ann. Cas. 806. Nothing in Winchester v. Howard, supra, is in conflict with this; in the first place, because the directors, under section 3, art. 12, of the Constitution, which section was the foundation of the action, are liable solely for loss sustained by embezzlement and misappropriation—a liability involving loss, and thus entirely different in character from that which appellants contend is imposed by section 309. Moreover, the court is at pains to point out that the constitutional enactment did not enlarge the liability imposed upon these trustees under the rules of common law, saying that no one contends that their liability "extends to damages resulting from mere negligence not resulting in some misappropriation nor a loss through bad management or incompetency or mistake," and saying further, "No officer, omitting for the nonce the suretyship, is made liable for any act or to any greater extent than he was liable before the constitutional amendment." And for a final word upon the equitable phase of the matter no court has found difficulty in reconciling the jurisdiction of equity over similar statutes, which the courts unhesitatingly hold to be penal in character. Merchants' Bank, etc., v. Stevenson, 10 Gray (76 Mass.) 232; Id., 7 Allen (89 Mass.) 489; Tradesman Publishing Co. v. Knoxville Car. Co., 95 Tenn. 634, 32 S. W. 1104, 31 L. R. A. 593, 49 Am. St. Rep. 943; National Bank v. Dillingham, 147

N. Y. 603, 42 N. E. 338, 49 Am. St. Rep. 692. In all of these jurisdictions it is held that a creditors' bill is the proper method to establish rights under like statutes, and in all of them the statutes themselves are declared to be penal in their nature. Indeed, the whole matter may be summed up in the statement that, even if section 309 be remedial so far as the creditor is concerned, it is highly punitive so far as the directors are concerned.

[3, 4] While we thus conclude that in this action we are dealing with section 309 in its penal aspect, that determination is, as we have before intimated, not vital to the final proposition pressed by respondents upon our attention, which proposition is that section 309, in so far as it affects this action and the right to maintain and prosecute it, has been repealed, and that with the repeal this action itself must fall. The Public Utilities Act went into force on March 23, 1912. Stats. and Amendments to the Codes, Extra Sess. 1911, p. 18. By the terms of that act (section 52b):

"The commission may authorize issues of bonds, notes or other evidences of indebtedness, less than, equivalent to or greater than the authorized or subscribed capital stock of a public utility corporation, and the provisions of sections 309 and 456 of the Civil Code of this state, in so far as they contain inhibitions against the creation by corporations of indebtedness, evidenced by bonds, notes or otherwise, in excess of their total authorized or subscribed capital stock shall have no application to public utility corporations."

In the event that the corporation issues any stock or stock certificate or bond, note, or other evidence of indebtedness in nonconformity with the order of the commission, or contrary to the provisions of the act, it is subject to a penalty of not less than $500 nor more than $20,000 for each offense (section 52e), and every officer, agent, or employé knowingly authorizing, directing or aiding in any such issue "shall be guilty of a felony." Manifestly these provisions work radical changes in the pre-existing law declared in section 309. Now, no longer do the assenting directors suffer any momentary penalty. It is the corporation which is to suffer; but, upon the other hand, no longer are the aiding and assenting directors guilty of a misdemeanor. They are guilty of a felony. The judgment in this action was entered on the 15th of April, 1912. This later law was in force upon that date, and had been in force since the 23d of March, 1912. That this change in the law destroyed absolutely appellants' right further to prosecute their action, whether that action be in its nature penal or remedial, no possible doubt can be entertained. True it is that the new law does not repeal sections 309 and 456 of the Civil Code in toto, but it does repeal them absolutely so far as they apply to that class of public utility corporations to which the Ocean Shore Railway Company belongs, and it contains no clause saving pending litigation or imperfect and inchoate rights. The right of action against these directors conferred by section 309 was a statutory right pure and simple, having no foundation in contract, nor any existence at common law. National Bank v. Dillingham, 147 N. Y. 603, 42 N. E. 338, 49 Am. St. Rep. 692.

[4] There can be no question in this state of the power of the Legislature to destroy such inchoate and unvested rights; for section 327 of the Political Code expressly declares that:

"Any statute may be repealed at any time except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal."

Says Thompson (2 Thompson, Corp. [2d Ed.] § 1331):

"Courts are not required to adopt the theory that these statutes are penal to justify the holdings that the repeal of such a statute without reservation destroys any unenforced rights of a creditor. Such holdings can be justified on the equally sound doctrine that the repeal of a statute which gives a cause of action destroys the right, and any pending action based on such statute is abated by such repeal."

Therefore it is that we say that it does not become of vital consequence in this consideration whether the statute be viewed as penal or remedial. The principle is that declared in Curran v. Owens, 15 W. Va. 208, in the following language:

"A right of action, which does not exist at common law, but depends solely upon statute, falls with the repeal of the statute without a saving clause * * * unless that right has been carried into judgment."

Such is the decision of this court in Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322, where an earlier law had made the father liable for the support of his insane adult son while confined in a state asylum. A later statute covering the whole field did not in terms repeal the earlier one, but was merely silent on the question of the father's liability. After the later statute had gone into operation the Napa State Hospital brought its action against Flaherty to compel him to support his insane adult son. Here was clearly the case of a remedial statute. This court, in holding the father not liable, declared as follows:

"If we were to concede, as claimed by appellant's counsel in their opening brief, that the entire act of 1889 was repealed by the act of 1897—and this court has very strongly so intimated in People v. King, 127 Cal. 574 [60 Pac. 35]—then the right to recover of defendant is lost. It is a rule of almost universal application, that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause. Sutherland on Statutory Construction, §§ 162, 163; Endlich on the Interpretation of Statutes, § 478, and cases in notes. It was said by Tindal, C. J., in Kay v. Goodwin, 6 Bing. 576, 4 Moore & P. 341, that the effect of repealing a statute is 'to obliterate it as completely from the records of the Parliament as if it had never passed, * * * except for the purpose of those actions which were

commenced, prosecuted, and concluded whilst it was an existing law.'"

To like effect in People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148, it is said:

"These cases have been cited as fairly typifying the extremes of judicial determination, and as expressing the reasons upon which their rules of decision are based. In the case of penalties and crimes the repeal operates to defeat all actions pending. In case of a statute conferring civil rights or powers the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and unperfected. In the case of statutes conferring jurisdiction the repeal operates by causing all pending proceedings to cease and terminate at the time and in the condition which existed when the repeal became operative. In cases of judgment pending upon appeal, the rule of decision is that the proceedings abate and the judgment falls."

In Flanigan v. Sierra County, 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597, discussing a California law, the Supreme Court of the United States says:

"The general rule is that powers derived wholly from a statute are extinguished by its repeal. * * * And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act."

And to the same effect are all of the cases in this state. McMinn v. Bliss, 31 Cal. 122; Lamb v. Schottler, 54 Cal. 319; Spears v. County of Modoc, 101 Cal. 303, 35 Pac. 869; Anderson v. Byrnes, 122 Cal. 272, 54 Pac. 821; City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674; Wheeler v. County of Plumas, 149 Cal. 782, 87 Pac. 802. Says Mr. Justice Gray in New London Northern R. R. Co. v. Boston, etc., R. R. Co., 102 Mass. 386:

"The conclusive answer to this argument is that a statute which wholly repeals an earlier one, either expressly or by implication, without any saving clause, makes it ineffectual to support any proceedings, whether not yet begun or pending at the time of its passage, and not already prosecuted to final judgment vesting absolute rights. The books are so full of cases illustrating this principle that the only difficulty is in making a selection."

Without further multiplying quotations it may be said that the principle is of universal application, as is plainly established by Vance v. Rankin, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173; Van Inwagen v. City of Chicago, 61 Ill. 31; Taylor v. Strayer, 167 Ind. 23, 78 N. E. 236, 119 Am. St. Rep. 469; Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; Cope v. Hampton County, 42 S. C. 17, 19 S. E. 1018; Bennett v. Hargus, 1 Neb. 419; Butler v. Palmer, 1 Hill (N. Y.) 324; Wilson v. Head, 184 Mass. 515, 69 N. E. 317; Yeomans v. Heath, 185 Mass. 189, 70 N. E. 1114; Surtees v. Ellison, 9 B. & C. 750, 109 English Reprint, 278; Kay, Assignee, v. Goodwin, 6 Bing. 576, 130 English Reprint, 1403; Rex. v. Justice of the Peace for the City of London, 3 Burr. 1455, 97 English Reprint, 924.

It follows herefrom that the demurrers were properly sustained, and the judgments appealed from are therefore affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

(171 Cal. 770)

WILCOX v. WILCOX. (L. A. 3521.)

(Supreme Court of California. Jan. 28, 1916.)

1. MARRIAGE ⇐58—ANNULMENT—GROUNDS.
In an action to annul a marriage, findings that prior to the marriage, and as an inducement thereto, and to the conveyance of certain property by plaintiff to defendant before the marriage defendant had represented herself as an unmarried woman, when in fact there was a former husband living from whom she had not been divorced, and had fraudulently represented that she had always been of a moral character, was a nurse and would be a kind and dutiful wife, would not sustain a judgment annulling the marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 115–123; Dec. Dig. ⇐58.]

2. DEEDS ⇐70 — CONVEYANCE TO WIFE BY HUSBAND—CANCELLATION—GROUNDS.
Finding of such false representations, *held* not to sustain a judgment setting aside the plaintiff's conveyance of real property to the wife after the marriage.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165–182; Dec. Dig. ⇐70.]

3. DEEDS ⇐160—CONVEYANCE TO WIFE BY HUSBAND—CANCELLATION—GROUNDS.
Where a husband conveyed realty to defendant in the belief that she was his lawful wife and induced by her representation that the property would be kept as a home for them both, and that she would not incumber it without his consent, her act in subsequently increasing a mortgage lien from $2,000 to $3,000 without his consent, did not destroy its character as a home.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 505–517; Dec. Dig. ⇐160.]

4. TRIAL ⇐396 — FINDINGS — RESPONSIVENESS TO ISSUES.
In an action to annul a marriage, and to cancel a conveyance of realty by plaintiff to defendant, any findings of undue influence on the part of defendant in obtaining the conveyance entirely outside the issues made by the pleadings, will be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935–938; Dec. Dig. ⇐396.]

5. DEEDS ⇐211 — HUSBAND TO WIFE — UNDUE INFLUENCE.
The mere relation of husband and wife does not constitute prima facie evidence of undue influence as against the wife to whom the husband has conveyed realty.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. ⇐211.]

6. MARRIAGE ⇐40—PRESUMPTION OF LEGALITY.
When a marriage has been shown in evidence whether regular or irregular, and whatever the form of proof, the law raised a strong presumption of its legality.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58–69, 79; Dec. Dig. ⇐40.]

7. MARRIAGE ⟸40—ANNULMENT—BURDEN OF PROOF.

The burden of proof is on the party assailing a marriage on the ground that a former husband or wife is still alive, to show not only the former marriage, but also that it has not been dissolved by death or judicial decree.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58–69, 79; Dec. Dig. ⟸40.]

8. MARRIAGE ⟸40 — PRESUMPTION OF VALIDITY.

The prima facie presumption in favor of the validity of a marriage assailed, outweighs the presumption of the continuance of the life of the former husband or wife.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58–69, 79; Dec. Dig. ⟸40.]

9. EVIDENCE ⟸597—SUFFICIENCY—PRESUMPTION.

Under Code Civ. Proc. § 1961, providing that a prima facie presumption may be controverted by other evidence, but that unless so controverted, the jury must find according to the presumption, the court, where there was nothing to offset the presumption in favor of the validity of a marriage assailed on the ground that defendant had a former husband living, was required to find according to the presumption; and that the evidence may have satisfied the court that the defendant was an unchaste woman, guilty of other wrongful acts, could not authorize it to disregard the presumption.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2449; Dec. Dig. ⟸597.]

10. MARRIAGE ⟸40—ANNULMENT—PRESUMPTION OF LEGALITY—GOOD FAITH.

In an action to annul the marriage on the ground that defendant had a former husband living from whom she had not been divorced, where the plaintiff's evidence did not show that the former husband was alive at the time of defendant's subsequent marriage to plaintiff, defendant was not called upon to show her honest belief that such former husband was not living; Civ. Code, § 61, subd. 2, providing that a subsequent marriage contracted by one "during the life of a former husband," is valid until its nullity is adjudged by a competent tribunal, if the former husband is absent, and not known to such person to be living for 5 successive years preceding the subsequent marriage or is generally reputed or believed by such person to be dead at the time of such subsequent marriage not applying to such case.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58–69, 79; Dec. Dig. ⟸40.]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Thomas Wilcox against Carrie Wilcox. Judgment for plaintiff annulling the marriage and canceling a certain conveyance of real property made by him to defendant. Motion for new trial denied, and defendant appeals. Judgment and order reversed.

Parker & Moote, J. W. McKinley, and Frank Karr, all of Los Angeles, for appellant. Trask, Norton & Brown and Edgar K. Brown, all of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an appeal by defendant, Carrie Wilcox, from the judgment and from an order denying her motion for a new trial. The judgment was one annulling the marriage between the parties and canceling a certain conveyance of real property in Long Beach, Los Angeles county, made by plaintiff to defendant.

[1, 2] The ground of annulment was that, at the time of her marriage to plaintiff, defendant was the wife of another man. That she had falsely represented herself as being an unmarried woman, when, in fact, there was a former husband living from whom she had not been divorced, was the principal ground upon which the conveyance, made by plaintiff after the purported marriage and upon the belief that defendant was his wife, was set aside. Other fraudulent representations were alleged and found to have been made, such as that she had always been of chaste and moral character, was a nurse, would be a kind, dutiful, and affectionate wife, etc. As we understand the findings as to this, all such representations were made prior to the marriage, and really as an inducement thereto and to the conveyance of certain property in Pasadena, made before the marriage, and which the trial court refused to set aside, and the findings in this connection mean only that the plaintiff relied upon the same in making the subsequent Long Beach property conveyance. Upon the authority of Barnes v. Barnes, 110 Cal. 418, 42 Pac. 904, it must be held that these findings must be discarded from any consideration which will give to them the effect of sustaining the judgment either as to the annulment of the marriage or the setting aside of the Long Beach property conveyance.

[3] It was further alleged and found, it may be conceded, that this conveyance was made not only because of plaintiff's belief that defendant was his lawful wife, but that it was induced by a representation on defendant's part that the property would be kept as a home or support for them both, and that she would not convey it away or incumber it without his consent. It was then incumbered by a mortgage for $2,000, and subsequently defendant, without plaintiff's consent, increased the mortgage lien to $3,000. There is absolutely no evidence to sustain a conclusion that defendant ever promised that she would not incumber the property, and there is nothing in the evidence to show that, in so far as any act of defendant is concerned, the property has not been kept for the purposes of a home for the parties. The mere additional incumbrance of $1,000 did not destroy its character as such, and there is nothing to indicate that it would have that effect.

[4] If any finding of the court may reasonably be construed as showing undue influence on the part of defendant in obtaining this conveyance, it is entirely outside the issues made by the pleadings, the complaint containing no suggestion or intimation to that effect, and must be disregarded. Nor can we find in the evidence any support for such a finding.

[5] It appears to be settled that the mere relation of husband and wife does not constitute prima facie evidence of undue influence as against the wife. Stiles v. Cain, 134 Cal. 170, 66 Pac. 231; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778.

We are satisfied that the judgment of the trial court can be sustained only on the theory that the evidence was sufficient to sustain its conclusion that the former husband was living at the time of defendant's marriage to plaintiff, and that if it was not sufficient for that purpose, the judgment must be reversed. The evidence as to this was substantially as follows: The marriage between plaintiff and defendant occurred on June 29, 1910. Some 17 or 18 years before that date defendant married a man named Albert Broberg, in St. Paul, Minn., and lived with him 3 days in Winnebago, a town near St. Paul. They then separated, he leaving her, she testified, and shortly thereafter she left the town and went to Philadelphia to her folks. She did not know where he went. She went by the name of Broberg for almost 2 years. She never obtained a divorce from Broberg, nor he from her. In 1898 or 1899 she married a Dr. Lehman in New York. Before marrying the latter she tried to find out where Broberg was. She went to where "he used to live" near St. Paul, and could not find him. A deputy sheriff told her that he was dead. She testified positively that "he is dead," acknowledging, however, in answer to a later question, that her statement to that effect was based solely upon what the deputy sheriff told her. She never saw him after they separated. He was a healthy, rugged man, about 33 to 35 years of age. Dr. Lehman, who was over 70 years of age, and she lived together only about 3 years, and he died June 8, 1910, a few days before defendant's marriage to plaintiff.

It will be seen from the foregoing that there was no affirmative evidence from which it might lawfully be inferred that Broberg was alive on June 29, 1910, other than that to the effect that he was alive 17 or 18 years before, and was then 33 to 35 years of age, and rugged and healthy. The most that can be said as to this evidence, however, is that it might possibly be held sufficient to create the prima facie presumption that he was still alive, nothing to the contrary appearing. But, as was said in Hunter v. Hunter, 111 Cal. 261, 267, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180:

"This presumption of the continuation of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong. Code Civ. Proc. § 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than 7 years, or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative—that the first marriage had not ended before the second marriage."

This rule was held to apply in civil as well as in criminal cases, and People v. Stokes, 71 Cal. 263, 12 Pac. 71, claimed to establish a different rule, was disapproved. In McKibbin v. McKibbin, 139 Cal. 448, 73 Pac. 143, an action for divorce, it appeared from the plaintiff's testimony that prior to her marriage with the defendant, she had been lawfully married to one Lake, who was still alive. It was claimed that plaintiff was bound to show a dissolution of that marriage to make out a prima facie case, but it was held substantially by the trial court that, as a divorce may have been granted or the marriage annulled, she was entitled to rely on the presumption of innocence of crime, the court saying:

"I am inclined to take the view that proof of solemnization, aided by the presumption that the solemnization was regular, would overcome the presumption of bigamy, that would result if she had two husbands."

[6] This court said that it "quite" agreed, quoting from 1 Bishop on Marriage and Divorce, as follows:

"Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law raises a strong presumption of its legality—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of presumption, the truth of law and fact that it is illegal and void."

[7, 8] These cases must be taken as establishing it to be the law in this state that the burden of proof is on the party assailing a marriage on the ground that a former husband or wife is still alive, to show not only the former marriage, but also that it has not been dissolved by death or judicial decree, and that the prima facie presumption in favor of the validity of the marriage assailed outweighs the presumption of the continuance of life of the former husband or wife. There is nothing in any subsequent case to impair the effect of these decisions. It is true that in Hunter v. Hunter, supra, the trial court had found in accord with the presumption, in favor of the validity of the marriage, and that this court simply sustained a finding on the ground that it had sufficient support in the evidence. It is also true that in McKibbin v. McKibbin, supra, the court did no more than to hold that such presumption was sufficient to make out a prima facie case. In neither case, therefore, was this court called upon to declare that the trial court must find in accord with such presumption. And, of course, whether it must do so or not depends upon the evidence in the particular case.

[9] If there is nothing to offset the effect of such presumption, the court or jury must find in accord therewith. It is expressly pro-

vided in section 1961, Code of Civil Procedure, that a satisfactory or prima facie presumption may be controverted by other evidence, direct or indirect, "but unless so controverted the jury are bound to find according to the presumption." In the case at bar the last date on which the former husband was shown to be alive was some 17 years before defendant's marriage to plaintiff. There was absolutely nothing to indicate that he was alive at any later date, except the presumption of continuance of life. To conclude that he was alive on June 29, 1910, involved the conclusion that the marriage to plaintiff was illegal, and that defendant had twice committed the crime of bigamy, first in marrying Lehman, and then in marrying plaintiff, with no evidence whatever upon which to found such a conclusion other than the presumption of continuance of life. That the evidence generally may have satisfied the trial court that defendant was an unchaste woman and was guilty of other wrongful acts could not authorize the court to disregard the presumption of her innocence of these crimes, and the presumption of the legality of her marriage to plaintiff. As well might it be contended that the effect of the presumption of innocence existing in favor of a defendant charged with a crime can be overcome by proof that he has been guilty of other distinct and different crimes, or is altogether a wicked and depraved individual. If there was any circumstance tending to show that Broberg was alive at the date of defendant's marriage to plaintiff, a case might fairly be held to have been made upon which the court was authorized to find against the presumption. But here we have nothing opposed to the presumption other than the fact that he was alive at a remote date, some 17 years before. The case is one where the presumption is not controverted by other evidence, direct or indirect, and where, accordingly, the court is bound to find according to the presumption.

[10] The learned District Court of Appeal, in deciding this case, were of the opinion that the question of the good faith of the party invoking such a presumption in a case of this character was a material element to be considered, and, finding in the evidence no direct statement by her that she believed the statement made to her that Broberg was dead, or any direct statement that she had never heard from him, concluded that the showing of good faith was not such as to require the trial court to find in accord with the presumption. We are inclined to think that the analysis of defendant's evidence in this regard was somewhat critical and technical, but assuming it to be fairly warranted by the record, we are unable to see that the element of good faith or belief of defendant is at all involved in such a matter as the one before us. As is said in the petition for a hearing in this court:

"The belief of a party in the death is material only, as appears from the cases referred to by the court, when as a matter of fact the party is alive."

Under the provisions of subdivision 2 of section 61 of the Civil Code, a subsequent marriage contracted by a person during the life of a former husband or wife of such person, is valid until its nullity is adjudged by a competent tribunal, if the—

"former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted."

In a case arising under this provision, a case involving the question whether the second marriage is valid notwithstanding the former husband or wife is alive and the former marriage has not been dissolved or annulled, of course the element of good faith and belief of the party that the former husband or wife is dead is an essential element, for the statute expressly so makes it. Such a case was Estate of Richards, 133 Cal. 524, 65 Pac. 1034, relied on by respondent and cited by the learned District Court of Appeal in support of its ruling that good faith and honest belief are elements in the case at bar. There is not a word in the opinion in that case which is opposed to the views enunciated in Hunter v. Hunter, supra. The same is true of Estate of Harrington, 140 Cal. 244,[1] also cited by the District Court of Appeal. Section 61, Civil Code, is not applicable here at all. Its provisions relate solely to a subsequent marriage "contracted by any person during the life of a former husband or wife of such person," etc. If the former husband or wife is not shown to have been living at the time of the subsequent marriage, which is the case here, no situation is presented which the party is called upon to combat by a showing of honest belief that such former husband or wife was then deceased.

From what we have said it is apparent that the judgment of the trial court cannot be sustained.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

(28 Cal. App. 597)

NICHOLSON et al. v. LEATHAM et al.

(L. A. 3410.)

(Supreme Court of California. Dec. 16, 1915.)

WILLS ⇐221—PROBATE—VACATION—FRAUD.

The existence of a fiduciary relation on the part of those securing probate of a will is not essential to the making of a sufficient case of extrinsic fraud to warrant a court of equity in charging the executors, etc., with a trust in favor of the defrauded parties and setting aside the judgment of probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 539–541; Dec. Dig. ⇐221.]

[1] 72 Pac. 1000, 98 Am. St. Rep. 51.

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Melissa Leatham Nicholson and others against Helen L. Leatham and others. A judgment for defendants was affirmed by the Court of Appeal of the Second District (153 Pac. 965), and plaintiffs apply for rehearing in the Supreme Court. Denied.

A. Lincoln Walker and Ansel Smith, both of Los Angeles, and Luce & Luce, of San Diego, for appellants. Sam Ferry Smith, of San Diego, for respondents.

ANGELLOTTI, C. J. The application for a hearing in this court after decision by the District Court of Appeal of the Second District is denied. In denying such application we deem it proper to say that, in so far as anything said in the opinion may be supposed to imply that a fiduciary relation on the part of those securing the probate of a will is essential to the making of a sufficient case of extrinsic fraud to sustain an action for a decree in equity charging the executor, legatee, or devisee with a trust in favor of the defrauded party (see Bacon v. Bacon, 150 Cal. 481, 89 Pac. 317; Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98), it is not in accord with our view of the law. No such distinction is warranted by the authorities. Such a doctrine is not at all essential to the conclusion reached by the District Court of Appeal, and the opinion filed sufficiently disposes of the case without reference to any such doctrine, and on the theory that the parties must be deemed to have had notice of the proceedings in time to have enabled them to assail the will, and that they did not use due diligence in regard thereto. It may be that no such implication as suggested was intended by the learned author of the opinion, but we feel that some language used may be thought by some to be susceptible of that construction.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

29 Cal. App. 284

THORNBER v. HART. (Civ. 1830.)

(District Court of Appeal, Second District, California. Dec. 29, 1915. Rehearing Denied Jan. 28, 1916. Denied by Supreme Court Feb. 24, 1916.)

ELECTIONS ⊂227—CONDUCT OF ELECTION—DELAY IN OPENING POLLS—VALIDITY OF VOTE.

In an election for the office of county supervisor, a delay from 6 a. m. to 7:15 a. m. in the opening of the polls in one large precinct, during which time a number of voters were unable to vote and left the polls, without a showing whether they voted on that day or not, in the absence of fraud, was not so great or considerable as to be inexcusable, or to justify the court on a contest in rejecting the entire vote of that precinct.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 197–200; Dec. Dig. ⊂227.]

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Election contest by J. H. Thornber against J. O. Hart. Judgment for contestant, and the contestee appeals. Reversed.

Borton & Theile, of Bakersfield, for appellant. E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for respondent.

JAMES, J. Appellant, at an election held in the county of Kern in 1914, was declared to have been elected to the office of supervisor. Thereafter respondent, who was the opposing candidate at that election, filed notice of contest, and a recount of the votes of the supervisorial district was had in the superior court. Respondent was successful in that proceeding. The contestee has appealed from the judgment.

The main contention is that the evidence was insufficient to support the findings and judgment. By the notice of contest first filed the contestant set out various irregularities or acts of malconduct on the part of the board of election, as are permitted under section 1111, Code of Civil Procedure, as grounds of contest, but did not specify in the original notice of contest particularly the ground afterwards relied upon, that there had been a delay in the opening of the polls in precinct No. 20 of the supervisorial district. At a later date, and after the time had expired within which the proceeding of contest might be instituted, the contestant was allowed to amend his statement of contest by adding thereto an allegation as follows:

"That in said precinct No. 20, the said polling place as established by the board of supervisors, as aforesaid, was not opened at the time required by law, and a large number of voters were unable to vote, who had presented themselves at said polling place for the purpose of voting, prior to the opening of said polling place."

The appellant objected to the making of this amendment, both on the ground that it was offered too late, and also on the ground that it in its substance did not sufficiently set out a ground of contest. Both objections were by the court overruled. The trial judge concluded, as shown by the record, that inasmuch as malconduct of the officers of election in some particulars had been set out and alleged in the original statement of contest, adding to such allegation of malconduct statements of other acts committed by such officers would not, in effect, be the making of a statement of a new cause or ground of contest. While section 1117, Code of Civil Procedure, provides that no statement of the grounds of contest will be rejected for want of form, if the grounds are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested, it does seem clear that the contestee in such cases is entitled to

have stated the particulars in which it is charged that malconduct was committed on the part of the officers conducting the election. In the statement of contest first filed it was not alleged in any way that contestant would rely upon proof to show there had been a delay in the opening of the polls in any precinct; while he assigned malconduct, he particularized in allegations pointing to certain specific acts and things. It is to indulge great liberality indeed toward the contestant to concede his right to file the amendment that was made. It is also exceedingly questionable whether the statement in the amendment was sufficient to show such a delay in the opening of the polls as would make a good ground of contest, for the quantity of time embraced within that delay is not stated; it is only stated that the polls were not "opened at the time required by law." In the case of Packwood v. Brownell, 121 Cal. 478, 53 Pac. 1079, the specification of malconduct which our Supreme Court held to be insufficient was:

"That the said board of judges of election of Pitt river precinct did not open the polls at sunrise of said day of election nor keep the polls open for the length of time required by law."

In the case just cited the ruling of the trial court, on a motion to dismiss the contest because of insufficiency of the specification, was reviewed, and the judgment reversed. However, it will not be necessary for us to announce a final conclusion on these two propositions, as we think that the main contention of appellant made as to a proposition which involves the crucial finding of the trial judge, must be sustained. The court at the hearing of the contest canvassed the vote cast in all the precincts of the supervisorial district, and rejected the entire vote of precinct No. 20 because there had been a delay of 1 hour and 15 minutes in the opening of the polls. The result of the tally on the precincts, excluding precinct 20, gave to contestant a majority of 55 votes. Precinct No. 20 was a large precinct. There were residing in it at the time of the election 733 registered voters, and the election returns showed that 549 of these had voted at the election, and that 239 had voted in favor of appellant and 163 in favor of contestant. So that, had the vote of precinct No. 20 not been rejected, the contestee would have had a majority of 11 votes over respondent. The court finds that the polls in precinct 20 were not opened until 7:15 a. m., and that there was not sufficient cause or excuse for the failure to open the polls; that between the hour of 6 a. m. and 7:15 a. m. at least 50 voters came to the polling place of precinct 20 and demanded the right to cast their ballots, and offered to vote, and that:

"Because of the polls not being open for the reception of ballots, a large number, to wit, more than 21, left the polls and were unable to vote, and it is not shown whether such voters did vote on said 3d day of November, 1914, or not."

The court further expressly found that none of the acts or omissions of the election officers of precinct 20 were done or permitted with any fraudulent design on the part of said election officers, nor for the purpose of affecting the result of the election. The evidence taken showed that the board of election officers arrived at the precinct in time to open the polls as required by law, but that the key to the building was missing. A search was instituted for the key, and some outsider finally found it, and the polls were thereupon immediately opened and votes received. So it appears that the delay in the opening of the polls which the court found to be without any fraudulent intent or intent to affect the result of the election, but still found to be inexcusable, was occasioned through the failure of the officers to make an entrance into the building or polling place. That the confusion in this regard was inexcusable we think can hardly be concluded from the evidence. As is said in Packwood v. Brownell, hereinbefore cited:

"It must be from the nature and necessity of the case that the Legislature intended that some margin, even though narrow, should be allowed for honest effort to comply with the statute, and did not intend that the vote of any precinct should be invalidated because the polls were not open at the very instant of sunrise. Therefore, further, if any person seeks to take advantage of omission in this regard, he must allege some delay sufficient to show a transgression of the statute inconsistent with an honest and intelligent endeavor to obey its command, or that the violation of its letter on which he relies has operated to obstruct the full and fair expression of the suffrage of the precinct."

It will be remembered that, for aught that the findings of the court show, the 21 persons or more who left the polls of precinct 20 before 7:15 o'clock may have returned and voted during the many remaining hours of the election day. Therefore, if the burden was upon the contestant to show that he had been injured by reason of the alleged failure of the officers to have the polls open at 6 a. m., it is plain, according to the findings of the court, that he did not sustain this burden by proof. It is argued, however, that upon a showing being made of the delay in opening the polls, a presumption of damage arose which shifted the burden of proof to the contestee and required of him a showing that the irregularity did not result in damage to the contestant. This question and those incidental to the proposition were considered in the case of Kenworthy v. Mast, 141 Cal. 268, 74 Pac. 841. In that case it was shown that there was a delay of from 6 to 7:45 o'clock in the opening of the polls of a certain precinct, a delay of 30 minutes more than the evidence and findings disclose here occurred in the case of precinct 20. The court there said that it had never been held in this state that a literal compliance with the provisions of the law as to the hour of opening the polls was absolutely essential to the validity of the vote of a precinct, and that the disobedi-

ence of even a mandatory statute must be liberally construed. The conclusion to be deducted from that opinion is that the Supreme Court did not consider a delay in opening the polls of 1 hour and 45 minutes at the commencement of the day a great deviation from the requirement of the statute. The court there referred to the Packwood-Brownell Case, supra, and called attention to the concurring opinion of the Chief Justice as filed in that case, wherein it was said that, while the requirements as to time or place of holding an election are mandatory, the time in that connection meant the proper day for holding the election, and—

"that a slight delay in opening the polls, explained and excused by the absence of one of the officers, and by the necessity of setting up the booth, railings, etc., ought not to disfranchise the voters of a precinct, in the absence of any showing of actual injury."

In the case last above cited there was even a greater delay in the opening of the polls than was shown in Kenworthy v. Mast, supra, the delay being from 6:29 a. m. until 8:15 or 8:30, and we glean from the opinion that such a delay was not to be denominated great or considerable. In Kenworthy v. Mast, it is said:

"The general rule, as stated in McCrary on Elections (section 165), is that, in the absence of a provision in the statute expressly declaring that a failure in this respect shall render the election void, it will be regarded as so far directory only, and that, unless the deviation from the legal hours has affected the result, it will be disregarded; but that if such deviation is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it has not."

Considering the facts in evidence in this case and applying to them the law as we understand the Supreme Court to have declared it, we are not of the view that the delay shown in the opening of the polls in precinct 20 was either "great" or "considerable." Conceding correctness for that conclusion, it follows that the contestant failed to support his charges of malconduct with proof of damage resulting therefrom to him. It would be most unjust, we think, to declare that all of the voters who cast their ballots at precinct 20 on election day should be disfranchised in their attempt to express a choice for supervisor simply because the election officers deviated from the strict requirement of the statute as to the opening of the polls. We, therefore, conclude that it was error for the court to have rejected the vote cast in that precinct. Had the findings of fact contained a particular statement showing the reason for the nonopening of the polls, a judgment might be directed without the necessity of further proceedings being had in the trial court. However, as the finding that the officers failed without sufficient cause or excuse to open the polls may import a finding of fraud, the review of the evidence which we have made becomes necessary in order to arrive at the decision indicated.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

(29 Cal. App. 212)

CITY OF SACRAMENTO v. SWANSTON et al. (Civ. 1397.)

(District Court of Appeal, Third District, California. Dec. 21, 1915.)

1. STATUTES ⟸72, 76—UNIFORM OPERATION—APPLICABILITY OF GENERAL LAW—CLASS LEGISLATION.

Notwithstanding Const. art. 1, § 11, declaring that all laws of a general nature shall have uniform operation, and article 4, § 25, prohibiting local or special laws in enumerated cases and in all other cases where a general law can be made applicable, the Legislature may pass laws designated to apply to or operate on a certain class of persons only, provided the class is founded on some natural or extrinsic or constitutional distinction, but there must be no arbitrary discrimination between parties standing in the same relation to the subject of the law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 72, 77½–78½; Dec. Dig. ⟸72, 76.]

2. EMINENT DOMAIN ⟸1—NATURE OF PROCEEDINGS.

The taking of private property in the exercise of the power of eminent domain is justifiable only on the theory of common benefit, and though Const. art. 1, § 14, provides that no property shall be taken or damaged without just compensation having been made, private property may be taken though the owner does not desire to give it up.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 1, 2; Dec. Dig. ⟸1.]

3. CONSTITUTIONAL LAW ⟸248 — EMINENT DOMAIN ⟸265 — STATUTES ⟸72, 76 — EQUAL PROTECTION OF THE LAWS—SPECIAL LEGISLATION.

Code Civ. Proc. § 1255a, authorizing the court, on the abandonment of condemnation proceedings by plaintiff, to enter judgment of dismissal and include in the costs assessed against plaintiff the fee of defendant's attorney in the proceeding, applies alike to all of the classes to which it applies, and does not discriminate as between persons belonging to that class, and denies to none the equal protection of the law, and the provision does not violate Const. U. S. Amend. 14, or Const. art. 1, § 11, providing that all laws of a general nature shall have a uniform operation, or article 4, § 25, prohibiting special laws; eminent domain proceedings being capable of differentiation from ordinary actions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Dec. Dig. ⟸248; Eminent Domain, Cent. Dig. §§ 400, 690–693; Dec. Dig. ⟸265; Statutes, Cent. Dig. §§ 72, 77; Dec. Dig. ⟸72, 76.]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by the City of Sacramento against George Swanston and another. From a judgment of dismissal with costs against plaintiff in favor of defendant named, plaintiff appeals. Affirmed.

Archibald Yell, of Sacramento, for appellant. Arthur C. Huston, of Woodland, and Driver & Driver, of Sacramento, for respondent.

HART, J. The action is in eminent domain for the condemnation of certain lands belonging to the defendants. The jury assessed the damages accruing to the lands described in the complaint by reason of the taking thereof for the purposes of the plaintiff, and in due time after the verdict so rendered and entered, the court, upon its findings of fact and conclusions of law, entered judgment of condemnation in the amount of damages admeasured by the jury. The plaintiff having failed, within 30 days after the final judgment of condemnation, to pay the amount at which the damages as to the defendant Swanston's lands was appraised or fixed by the jury, as required by section 1251 of the Code of Civil Procedure, the court, in accordance with the provisions of section 1255a of said Code, upon motion of said defendant, entered a judgment dismissing the action and taxing costs against the plaintiff. Included in the costs so allowed to the defendant is an attorney's fee of $3,000, such a fee constituting, under the terms of section 1255a, supra, an item of costs which, with other legal costs, may be allowed against a plaintiff in condemnation proceedings where there has been an express or implied abandonment of such proceedings by the plaintiff at any time after the filing of the complaint. This appeal is prosecuted by the plaintiff from said judgment of dismissal.

[1] The principal and, indeed, the sole complaint against the judgment arises from the allowance by the court of an attorney's fee to the defendant, the plaintiff claiming that so much of section 1255a of the Code of Civil Procedure as authorizes the court, upon the abandonment of the proceedings by the plaintiff and thereupon the entry of judgment of dismissal, to include in the costs assessed against the plaintiff the fee of the defendant's attorney in the proceeding is unconstitutional and void for these reasons: (1) That said section in the particular mentioned violates the Fourteenth Amendment of the federal Constitution; (2) that it contravenes certain provisions of our state Constitution, requiring that laws of a general nature shall be uniform in their operation, and prohibiting the passage of special laws.

For the support of their position as thus stated counsel for the plaintiff rely principally upon the case of Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 Pac. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193, 11 Ann. Cas. 712, and the cases therein cited. In the case just named, the Supreme Court held to be violative of the Fourteenth Amendment of the federal Constitution and of the provisions of our state Constitution, requiring that every law of a general nature shall have a uniform operation and prohibiting the passage of special laws the provision of our mechanics' lien law which authorized the allowance by the trial court in actions to foreclose mechanics' and laborers' liens—

"as part of the costs, * * * reasonable attorney's fees * * * to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant."

The reasoning of the court in that case is, substantially: That it is a provision which imposes a penalty upon the defendants in such an action for a failure to pay certain debts, and thus the law singles out a certain class of debtors and punishes them when, for like delinquencies, it punishes no others. They are therefore not treated as other debtors, or equally with other debtors.

"If the litigation terminates adversely to them," so proceeds the reasoning, "they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right; while their adversaries recover if right and pay nothing if wrong."

Thus, so goes the argument, in suits to which they are parties they are discriminated against, do not stand equal before the law, and are denied its equal protection, in violation of the Fourteenth Amendment of the federal Constitution. Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666.

In support of the position that the provision of the law concerned here involves special legislation or the granting of special privileges, rights, and immunities, contrary to certain specific inhibitions of section 25, art. 4, of the Constitution, the court, in the Builders' Supply Co. Case, cites the following cases, which are also cited here: Davidson v. Jennings, 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340, 83 Am. St. Rep. 49; Atkinson v. Woodmansee, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325; Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. 350; Hocking Val. Coal Co. v. Rosser, 53 Ohio St. 12, 41 N. E. 263, 29 L. R. A. 386; Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006; Wilder v. Chicago Ry. Co., 70 Mich. 382, 38 N. W. 289; Openshaw v. Halfin, 24 Utah, 426, 68 Pac. 138, 91 Am. St. Rep. 796; Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500. In all these cases, with the exception of Wilder v. Chicago Ry. Co., 70 Mich. 382, 38 N. W. 289, and Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500, in which, however, the identical principle is discussed and the same rule applied, statutes providing for laborers' or mechanics' liens are involved. As seen, the reasoning by which the conclusions in those cases are arrived at is substantially the same as that upon which the United States Supreme Court, in Gulf, etc., Ry. Co. v. Ellis, supra, declared the Texas statute authorizing the allowance of attorney's fees to persons having a bona fide claim for services, or for

damages against a railroad company for stock killed, was unconstitutional and void as in violation of the Fourteenth Amendment of the federal Constitution.

There have been no other provisions of law, either organic or statutory, which have been the source of so wide a range of discussion, or which have been more difficult to apply in given cases than those inhibitions of the state and federal Constitutions whose purpose is to establish equality before the law, and therefore the uniform operation of all laws of a general nature and the prohibition of class and special legislation.

It is not true that any law which is designed to operate upon a particular class of persons or property involves special legislation, or is wanting in uniformity of operation, or denies to a person the equal protection of the law within the meaning of the constitutional guaranties relating to those subjects. Indeed, that even special laws are in certain cases permissible under our present state Constitution and the cases expounding the provision which, by implication at least, authorizes such legislation, is a well-settled proposition. Article 4, § 25, subd. 33; People v. McFadden, 81 Cal. 498, 22 Pac. 851, 15 Am. St. Rep. 66; People v. Mullender, 132 Cal. 221, 64 Pac. 299; Board of Directors v. Nye, 8 Cal. App. 527, 542, 543, 97 Pac. 208. It is true, however, that the design of the framers of our present Constitution, by inserting into that instrument provisions prohibiting class or special legislation, was to correct or prevent a repetition of the evils which grew up under the Constitution which the present superseded from the vast amount of special legislation, applying only to certain persons and things, which found its way to our statute books. The result is that now special legislation is not, as formerly, generally permissible, but only allowable where the exigency of the occasion imperatively calls for a special law.

It is obvious, however, that the case now before us is not of that class where a resort to special legislation is necessary or contemplated by subdivision 33, § 25, art. 4, of the Constitution. The sole question here, then, is whether the law in question as to the particular provision thereof under review, being a law of a general nature, is wanting in uniformity in its operation, or whether it is a special law within the constitutional inhibition in that regard or offends the mandate of the national Constitution against the passage of laws having the effect of denying to any person within the jurisdiction of this state the equal protection of the laws.

What is meant by the provision of our Constitution that "all laws of a general nature shall have a uniform operation" (article 1, § 11)—a provision which was contained in the state Constitution of 1849—was as clearly and logically explained as that language has ever been, judicially, in the very early case of Smith v. Judge Twelfth District Court, 17 Cal. 555, by the late Judge Baldwin, voicing the views and conclusion of the court. In that case, the question was as to the validity of a statute passed by the Legislature, not only authorizing, but making it the duty of the judge of the district court of this state to transfer a criminal case for trial from the city and county of San Francisco, where the crime was committed, to the district court of the Eleventh judicial district, in and for Placer county. The constitutionality of said act was upheld, it being permissible, under the Constitution of 1849, to pass special laws, with the result that there was had under that instrument special legislation upon an infinite variety of subjects. The court in that case said:

"* * * The construction given to the word 'uniform,' in this view [the view urged by counsel] is universal. * * * But this is absurd, for different classes of crimes may and do call for different modes of procedure. * * * But the error is in a misapprehension of this term 'uniform.' The language must be carefully noted. It is not that all laws shall be universal or general in their application to the same subjects, nor is it even that all 'laws of a general nature' shall be universal or general in their application to such subjects; but the expression is that these laws 'of a general nature' shall be 'uniform in their operation'—that is, that such laws shall bear equally, in their burdens and benefits, upon persons standing in the same category. But this category depends upon the facts which characterize the offense. Every defendant is not entitled to the same privileges, or subject to the same burdens, as every other; for instance, some are entitled to bail, others are not, and this depends upon the particular facts characterizing the imputed crime. When we speak of uniformity in the operation of a law, we speak of that operation which is equal under the same facts; for what justice or uniformity would there be in applying the same rigor of remedy or the same measure of punishment to all conditions of fact or degrees of criminality, merely because there existed a similarity or identity in the general charge? The effect of laws of a general nature shall be the same to and upon all; but who are 'the all' who are the subjects of this operation? Obviously, the answer is, all who stand in the same relations to the law; all, in other words, the facts of whose cases are * * * the same. To treat one man differently from another man—to deny to one man a privilege extended to another man—is not partiality; it may be a just discrimination; to constitute partiality and the invidious discrimination against which the Constitution aims, the denial to another of what is given to one must be made upon substantially the same facts; or, to express the idea differently, the denial must be of the same claim before accorded."

Although, as stated, the framers of our present Constitution took particular pains to guard against the indiscriminate enactment of laws the effect of which was to operate only upon particular persons or things, still, in the very nature of things, it was and is impossible, in a state, like ours, having a variety of interests calling for diverse kinds of legislation, sometimes antagonistic to each other and where, therefore, a single rule, universal in its application throughout the commonwealth, would operate as a distinct and positive detriment to the interests of certain lo-

calities or certain classes of people, to present a system of laws alike applicable to all of the great variety of conditions in the state. Hence the framers of the Constitution recognized the necessity of laws which, in a sense, would be special so far as their operation was concerned—special in the sense that they applied or were to apply to certain classes of persons or things only to the exclusion of all other classes. It is therefore competent for the Legislature to pass laws of this character; that is, laws which are designed to apply to or operate upon a certain class of persons only, but the rule is that the class to which the law is solely to apply must be founded upon some natural or intrinsic or constitutional distinction, or, in other words:

"The individuals to whom the legislation is applicable must constitute a class characterized by some substantial qualities or attributes of such a character as to indicate the necessity or propriety of certain legislation restricted to that class." City of Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 604, and numerous other cases cited in Board of Directors v. Nye, 8 Cal. App. on page 536, 97 Pac. 208.

And, furthermore, lest by such enactments, the constitutional inhibition against special legislation may be violated, it is the rule that, in the passage of laws designed to operate upon a particular class only, there must be no arbitrary discriminations between parties standing in the same relation to the subject of such law, and that if, by such laws, such discriminations are made, then the legislation will fall under the force of the constitutional mandates against special enactments. Ex parte King, 157 Cal. 161, 106 Pac. 578, and cases therein cited. And in that case it is further said:

"If it [the law] operates uniformly upon all the members of such class it necessarily has the 'uniform operation' required by section 11, art. 1, of the Constitution. The question whether the individuals affected by a law do constitute such a class is primarily one for the legislative department of the state, and it is hardly necessary to cite authorities for the proposition that when such a legislative classification is attacked in the courts, every presumption is in favor of the * * * legislative act. Where upon the facts legitimately before a court, it is reasonable to assume that there were reasons, good and sufficient in themselves, actuating the Legislature in creating the class, though such reasons may not clearly appear from a mere reading of the law, such assumption will be made, and the legislation upheld. To warrant a court in adjudging the act void on this ground, it must clearly appear that there was no reason sufficient to warrant the legislative department in finding a difference and making the discrimination."

See Grumbach v. Lelande, 154 Cal. 679, 685, 98 Pac. 1059.

Thus we are now brought face to face with the concrete proposition submitted for decision in this case, and by the light of the principles above stated the question must be considered and determined.

[2] Eminent domain is an attribute of sovereignty and the right or power of a sovereign state to appropriate private property to particular uses without the consent of the owner. The taking of private property by the state, in the exercise of this power, cannot be, abstractly viewing it, less justifiable on moral grounds than the enforced taking of private property by one individual from another for the latter's private uses. It is justifiable only because the power makes for the common benefit, and is upheld upon the theoretical conception that every owner of private property takes and holds such property subject to the condition that the state may take it from him, if occasion discloses that the common welfare will be the better subserved by its public use than by its private ownership. The people of the state, or that portion of the people who are vested with the right of franchise, in whom the power resides, have delegated the power to the Legislature, and the latter, in turn, has constituted certain specified persons as the agents of the state for the exercise of the power in particular instances. The Constitution of this state, as does that of nearly every other state, provides that, in the exercise of this power, no property shall be taken or damaged without just compensation having been made to, or paid into, court for the owner. Article 1, § 14. Notwithstanding the condition thus imposed as a prerequisite so to take one's property, the fact remains that when property is taken under the right of eminent domain, it is taken against the will or consent of the owner. And private property may thus be taken, even if the owner, for reasons peculiar to himself, would prefer to retain it rather than to receive for it a sum vastly in excess of its actual value for any practical purpose to which it might be put. In brief, when the state, through any of its duly constituted agencies, makes a call for the property for a public use, it must be surrendered in any event; and whether the "property" referred to in the Constitution be merely the rights in the thing so desired or the thing itself, it is nevertheless true that the enforced giving up of the rights therein amounts in practical and substantial effect to a like giving up of the title to the thing itself. The result is that when this power is sought to be visited upon particular privately owned property, the owner thereof is, if proceedings in condemnation be found necessary, forced into litigation as to the subject-matter of which he is in no way in default, or for which he is not responsible in the sense in which a defendant who has breached a contract or by affirmative acts on his part has deprived the plaintiff of a right or imposed upon him a wrong is responsible for litigation. He, in short, although not desiring to give up his property for the price offered for it or at all, and, although acquiring title to it subject to the burdens which follow from an inherent power or legal right in the people in their sovereign capacity, does not invite the litigation, nor is he the actor therein, as one who violates a contract or commits some private wrong invites the litigation

necessary to enforce the obligations of the contract or to correct the wrong.

Thus it must at once become obvious that a proceeding for the condemnation of private property for a public use, under the power of which we have been speaking, is, in its origin, its purpose and its characteristics, essentially different from any other action or proceeding established by our law as an instrumentality for the enforcement of a private right or the redress or prevention of a private wrong. It is, indeed, not included by the Code within the category of ordinary actions at law or suits in equity, but is denominated, with others, as a "special proceeding," and even as to other proceedings so denominated in the Code, it is, by reason of the characteristics peculiar to it, strictly sui generis.

[3] It, therefore, cannot be doubted that the proceeding to condemn property under the right of eminent domain is so differentiated from the ordinary actions or proceedings in a court of justice "by which one party prosecutes another for the enforcement or protection of a right, or the redress of a private wrong," as to bring it within the settled test justifying the assignment of the proceeding to a particular class for the purposes of reasonable provisions not applicable to other classes of actions. The test in that regard is: If the classification is "based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted," any reasonable special provision as to the action so classified, and which is not applicable to other classes, will not be held to be void as involving special or discriminatory legislation within the constitutional provisions upon that subject. This rule is conceded in all the cases, and is elaborately considered by Chief Justice Angellotti in the case of Engebretsen v. Gay, 158 Cal. 30, 32, 109 Pac. 880, in which, after reviewing many cases, including Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 Pac. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193, 11 Ann. Cas. 712, mainly relied upon by the appellant here, it is held that a provision in the street improvement act of 1885 (St. 1885, c. 153), allowing, in addition to the taxable costs, an attorney's fee to the plaintiff in an action to foreclose a lien upon property improved under said act, is not discriminatory or violative of the state constitutional inhibition against special legislation or of any provision of the federal Constitution. The theory of the decision, as we understand it, is that, as may be done where there is default in the payment of the ordinary taxes assessed against property, the Legislature has the right to impose upon those defaulting in the payment of street assessments for the improvement of streets a penalty which may include a reasonable attorney's fee.

In the case at hand there exists no basis for the reasoning which led to the conclusion arrived at in Builders' Supply Depot v. O'Connor, supra, and in Gulf, etc., Ry. Co. v. Ellis, supra. In those cases it was held, as we have seen, that an allowance to the plaintiff of an attorney's fee if he was victorious in the trial was distinctly discriminatory, because no such allowance was provided for the defendant in case he prevailed at the trial. In this case, however, as in no other case of which we can presently think, the statute gives to the plaintiff the right to abandon the proceeding, even after a trial thereof and a verdict and judgment of condemnation rendered and entered, and, as a penalty for such abandonment, accords to the defendant the right to be reimbursed by the plaintiff for not only the ordinary costs but an attorney's fee. No right of abandonment is awarded by the statute to the defendant, and, in the very nature of the case, there could not be so that it would affect or impair the right of the plaintiff to condemn and take his property. The conditions as to the two parties in the proceeding are essentially and radically different.

But, in our judgment, the real rationale of the authority of the state, to which the sovereign power has delegated the jurisdiction over the right of eminent domain, to exact from the plaintiff the payment as costs of a reasonable attorney's fee to the defendant under the circumstances indicated in the statute and which, in our opinion, could be so exacted in any event or under any circumstances, lies in the control, hedged only by limited constitutional restraints, it has over that sovereign right.

As before explained, the persons, artificial or otherwise, upon whom the right to exercise or invoke on specified occasions the power of eminent domain is conferred by the state or the Legislature are mere agents of the state for that particular purpose. They are, in other words, by the state specially clothed with power to exercise a right of sovereignty which they could not exercise but for the action of the Legislature in clothing them with the authority of agents for that purpose. The act of conferring that power upon those persons is entirely and purely voluntary upon the part of the state. The state cannot be compelled to part with it by conferring it upon other persons desiring to exercise it, but may withhold it and itself exercise it, subject, of course, to the constitutional restraints referred to, to the exclusion of all other persons or instrumentalities. Therefore, no one will dispute the right in the Legislature, in conferring the right to exercise the power of eminent domain upon others, to impose any reasonable conditions upon its exercise by those others as it sees fit. In this state it has imposed upon those in whom it has invested that right, as one of the conditions upon which they may exercise it, the requirement that, in case they abandon the proceedings in condemnation after they have instituted them, they must pay

the defendant, in addition to ordinary taxable costs incurred by him by reason of the proceeding, reasonable attorney's fees. The condition is not an unreasonable one to impose in such a case. The right of eminent domain involves an extraordinary power of sovereignty. While it is an eminently proper and necessary right of sovereignty, its exercise should be carefully guarded so as to prevent abuses arising under it. The Legislature can, as stated, and it should, impose upon its exercise such reasonable conditions as will discourage litigation not founded upon merit arising under it or as will penalize to a reasonable extent those who resort to it with the intention of securing property at the price they appraise it for and abandoning the proceeding if the value fixed by the jury and court are in excess thereof even only in a reasonable amount. Under the statute complained of here, if the plaintiff accepts the property at the price at which it is judicially appraised, the defendant only receives the compensation so fixed. If the property is not accepted by the plaintiff, then he must reimburse the defendant for the expenses which he has been compelled to bear in litigation for which he was not responsible.

Thus it is plainly to be seen that the section of the Code in question does not impinge upon any provision either of the state or federal Constitution. The provision animadverted upon here applies alike to all of the class to which the section applies. It does not discriminate as between persons belonging to that class and denies to none the equal protection of the law.

The views thus expressed are in accord with those advanced upon precisely the identical question by the adjudicated cases. Some of these cases we have already referred to. But there is another case to which we may well refer in connection with the observations last above made. The case is from the Supreme Court of Illinois. In that state, the legislative law upon eminent domain, among other provisions, contains one like ours, allowing the defendant, in proceedings to condemn property under the right of eminent domain, his costs and attorney's fees, to be taxed against the plaintiff, when the latter dismisses or abandons the proceeding. In Sanitary District of Chicago v. Bernstein et al., 175 Ill. 215, 51 N. E. 720, the validity of the provision of the statute of said state so allowing attorney's fees was challenged upon constitutional grounds similar to those urged here. The Illinois court disposed of the objections in a well-considered opinion, from which we here present an extended excerpt because of its cogent application to the present case:

"The ground upon which it is argued that the provision is unconstitutional is that it is special legislation, and imposes upon one class of litigants a charge from which all others instituting proceedings in court are free. Any other plaintiff or petitioner may dismiss his suit while pending, and suffer no penalty beyond the payment of statutory costs; while, if a petitioner under the eminent domain act shall, for any cause, dismiss the petition, the statute gives a right to the defendant to recover, in addition to the taxable costs, the amount paid or incurred by him for costs, expenses, and reasonable attorney's fees in his defense. Every citizen has an equal right with every other to resort to the courts of justice for the settlement and enforcement of his rights; and it is true that a discrimination between different classes of litigants, which is merely arbitrary in its nature, is a denial of that right and of the equal protection of the law. If, however, there be a reasonable ground of distinction, so that the discrimination does not appear to be purely arbitrary or evasive of constitutional rights, we think that the Legislature has a discretion to impose conditions or restrictions which they may deem in furtherance of justice. That discretion cannot be controlled by the courts, but its exercise must be left to the wisdom and sense of justice of the Legislature. We think that no one will fail to observe a difference, in principle and natural justice, between a litigation where plaintiff invokes the action of the court to recover money or property from another, and dismisses such action, and a proceeding to ascertain the compensation to be paid for property to be taken for public use. The Constitution protects the owner by a provision that his property shall not be taken for public use without just compensation. The proceeding is not the enforcement of individual right, but to settle the condition upon which the sovereign power to take the property may be exercised. The judgment is not binding upon the petitioner, but it may decline to enter upon the property or to make payment of compensation. If the possession is taken, and the compensation paid, the owner gets nothing but the fair cash market value of his property; and if it is not paid, or the attempted taking is discontinued by the dismissal of the petition, he is a loser to the extent of the amount expended. The act seems to be in harmony with the spirit and intent of the Constitution, and we think it valid."

See, also, Gano v. Minneapolis & St. Louis R. R. Co., 114 Iowa, 713, 87 N. W. 714, 55 L. R. A. 263, 89 Am. St. Rep. 393, and cases therein cited.

The city attorney, representing the plaintiff in this proceeding, has presented his side of the case here in a forceful and masterly and earnest manner; but the authorities are clearly against his position, and, as must be manifest from the discussion herein, we are, upon the authorities as well as upon principle, constrained to the conclusion that the law under attack on this appeal is not amenable to the objections on constitutional grounds urged against it.

The judgment is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(29 Cal. App. 246)

SNOOK et al. v. PAGE. (Civ. 1435.)

(District Court of Appeal, Third District, California. Dec. 21, 1915.)

1. BROKERS ⊂⊃46 — COMPENSATION — CONTRACT OF EMPLOYMENT.

Where a firm is employed as exclusive agent, and is not given the exclusive right to sell property, the owner may sell by his own efforts without becoming liable for commission; the only effect of the contract being to prevent the owner from placing the property in the hands of another agent.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 47; Dec. Dig. ⊂⊃46.]

2. BROKERS ⊂⊃46 — COMPENSATION — CONTRACT OF EMPLOYMENT—"SOLELY."

A contract whereby defendant empowered plaintiffs solely to sell his property within 120 days, and agreed to pay them 5 per cent. commission and one-half of price obtained above $20,000 commission on any sale made by them during the life of the agreement if sold to purchaser to whose attention the property was brought through them, does not entitle plaintiffs to commission where a sale is made by defendant by his own efforts; the word "solely," as used in the contract, importing only sole agency.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 47; Dec. Dig. ⊂⊃46.

For other definitions, see Words and Phrases, First and Second Series, Solely.]

3. BROKERS ⊂⊃46 — COMPENSATION — CONTRACT OF EMPLOYMENT—"RATIFY."

A contract employing plaintiffs to sell property and agreeing to pay them a commission on any sale ratified by defendant does not entitle plaintiffs to commission on a sale by the defendant; the term "ratify" meaning to give validity to the act of another.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 47; Dec. Dig. ⊂⊃46.

For other definitions, see Words and Phrases, First and Second Series, Ratify.]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by James A. Snook and another, doing business under the firm name of Snook & Nelson, against Mrs. Alice Page. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

H. B. M. Miller, of San Francisco, and Charles E. Snook, of Oakland, for appellants. Robinson & Robinson, of Oakland, for respondent.

BURNETT, J. The appeal is from a judgment of nonsuit in an action for the recovery of $3,630, claimed as commissions for the sale of real property. The contract of agency, as far as necessary to quote, was as follows:

"For value received, and in consideration of the agreement on the part of Snook & Nelson, hereinafter contained, to perform services for me, I appoint said Snook & Nelson my agents, and as such authorize them to sell for me within one hundred and twenty days from date hereof the following described property: * * * Said property may be sold as a whole or in such subdivisions as herein stated, provided that the entire selling price shall not be less than $20,000.

"I hereby empower said Snook & Nelson solely to contract in writing to sell said property with the same effect as if I were present and authorized the same. * * * I agree to pay to Snook & Nelson 5 per cent. commission and one-half of price obtained above $20,000 commission on any sale made by them or ratified by me during the life of this agreement, or thereafter if sold to purchaser to whose attention said property was brought through them."

It is not claimed that plaintiffs made a sale or obtained a purchaser, but it is conceded that defendant, without any aid from or consultation with them, made a contract for the sale of the property. It is contended, however, that, under the peculiar terms of their contract, plaintiffs were entitled to a commission if a sale were made by the owner of the property. The proper construction of said contract of agency is therefore the desideratum in the case.

The first question of importance, then, is whether the plaintiffs were constituted the exclusive agents, or were they given the exclusive right to sell said property?

[1] If the former only, the rule is well settled that:

"The owner has the right to sell the same by his own unaided efforts without becoming liable to the broker for commission, that the only effect of such contract is to prevent the owner from placing the property in the hands of another agent, and that the owner does not thereby relinquish his right to sell the property himself independently of the broker." Golden Gate Packing Co. v. Farmers' Union, 55 Cal. 606; Waterman v. Boltinghouse, 82 Cal. 659, 23 Pac. 195; Dreyfus v. Richardson, 20 Cal. App. 800, 130 Pac. 161.

The right on the part of the owner is an implied condition of the agency, subject to which the agent accepts it, and, as his commission is payable only in case of his success in finding a purchaser, the agent takes his chances of the owner himself making a sale. Dole v. Sherwood, 41 Minn. 535, 43 N. W. 569, 5 L. R. A. 720, 16 Am. St. Rep. 731.

[2] The contract herein certainly does not expressly confer upon plaintiffs the exclusive right to sell the property, nor does it in apt terms, if at all, provide for a commission in case the owner himself should dispose of it.

In considering the matter we are to keep in mind that the burden is upon plaintiffs to establish their claim, and that, since the contract was prepared by them, any uncertainty or ambiguity in the terms of the instrument must be resolved in favor of the owner.

With this in view, then, taking the contract "by the four corners," we reach the conclusion that plaintiffs were made the exclusive agents, but they were not clothed with the exclusive right to sell the property. The use of the word "solely" can furnish the only pretense of justification for the contention of plaintiffs, but, fairly interpreted, the clause imports the meaning of sole agency. If it had been the intention to deprive the owner of the right to sell, or in case of such sale to create a liability for commissions, it could, and, no doubt, would, have been easily and clearly expressed. With such contingency in view, the parties would have provided that

"Snook & Nelson should have the exclusive right to sell said property," or, "in case of a sale made by the owner, they should be entitled to the same commissions as though made by themselves."

The fact is that by the clause under consideration the parties were not treating of an actual sale, nor did they contemplate any personal participation of the owner in the transaction. The language shows that they were considering a contract or agreement for the sale, rather than the sale itself, and such contract made in the absence of the owner, which, of course, excludes by implication the consideration of what might be done by the owner herself in consummating a transfer of the property. In this respect the contract in Davis v. Van Tassel (Sup.) 107 N. Y. Supp. 910, was apparently more favorable to the broker than the one involved herein, but in that case the court said:

"No doubt, a contract could be made whereby, in consideration of the efforts made by an agent to sell property, the owner might obligate himself to pay a sum agreed upon if the premises were sold even without the aid of the broker; but it does not seem to me that this is such a contract. The plaintiff is constituted the recognized sole agent for the property; but there is nothing in the fact of sole agency which in itself gives the broker any right to commissions, unless he is the procuring cause of the sale."

It was further held that the words, "And at such times as a sale shall be effected for any of the above-mentioned property for the prices named * * * I agree to pay upon the sum of 2 per cent. * * * at such times as such sales are effected," referred to sales made by such agents, and did not include a sale made by the owner himself.

The cases cited by appellants involve an entirely different contract from the one before us.

In Crane v. McCormick, 92 Cal. 176, 28 Pac. 222, by the terms of the contract the brokers were authorized to sell the property at any time within one year, and it was expressly agreed that the commissions should be paid if the owners withdrew the property from sale or effected a sale in any way during the year. The owners did make a sale during the year, and therefore one of the conditions happened that rendered them liable for the commission.

In Maze v. Gordon, 96 Cal. 61, 30 Pac. 962, the contract provided that, if the owner should, before the expiration of the contract, withdraw the sale of the property, the broker should be entitled to his commission, and it was properly and necessarily held that, since the owner did withdraw the property from sale within said time the broker was entitled to his commission.

In Kimmell v. Skelly, 130 Cal. 555, 62 Pac. 1067, the owner specifically agreed that a commission was to be paid "in the event of a sale of said real property by them or any one else, including myself."

In those cases and some others cited it may be said the principal controversy was as to whether there was sufficient consideration for the agreement. There was no such dispute, as herein, over the interpretation of the contract itself.

[3] The other point, that the owner is liable for the reason that she ratified the sale, is even less tenable. The contention is that she ratified the sale by making it. This would certainly be a strange and extraordinary use of the term "ratify." We must assume that the parties attached to the term its ordinary and usual signification.

In Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178, it was held:

"To ratify is to give validity to the act of another, and implies that the person or body ratifying has at the time power to do the act ratified."

In Heyn v. O'Hagen, 60 Mich. 150, 26 N. W. 861, it was said:

"To ratify is to give sanction and validity to something done without authority by one individual on behalf of another."

In legal phrase it usually means to approve or confirm by a principal what has been done by an agent or one assuming to act for another. City of Lexington v. Lafayette County Bank, 165 Mo. 671, 65 S. W. 943.

"The terms 'adopt' and 'ratify' are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent." Shepardson v. Gillette, 133 Ind. 125, 31 N. E. 788.

In 33 Cyc. p. 1528, "ratification" is defined as:

"The act of giving sanction and validity to something done by another; the adoption by a person as binding upon himself of an act done in such relations that he may claim it was done for his benefit, although done under such circumstances as would not bind him but for his subsequent assent; the approval by act, word, or conduct of that which was attempted (if accomplished), but which was improperly or unauthorizedly performed in the first instance; the confirmation of a previous act done either by the party himself or another; the confirmation of a voidable act; a definition of establish."

As used in the Code, the term undoubtedly refers to the act of another. See sections 2310 and 2312, Civ. Code.

The act of defendant in selling the property was, of course, the act of the principal, and, moreover, it was an entirely valid act. It was not voidable in any sense, even though it should be held that the brokers were given the exclusive right of sale. For this exclusive right of sale would only mean that they were entitled to their commission, no matter how or by whom the sale was effected.

We think the decision was right, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(29 Cal. App. 158)

LYNIP v. ALTURAS SCHOOL DIST. OF MODOC COUNTY et al.†

(Civ. 1420.)

(District Court of Appeal, Third District, California. Dec. 13, 1915.)

1. JUDGES ⟸51—DISQUALIFICATION TO ACT —OBJECTIONS—WAIVER—STATUTE.

Under Code Civ. Proc. § 170, providing that the disqualification of a judge for relationship within the third degree to a party may be waived in writing, where defendants, in an action by the cashier of a bank in its behalf, as soon as it appeared on plaintiff's cross-examination that the presiding judge was a brother of a director of the bank objected that the judge was disqualified and requested a change of venue, the objection did not come too late, and defendants did not waive their privilege to object.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. ⟸51.]

2. JUDGES ⟸45—DISQUALIFICATION—RELATIONSHIP—STATUTE.

In an action by the cashier of a bank as the trustee of an express trust on behalf of the bank, by virtue of Code Civ. Proc. § 369, the presiding judge, brother of a director of the bank, was disqualified under section 170, providing that no judge shall act as such in any action when he is related to either party, or to an officer of a corporation which is a party, within the third degree.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 208–212; Dec. Dig. ⟸45.]

3. JUDGES ⟸51—DISQUALIFICATION TO ACT —OBJECTION TO MOTION.

In an action by the cashier of a bank on its behalf, where it was objected, as soon as the fact appeared on plaintiff's cross-examination, that the presiding judge was disqualified because he was a brother of a director of the bank and so related to an officer of a corporation which was a party, the objection to the motion for disqualification that it did not show the bank was a corporation should have been made at the time.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. ⟸51.]

4. JUDGES ⟸45—DISQUALIFICATION—RELATIONSHIP TO "OFFICER" OF CORPORATION —"OFFICE"—STATUTE.

A director of a bank is its "officer" within Code Civ. Proc. § 170, providing that no judge shall sit or act as such in any action when he is related to an officer of a corporation which is a party, since an "office" in a corporation is a position of trust or authority in the regular and continued employment of the corporation, a position which a director occupies.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 208–212; Dec. Dig. ⟸45.

For other definitions, see Words and Phrases, First and Second Series, Office; Officer.]

5. ASSIGNMENTS ⟸73—RIGHTS OF ASSIGNEE AS AGAINST THIRD PARTY.

Trustees of a school district were not liable, to the assignee of the contractor for a school building who defaulted before completion, for the assigned amount of the contract price of the building, although they indorsed the assignment, thereby recognizing it, reciting an agreement to pay the sum "out of the payment" to be made "at the time of completion and acceptance of said building."

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 139–142; Dec. Dig. ⟸73.]

6. GUARANTY ⟸42—RIGHT OF ACTION.

Where the contractor for a school building defaulted in completion, the assignee of $4,000 of the retained percentage of the contract price could not recover against the school district trustees on their guaranty, attached to the assignment, providing that in consideration of the assignee's advancement to pay for labor and materials the trustees guaranteed that the amount advanced should be repaid, upon completion of the building, out of the percentage of the contract price held back until completion, since the instrument was not a guaranty of the original obligation that the debt would be paid.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 51, 52; Dec. Dig. ⟸42.]

Appeal from Superior Court, Modoc County; C. A. Raker, Judge.

Action by B. F. Lynip against the Alturas School District of Modoc County and others. From a judgment for plaintiff, and an order denying a motion for new trial, defendants appeal. Judgment and order reversed.

Cornish & Robnett, of Alturas, for appellants Auble, Ballard, and Smith. C. S. Baldwin, of Alturas, for appellant Alturas School Dist. Jamison & Wylie, of Alturas, for respondent.

BURNETT, J. There is little if any controversy as to the facts involved herein. In the year 1911, one A. E. Pearson, as original contractor, was engaged in the construction of a grammar school building in the town of Alturas, Modoc county, under a written contract for the total price of $20,350. Defendants Auble, Ballard, and Smith were the trustees of the school district. On or about November 18 of said year said Pearson made application to the plaintiff, as cashier of the First National Bank of Alturas, for a loan of $4,000 to enable said Pearson to pay for labor and materials for the construction of said building. Plaintiff, acting for said bank, loaned Pearson said sum and took an assignment to the extent thereof of the last or final payment which might become due said Pearson after the completion of said building.

On cross-examination plaintiff testified that this was not a personal transaction of his, that it was a "bank affair," and that he was prosecuting the action for the bank. The record then shows the following:

"Q. Who are the directors of your bank, that is, the First National Bank of Alturas? A. A. W. Toreson, D. C. Berry, A. B. Etes, H. R. Gaustad, John E. Raker, Ulty McCabe, E. Van Loan, C. A. Estes, and myself. Q. You say that John E. Raker is a director? A. Yes. Q. Is that a brother of his honor, Clarence A. Raker, who is presiding here? A. Yes, sir. Mr. Robnett: If your honor please, it just now develops in this case that your honor, under the Code, will be disqualified to proceed, owing to the fact that this action, although nominally brought in the name of B. F. Lynip, is in reality prosecuted by the First National Bank of Alturas, of which your brother, John E. Raker, is a director. I submit a motion at this time that your honor is disqualified, and there should be a change of venue in this case. It did not appear on the face of the record before. Mr. Jamison: If your honor please, I think it is out of the ordinary procedure. At this moment I am not prepared to take up and argue this matter. Usually, if any objection of this kind is

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

† Opinion modified. See 160 Pac. 175.

made, it is made in the beginning, before the case has reached trial in any way, shape, or form. Mr. Robnett: The record did not show on its face any disqualification. The other side had all the facts in their office and in their knowledge, and we had none of them. That is why the motion comes now. I simply submit the motion, and we are willing to proceed with the evidence and have the motion considered later. We make the motion now under our understanding of the law, and object to your honor presiding at the trial. The Court.: The motion is denied."

[1, 2] Section 170 of the Code of Civil Procedure provides:

"No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding: * * * 2. When he is related to either party, or to an officer of a corporation which is a party, * * * within the third degree, computed according to the rules of law."

The section further provides that said disqualification may be waived in writing. That is the only method specified, and while, under certain circumstances, a party might be estopped to raise the question of disqualification, no such situation is presented here. Appellants made the objection as soon as they were apprised of the facts that seemed to bring the case within said inhibition of the statute. Upon no consideration of principle or authority do we think it should be held that the objection came too late or that appellants had waived the privilege. It will be noticed that the foregoing is the only objection made by respondent to the motion. Certain other considerations are suggested here, however, in attempted justification of the order denying said motion. One is that the bank is not a party to the suit. Nominally this is true, but said bank appears unquestionably to be the real party in interest. The statute should have, we think, no such narrow construction as is contended. Plaintiff could maintain the action only by virtue of section 369 of the Code of Civil Procedure—that is, as the trustee of an express trust—but the judgment rendered would affect particularly the interest of the bank for whose benefit the action was prosecuted, and that is the determinative factor. Neither can there be any doubt as to what bank was interested in the suit. The quotation already made leaves nothing to be desired as to this point.

[3] The suggestion is made that it was not shown that the bank was a corporation. Such objection, if intended to be relied on, should have been made at the time. This would have been only fair to opposing counsel. Indeed, as we have seen, there was apparently no controversy as to the facts. It was assumed by all parties that the conditions existed that would make the rule applicable except that the application was made too late. But the point is made by appellants that it appears that it was a national bank, and since the law requires a national bank to be incorporated we must assume that it was such corporation. If strict proof were required, we would probably not be justified in acting upon such presumption, but, under the peculiar circumstances here, we must hold that there was acquiescence in the existence of the facts implied in the statement of counsel for appellants.

[4] The suggestion that a director is not an officer of the bank, urged strongly by respondent, is, we think, without any merit at all. An office in a corporation has been defined as "a position of trust or authority in the regular and continued employment of the corporation." The duties of a director are familiar and need not be detailed, and it may be said that his position is of the highest "trust and authority" in connection with the affairs of the corporation. His authority is not only paramount, but the other executive officers are subject to his will for their appointment and tenure. The question does not seem to have been considered many times by the courts, but there is authority for the position of appellants. In United States v. Means (C. C.) 42 Fed. 603, it was held that directors of a national bank are "officers" within the meaning of Revised Statutes of the United States, section 5209 (U. S. Comp. St. 1913, § 9772), which makes it a misdemeanor for bank officers to make false entries in any book, report, or statement of the bank, with intent to deceive any of its officers, the court saying:

"As to the directors there is not the shade of doubtful construction of this act. They are not only officers, but managers, of our national banks. They come within every sense and meaning of the word 'officer,' and are within the rule of the association of words in the act already referred to and of the decisions cited."

In Laws 1875, c. 611, § 21, providing that—

"if any certificate or report made, or public notice given, by an officer of a corporation shall be false in any material representation, all the officers who have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof,"

—officers should be construed to include the directors of the corporation, for, in a strict sense, the directors of a corporation are its officers. Torbett v. Eaton, 49 Hun, 209, 1 N. Y. Supp. 614; Brand v. Godwin, 8 N. Y. Supp. 339; Com. v. Wyman, 49 Mass. (8 Metc.) 247. Our attention has not been called to any decision in this state directly in point, but in the Civil Code and in the case of Sherwood v. Wallin, 154 Cal. 735, 99 Pac. 191, it seems to be assumed that they are officers. It appears to us so plain that we are not surprised that there has been little or no controversy concerning it.

Moreover, upon the merits, we think the decision was erroneous, judgment having been rendered for plaintiff after trial. The basis of the claim lies in an assignment made on November 18, 1911, by said Pearson as contractor aforesaid. The said assignment, after reciting the contract with said district and the advancement to said Pearson by B. F. Lynip of the sum of $4,000 to enable the former to

pay for the material and labor on said building concludes as follows:

"Therefore, I hereby assign, convey and set over unto the said B. F. Lynip the sum of four thousand dollars, out of the twenty-five per cent. of said contract price, to be paid to me under said contract after the completion and acceptance of said building as aforesaid, and hereby authorize the said board of trustees to pay said sum out of said twenty-five per cent. to said B. F. Lynip instead of to me, to to accept his receipt therefor in all respects as though said receipt was signed by me, hereby authorizing the said B. F. Lynip to receive and receipt for said sum of four thousand dollars out of said twenty-five per cent. of said contract price, in my place and stead."

[5] An assignment almost identical in form and between the same parties, involving the sum of $430, executed November 6, 1911, nearly two weeks prior to the one before us, was thoroughly considered by this court in the case of Lynip v. Alturas School District, 24 Cal. App. 426, 141 Pac. 835. We may refer to said decision for a declaration of the facts connected with, and of the principle that must control in the interpretation of, the assignment herein. Therein it was held that the assignment operated—

"solely upon the fund to become due and payable only upon the completion of the building, not upon moneys becoming due and payable as the work progresses; and, if the contractor abandons the contract before completion, the trustees are not liable to the assignee for the amount of the assignment, under their indorsement thereon recognizing the assignment and reciting an agreement to pay the sum named 'out of the payment' to be made 'at the time of completion and acceptance of said building.'"

[6] There was in this case a similar indorsement made by the trustees, but there is this additional feature not found in the Lynip Case, supra: Two days after said assignment was made it was again presented to the trustees of said district and it then had attached to it a second page, containing the following guaranty:

"We, the undersigned, in consideration of B. F. Lynip advancing to A. E. Pearson, the amount named in the assignment thereto attached, to wit, the sum of four thousand dollars, for the purpose of paying for the labor performed, and the material furnished and used in the school building now being constructed by the said A. E. Pearson for the Alturas school district of Modoc county, California, do hereby guarantee that the said sum of $4,000.00 so advanced by the said B. F. Lynip to the said A. E. Pearson, as aforesaid, shall be repaid to the said B. F. Lynip upon the completion of the said school building, out of the 25 per cent. of the contract price of said building, held back until the completion of said building."

On the same or the following day this was signed by two of the trustees, E. F. Auble and S. T. Ballard, and a day or two later by the other trustee, L. S. Smith.

It is by virtue of this guaranty that plaintiff sought to recover, contending that it was a guaranty of the original obligation—in other words, a guarantee that the debt would be paid. If such had been the intention of the parties, however, how easy to have so provided. If such was their intention, they were very unfortunate in the use of terms. The only reasonable construction of the instrument, it seems to us, embodies the conclusion that the trustees would recognize Lynip as being entitled to the last payment rather than Pearson. This necessarily implied that there would be a last payment due. They guaranteed, in the other words, that the money should be repaid to Lynip out of a certain fund, to wit, "the 25 per cent. of the contract price of said building, held back until the completion of the building." There never was any such fund, since Pearson abandoned the contract and the contract price was exhausted in the completion of the building by the trustees. It is to be observed that the trustees did not guarantee that Pearson would complete the building or that the 25 per cent. would be due him when the building was completed, but the guaranty was virtually that effect would be given to the assignment, to which, it may be repeated, it was attached, and to which it refers, and of which it was made an inseparable part. This assignment was not the original obligation of the trustees nor of Pearson, but was collateral, as a form of security. The original obligations was in the form of a promissory note signed by Pearson alone, and to secure its payment he made the assignment and the defendants guaranteed that they would recognize its operation in the distribution of said 25 per cent. fund. It is true that this construction probably deprives said guaranty of any legal value. The trustees had already indorsed on said assignment their acceptance, and they were thereby obligated to pay said fund to Lynip; but whatever may be the effect of said guaranty, the guarantors have a right to stand upon its terms. The fact is, apparently, that the trustees, as individuals, guaranteed that they, as trustees of the district, would recognize Pearson's assignment and pay the money to his assignee instead of to him. But there was no default on the part of the trustees. They were not called upon to pay the money, since the obligation never matured. As far as the guaranty is concerned, the trustees, as such, were the principals and they, as individuals, were guarantors. There having been no default on the part of the principals, it would follow that the guarantors were exonerated from liability.

Several cases are cited by respondent in support of his contention, but it will be observed that therein the liability of the guarantors was not limited as in the case before us. Bagley v. Cohen, 121 Cal. 604, 53 Pa. 1117, may be taken as an example. The contract was:

"On or before sixty days I, E. H. Gould, do hereby agree to pay to F. S. Bagley or order, out of the profits realized by me from my business of packing raisins at Malaga, during the present season, the sum of three hundred and ten dollars in gold coin of the United States of America."

Prior to the delivery of this contract and as a part of the same transaction, the defendant subscribed the following guaranty, which was written beneath the contract:

"I, E. A. Cohen, do hereby guarantee the payment of the foregoing note in accordance with the conditions thereof."

Within ten days after the execution of the foregoing instrument Gould sold and conveyed all his right, title, and interest in and to his business of packing raisins at Malaga, and thereby prevented himself from realizing any profits out of said business. It was properly said by the Supreme Court that:

"The contract of the defendants being a part of the same transaction with the contract of Gould, the two instruments make but a single contract on their part. Hazeltine v. Larco, 7 Cal. 32. Their guaranty that Gould would perform his contract was an original undertaking by them, and their liability as guarantors is commensurate with that of Gould. Civil Code, § 2808. Their promise that he would perform his contract 'in accordance with the conditions thereof' made them absolutely liable for his failure to perform it when he should be so liable. Otis v. Haseltine, 27 Cal. 80."

The defendants therein, as seen, guaranteed the performance of Gould's contract and hence they were of course liable when he defaulted. The defendants here made no such guaranty of Pearson's performance, but guaranteed a payment in accordance with the terms of their contract with Pearson. The latter having defaulted released them and also the guarantors.

We think the order and judgment should be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 260

PEOPLE v. DATES. (Cr. 602.)

(District Court of Appeal, First District, California. Dec. 27, 1915. Rehearing Denied by Supreme Court Feb. 24, 1916.)

1. CRIMINAL LAW ⟸564—VENUE—EVIDENCE—SUFFICIENCY.

The contention that on the trial of an executor for embezzlement for failure to pay a legacy as ordered by a decree of partial distribution the venue was not proved, because accused was in another county between the date of the decree and the date of an attachment of accused, and because after the attachment and until the indictment accused was in the custody of the sheriff of the county in which the indictment was found, is not sustainable, because accused could have drawn an order while in custody for the funds and converted the same to his own use.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 726, 1277–1284; Dec. Dig. ⟸564.]

2. EMBEZZLEMENT ⟸8 — EMBEZZLEMENT BY EXECUTORS—OWNERSHIP OF LEGACY.

An executor may embezzle a legacy before decree directing payment to the legatee; for an order of payment is not the inception of the title of the legatee, but title vests, under Civ. Code, § 1341, in the legatee at testator's death.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 6; Dec. Dig. ⟸8.]

3. EMBEZZLEMENT ⟸44—EMBEZZLEMENT BY EXECUTOR—EVIDENCE.

That an executor charged with embezzling a legacy reported in one or more of his reports that the money was on hand was not conclusive that the same was actually on hand at the time of such reports, but the jury could find that the legacy had been converted to his own use prior thereto.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67–70; Dec. Dig. ⟸44.]

4. EMBEZZLEMENT ⟸38—EMBEZZLEMENT BY EXECUTOR—EVIDENCE—ADMISSIBILITY.

On the trial of an executor for embezzling a legacy based on his refusal to pay the same to the legatee as ordered by decree of partial distribution, the decree of partial distribution was admissible in evidence to show a demand of payment and a refusal, though the decree required payment within less time than that allowed for an appeal, where the executor did not appeal in his capacity as legatee individually affected by the decree.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66; Dec. Dig. ⟸38.]

5. EXECUTORS AND ADMINISTRATORS ⟸315—DECREE OF PARTIAL DISTRIBUTION—VALIDITY.

A petition for partial distribution was signed by the local attorney of an infant legatee. Subsequently the legatee, on becoming of age, participated in the proceedings for partial distribution. The executor appeared in response to the notice given and filed his formal resistance to the petition, and on the day set for hearing appeared and consented in open court to the decree. *Held*, that the executor waived any informalities in the proceedings, and he could not attack the decree as entered by the court without acquiring jurisdiction.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298–1314; Dec. Dig. ⟸315.]

Appeal from Superior Court, Marin County; Emmet Seawell, Judge.

Edward M. Dates was convicted of embezzlement, and he appeals. Affirmed.

Walter F. Thompson, and H. F. Marshall, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment of conviction of the defendant under indictment and conviction for embezzlement and from an order denying a new trial.

The facts, which in the main are undisputed, are as follows: The defendant was the husband of Bessie S. Dates, deceased, and the stepfather of Mildred Jane Porter, the complaining witness before the grand jury. The wife of the defendant died in February, 1912, leaving a will, of which the defendant became and was the executor up to the time of the indictment. The estate of the deceased amounted in value to $64,804.40, of which the sum of $43,654.89 was net cash in the hands of the executor. By said will the defendant was bequeathed an undivided one-half of the estate, while to her daughter, Mildred Jane Porter, the deceased left a legacy of $25,000 in money. There were also certain other minor legacies aggregating the

sum of $5,000. This will was duly offered and admitted to probate, and the defendant was appointed executor without bonds. The first annual account of the executor was filed in September, 1913, and showed the above net cash balance in his hands after all claims had been presented and paid. On April 13, 1914, a petition for partial distribution was filed. It purported to be signed by Mildred Jane Porter, but it is conceded that her signature to said petition was written by the local attorney who assumed to act for her in preparing and presenting the petition. At the time this petition was filed Mildred Jane Porter was in the state of Wisconsin, and was a minor just under the age of 18 years. Notice of hearing thereon was served upon the attorney of record of the defendant, and shortly thereafter a resistance to the petition signed by the defendant was presented and filed. A hearing was had on June 12, 1914, and thereupon the court made an order or decree of partial distribution, by the terms of which the defendant was directed to pay to Mildred Jane Porter on or about the 16th day of June, 1914, the sum of $25,000, the full amount of her legacy. On June 19, 1914, the defendant having failed and refused to comply with this order, an attachment was issued for his person upon an order to show cause why he had failed to pay over said legacy, and on July 10, 1914, on the hearing thereon, the defendant was committed to the custody of the sheriff until he should obey the order of the court. He remained in the sheriff's custody until August 5, 1914, when the grand jury returned an indictment charging him with the embezzlement of the amount of this legacy. Upon trial the defendant was convicted and sentenced to seven years in the state prison. From the judgment of conviction and from an order denying a motion for a new trial, the defendant prosecutes this appeal.

[1] The first contention urged by the appellant is that the venue of the offense was not proved as laid in the indictment. This contention the appellant predicates upon certain premises, the first of which is his assertion that the time within which his embezzlement of the money constituting this particular legacy could possibly have been committed is that lying between the 12th day of June, 1914, the date of the decree of partial distribution, and the 5th day of August, 1914, the date of the indictment. During this period the evidence shows that the defendant was in Monterey county from June 10th to June 19th, and hence, appellant argues, could not have committed a crime triable in Marin county between those dates. From June 19th to August 5th the defendant was in the custody of the sheriff and in jail in Marin county, and could not, therefore, according to the argument of appellant, have committed the crime of embezzlement between those dates. Conceding for the sake of argument that the venue of the crime would have been properly laid in Monterey county had the defendant committed the offense while there, still we see no difficulty in the way of his having been able to accomplish the criminal conversion of this money during the time when he was in the custody of the sheriff in Marin county. He could easily have drawn a check or order on the actual custodian of the funds if they were then intact, and have thus diverted them to his own use.

[2] The second premise of the appellant is equally untenable wherein he argues that the earliest date at which he could have committed the offense was June 12, 1914, the date of the decree of partial distribution. It is appellant's contention that the title of Mildred Jane Porter to this legacy takes its inception in this decree; but this is not the law of this state. According to the terms of section 1341 of the Civil Code:

"Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death."

See Estate of Campbell, 149 Cal. 712, 87 Pac. 573; Estate of Glenn, 153 Cal. 77, 94 Pac. 230.

In the light of this section of the Code and of these authorities, it seems clear that Mildred Jane Porter was the owner of this legacy from the date of her mother's death, subject to the claims of the creditors of the estate and to the rights of other devisees and legatees to a ratable distribution in case the estate prove insufficient to fully satisfy the terms of the will, neither of which conditions exists in this case. For purposes of administration the temporary possession of the entire estate, including the money which this legacy called for, was in the executor; and the condition of his trust was that it should be safely kept until such time as it should be distributed to its owners by the court's decree. The fact that the defendant, as executor of this estate and custodian of these funds, was also the owner, as devisee, of an undivided one-half of the estate, would in no sense have entitled him to convert any portion of this estate to his own personal uses prior to its legal distribution; and, if he did so, he would be guilty of embezzlement, although no decree of partial or final distribution had yet been made. This being so, the contention of the appellant as to the limited period to which the time of commission of the offense is to be confined must fail. The jury may have concluded from the evidence before it that the defendant had converted these funds to his own uses prior to the making of the decree of partial distribution, and we think there was enough evidence to justify such a conclusion.

[3] The fact that in one or more of his reports or accounts the executor reported this money as on hand in the estate would not be at all conclusive that the funds were actually there at the time of such report.

[4] The appellant urged several objections to the admission in evidence of the decree of partial distribution, which objections he vigorously repeats in this court as grounds of reversible error. But the decree of partial distribution, as we have seen, was not the source of the legatee's title, but served only in this case as the basis for the demand made on behalf of the complaining witness, refusal of which would in itself amount to an act of conversion. This view of its value as evidence in the case removes much of the force of appellant's objections to the decree of partial distribution based upon the claim that it had not become final through the expiration of the period within which it might have been appealed from at the time of its offer and admission in evidence. As to this proposition, it was not necessary that it should have become final in order to serve as a basis for the legatee's demand for the delivery to her of the legacy which it directed. The statute (Code Civ. Proc. § 1661) provides that the court may make its order "requiring the executor to deliver to the legatee the whole portion of the estate to which he may be entitled." It follows necessarily that the court could in such order require such delivery within a specified time, which might be much more brief than the time allowed for an appeal from such order; besides, this defendant, as executor, had not right of appeal from this order. Estate of Williams, 122 Cal. 76, 54 Pac. 386. His only right of appeal was in his capacity as devisee, and in that capacity his rights were unaffected by this order. And, since it did not determine the legatee's title to her legacy, but only her right to its present possession upon a fixed date, the defendant, as the executor of the estate, was bound to comply with it, or else, as a devisee injuriously affected thereby, to appeal from it within the time required for compliance with its terms, just as in the case of any other judgment or order requiring the present payment of money, from which a party has the right of appeal within a certain period. If he would stay the execution or effect of the judgment or order, he must exercise his right of appeal from it at once, or else he must obey its mandate. In this case the defendant neither obeyed the court's order in his capacity as executor, nor appealed from it in his capacity as a devisee, and hence it was properly admitted in evidence as the basis of the legatee's demand for the delivery of her legacy to her, the refusal of which would be evidence of a conversion.

[5] The appellant's further contention that the trial court erred in admitting this decree in evidence, for the reason that the probate court did not acquire jurisdiction to make it, is based upon the facts that the petition for partial distribution had appended to it the name of Mildred Jane Porter, which was written there, not by herself, but by her local attorney, while Mildred Jane Porter was, at the date of filing said petition, a minor just under the age of 18 years, and was not competent to give a delegation of authority. But the record affirmatively shows that shortly after the filing of this petition Mildred Jane Porter became of age, and coming to California, and, being then of age, participated in the proceedings for partial distribution, and thereby ratified the acts of the attorney who represented her in filing and presenting her petition. The record also discloses that the defendant appeared in response to whatever notice was given, and filed his formal resistance to the petition without objection to it upon the grounds now urged; and it further appears that upon the day set for hearing the attorney of record for defendant, as executor of the estate, appeared and consented in open court to the entry of the decree. These acts on the part of the defendant constituted a waiver of whatever informalities there may have been in the presentation of the petition or in the form of notice of the hearing thereon. Crew v. Pratt, 119 Cal. 131, 51 Pac. 44.

The appellant urges a number of objections to the instructions given or refused or modified by the court; but a reading of the entire body of the instructions as given by the court convinces us that these objections are not substantial enough to justify a reversal or merit a separate review.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

29 Cal. App. 251

DABNEY OIL CO. v. PROVIDENCE OIL CO. OF ARIZ. et al. (A. H. BUTLER & CO. et al., Interveners). (Civ. 1775.)

(District Court of Appeal, Second District, California. Dec. 23, 1915.)

APPEAL AND ERROR ⇐80 — DECISIONS APPEALABLE.

In an action against numerous defendants, appellants were allowed to intervene after they had lost control of the corporate plaintiff. On motion of plaintiff the action was dismissed as to some of the defendants, but continued as to others. *Held*, that the interveners were not entitled to appeal from such order of dismissal, it being only a partial determination of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494–509; Dec. Dig. ⇐80.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Dabney Oil Company against the Providence Oil Company of Arizona and others, in which A. H. Butler & Co. and others were allowed to intervene. From a judgment of dismissal as to some of the defendants, the interveners appeal. Appeal dismissed.

Valentine & Newby, of Los Angeles, for appellants. Hunsaker & Britt, Murphey & Poplin, and N. P. Moerdyke, all of Los Angeles, for respondents.

CONREY, P. J. In this action a complaint was filed by the Dabney Oil Company to establish the plaintiff's ownership of certain oil-bearing lands and to have certain of the defendants declared trustees for the plaintiff of property held in possession by them, and for an accounting. After the filing of plaintiff's complaint an election of directors of plaintiff corporation was held and the control of the corporation passed from a board of directors which was acting in harmony with A. H. Butler & Co. (a corporation) and others associated with them as stockholders in the Dabney Oil Company, to a new board of directors controlled by certain of the defendants. Under its new control the plaintiff caused a substitution of attorneys to be made herein and moved for a dismissal of plaintiff's action as against the defendants A. T. Jergins, Palladium Investment Company, a corporation, and Midway Royal Petroleum Company, a corporation. At the time of substitution of a new attorney for the plaintiff corporation the court by order gave leave to said A. H. Butler & Co. et al. (appearing by the same attorneys who had theretofore been employed as attorneys for the corporation), to file a complaint in intervention. That complaint was filed, and later an amended complaint in intervention was filed by the same interveners. The motion for dismissal of the action of the plaintiff as against the three defendants above mentioned and the demurrer of those defendants to the amended complaint in intervention came on for hearing at the same time. After argument it was ordered that the motion be granted; also that the demurrer of those three defendants to the amended complaint in intervention be sustained without leave to amend, and it was ordered that the action be dismissed as to the defendants Midway Royal Petroleum Company, A. T. Jergins, and Palladium Investment Company, and that the amended complaint in intervention be dismissed as to said defendants. The defendants named in the amended complaint in intervention are the same as the defendants named in the principal complaint. So far as the record shows, the action remains pending as to seven defendants other than the three affected by said orders of dismissal. The interveners have attempted to appeal "from the judgment of dismissal as to the defendants Midway Royal Petroleum Company, A. T. Jergins, and Palladium Investment Company, rendered in the above-entitled action on the 1st day of April, 1913, and from the whole of said judgment."

The respondents claim that the appeal should be dismissed for the reason that the order of dismissal was not a final judgment and determination of the action. As authority for the proposition insisted upon by them they refer us to Nolan v. Smith, 137 Cal. 360, 70 Pac. 166, and other cases cited in their brief. In response to these cases appellants direct attention to Stich v. Goldner, 38 Cal. 608, and other cases, which hold that an appeal lies where an order has been made refusing to allow the filing of a complaint in intervention, or where a judgment of dismissal has been entered against the interveners after an order sustaining a demurrer to their complaint. In Baxter v. Boege,[1] (Civil No. 1763), wherein our decision was filed on the 21st day of December, 1915, we have discussed those decisions and outlined our views upon the subject. We agree that if the order appealed from herein had been an order or judgment dismissing the intervention as to all of the parties, the interveners would have the right to appeal therefrom. But since the order does not attempt to dispose of all of the issues involved in the intervention, but is only a partial determination thereof, the case is the same as where a dismissal is granted as to some but not all of the defendants to the action and the plaintiff attempts to appeal therefrom. As held in Baxter v. Boege, supra, such right of appeal does not exist.

For these reasons we conclude that the objections made by respondents to further consideration of this appeal should be sustained, and the appeal is dismissed.

We concur: JAMES, J.; SHAW, J.

(29 Cal. App. 225)

Ex parte O'CONNOR. (Cr. 333.)

(District Court of Appeal, Third District, California. Dec. 21, 1915.)

1. HABEAS CORPUS ⟸92—NATURE OF PROCEEDING—QUESTIONS REVIEWABLE.

The sole ultimate question involved in habeas corpus is whether the order, adjudication, or process whose validity is attacked is one within the lawful jurisdiction of the judge, court, or tribunal making, granting, or issuing it.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. ⟸92.]

2. HABEAS CORPUS ⟸85—JUDGMENT—VALIDITY—PRESUMPTION.

The judge of the superior court who committed petitioner to the state hospital on the ground of intemperate use of narcotics or stimulants, causing the loss of his power of self-control, being by law invested with jurisdiction of the subject-matter of the adjudication, and having acquired jurisdiction of the person of the petitioner, it must be assumed on a collateral attack on the adjudication by habeas corpus, in the absence of a contrary showing upon the face of the judgment roll, that the proceedings leading to the judgment or order of commitment were in all respects regular and in accordance with the vital requirements of the statute.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. ⟸85.]

3. DRUNKARDS ⟸2—COMMITMENT TO STATE INSTITUTION—PROCEEDINGS—DISCRETION OF COURT.

Under Pol. Code, § 2185c, as added by St. 1911, p. 396, prescribing the proceedings for commitment of an inebriate to the state hospital, and requiring the judge to give a reasonable op-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Opinion withdrawn, but for opinion in Supreme Court, see 160 Pac. 1072.

portunity for the production and examination of witnesses, what constitutes a reasonable opportunity must be determined by the circumstances of each case, and is within the sound discretion of the judge before whom the charge is heard.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 2–4, 9; Dec. Dig. ⟸2.]

4. DRUNKARDS ⟸2—COMMITMENT TO STATE INSTITUTION—PROCEEDINGS—DISCRETION OF COURT.

Under Pol. Code, § 2185c, as added by St. 1911, p. 396, requiring the judge in a proceeding to commit an inebriate to the state hospital to give a reasonable opportunity for the production and examination of witnesses, where the judge informed the person proceeded against that he was entitled to subpœna witnesses and to examine them at the hearing in his own behalf, the fact that only a few hours could have intervened between the making of the order and the time specified therein for the hearing, does not show an abuse of discretion by the judge, in the absence of any request by the party for further opportunity.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 2–4, 9; Dec. Dig. ⟸2.]

5. JURY ⟸19—RIGHT TO TRIAL BY JURY—NATURE OF RIGHT.

One against whom proceedings for commitment to the state hospital as an inebriate were commenced is not entitled as of right to a jury trial, and Pol. Code, § 2185c, as added by St. 1911, p. 396, authorizing such commitment, is not unconstitutional for failure to provide for jury trial; the right secured by the Constitution being the right to a jury trial as it was recognized at common law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 104–133; Dec. Dig. ⟸19.]

Application by Jeremiah C. O'Connor for a writ of habeas corpus. Writ discharged, and prisoner remanded.

Edward D. Wilbur, of San Francisco, for petitioner. Edward J. Tyrrel, of Oakland, and W. F. Stafford, of San Francisco, for respondent.

HART, J. The petitioner was on the 9th day of June, 1915, by the Hon. John J. Van Nostrand, a judge of the superior court in and for the city and county of San Francisco, committed, under and by virtue of the provisions of section 2185c of the Political Code (Stats. 1911, p. 396), to the Napa State Hospital for the cure and treatment of the insane. The petitioner insists that the order of commitment under which he is held at the state hospital is void for reasons to be hereafter noticed, and that therefore his confinement in said institution involves an unlawful restraint of his personal liberty.

So much of section 2185c of the Political Code as is necessary to a clear understanding of the points made by the petitioner reads:

"Whenever it appears by affidavit to the satisfaction of a magistrate of a county, or city and county, that any person is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control, or is subject to dipsomania or inebriety, he must issue and deliver to some peace officer for service, a warrant directing that such person be arrested and taken before a judge of the superior court for a hearing and examination on such charge. Such officer must thereupon, arrest and detain such person until a hearing and examination can be had. At the time of the arrest a copy of said affidavit and warrant of arrest must be personally delivered to said person. Such affidavit and warrant of arrest must be substantially in the form provided by section 2168 of the Political Code for the arrest of a person charged with insanity. He must be taken before a judge of the superior court, to whom said warrant and affidavit of arrest must be delivered to be filed with the clerk. The judge must then inform him of the charge against him, and inform him of his rights to make a defense to such charge and produce any witnesses in relation thereto. The judge must by order fix such time and place for the hearing and examination in open court as will give a reasonable opportunity for the production and examination of witnesses. Such order must be entered in the minutes of the court by the clerk and a certified copy of the same served on such person. The judge may also order that notice of the arrest of such person and the hearing of the charge be served on such relatives of said person known to be residing in the county, as the court may deem necessary or proper. The hearing and examination shall be had in compliance with the provisions of sections 2169 and 2170 of the Political Code."

Sections 2169 and 2170 of the Political Code read as follows:

"Sec. 2169. The superior judge may, for any hearing, issue subpœnas and compel the attendance of witnesses and must compel the attendance of at least two medical examiners, who must hear the testimony of all witnesses, make a personal examination of the alleged insane person, and testify before the judge as to the result of such examination, and to any other pertinent facts within their knowledge. The judge must also cause to be examined before him as a witness, any other person whom he has reason to believe has any knowledge of the mental condition of the alleged insane person or of his financial condition or that of the persons liable for his maintenance. The alleged insane person must be present at the hearing, and if he has no attorney, the judge may appoint an attorney to represent him.

"Sec. 2170. If the medical examiners, after making the examination and hearing the testimony, believe such person to be dangerously insane, they must make a certificate, under their hand, showing as nearly as possible the facts as herein indicated, and in substantially the following form."

Then follows the form of the certificate of the medical examiners appointed to investigate the condition of the patient, which must, among other things, contain a general statement of the facts from which the medical examiners have reached the conclusion that the patient—

"is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control, or is subject to dipsomania or inebriety."

The petitioner presents and urges several different and distinct grounds upon which he bases the claim that his commitment to the state hospital was beyond the authority of the judge to order. These are: (1) That a copy of the affidavit upon which the warrant for his arrest was issued and of said warrant of arrest were not personally delivered to him at the time of his arrest; (2)

that the time fixed by the judge after the petitioner was brought before him for the hearing of the charge was not such as to afford to the petitioner "a reasonable opportunity for the production and examination of the witnesses"; (3) that the petitioner was, as a matter of right, entitled to a trial by jury upon the charge preferred against him, and that, such right having been denied to him, his commitment to the state hospital was not the crystallization of a trial according to due process of law, and that section 2185c, by reason of the absence therefrom of a provision giving to persons charged thereunder the right of trial by jury, is unconstitutional.

[1, 2] Obviously the sole ultimate question which is involved in a proceeding on habeas corpus is one merely of jurisdiction; that is, whether the order or the judgment or the adjudication or the process whose validity is thus attacked and questioned was one coming within the lawful authority or jurisdiction of the judge or the court or other legally constituted tribunal making, granting, or issuing it. And, since it is clear that the judge making the adjudication assailed through this proceeding is by law invested with jurisdiction of the subject-matter thereof, and that he acquired jurisdiction of the person of the petitioner, it must be assumed, in this collateral attack upon the adjudication, in the absence of a contrary showing appearing upon the face of the judgment roll, if it may so be called, that the proceedings leading to the judgment or order of commitment were in all respects regular or had in accordance with the vital requirements of the statute authorizing the commitment. Ex parte Clary, 149 Cal. 735, 87 Pac. 580; State Commission in Lunacy v. Eldridge, 7 Cal. App. 298, 94 Pac. 597, 600; Ex parte Lewis, 11 Cal. App. 530, 105 Pac. 774; Gridley v. College of St. Francis, 137 N. Y. 327, 33 N. E. 331. These observations apply particularly to the first two points, in the order above given, against the validity of the commitment.

The affidavit upon which the warrant of arrest was issued was made and filed by Jeremiah O'Connor, Jr., a son of the petitioner, on the 8th day of June, 1915, and on that day was, with a copy thereof and a copy of said affidavit, given into the hands of a police officer.

The certificate of the officer executing the warrant, and which is a part of the record in the proceedings, recites that said officer received said warrant on the 8th day of June, 1915, and served the same by arresting said Jeremiah O'Connor, alleged to be an inebriate, and brought him before Hon. John J. Van Nostrand, judge of the superior court of the state of California in and for the city and county of San Francisco on the 8th day of June, 1915, "and I further certify," continues the certificate, "that I delivered a copy of said warrant of arrest, together with a copy of the affidavit of intemperance, as directed in said warrant, personally to said Jeremiah O'Connor at the time of his arrest."

The order fixing the time for the hearing of the charge, as does the judgment or order of commitment, recites that the petitioner was brought before the judge on the 9th day of June, 1915, upon a warrant issued upon an affidavit sworn to by Jeremiah O'Connor, Jr., that he was then and there, in open court, informed of the charge alleged in said affidavit against him, and was further informed of his rights to make a defense to such charge, and to be represented by counsel, and produce witnesses in relation to such charge. The order fixing the time for hearing also required that a copy of the same be served on the petitioner, the time for the hearing having been fixed for the hour of 11 a. m. of said 9th day of June, 1915, and one Roseberg certified that he served said order on the petitioner by delivering to him a copy of the same.

Thus it will be observed that there is absolutely no ground for the contention that a copy of the affidavit, and the warrant was not personally delivered to the petitioner at the time of his arrest, as the statute requires shall be done.

[3, 4] As to the point that the petitioner was not accorded "a reasonable opportunity for the production and examination of witnesses," as the statute requires, we cannot say that the judge abused his discretion in that regard. As has been shown, the record discloses that the petitioner, upon being brought before the judge, was by the latter informed of all the rights guaranteed to a person charged under section 2185c with being an inebriate or dipsomaniac. He was explicitly told that he was entitled to subpœna witnesses and to examine them at the hearing in his own behalf.

What constitutes the "reasonable opportunity" to produce and examine witnesses which the statute contemplates shall be given a person charged and examined under section 2185c of the Political Code is a matter which must be determined by the circumstances of each particular case, and thus the matter is one whose determination rests in the sound discretion of the judge before whom the charge is pending and heard. This court so held in the case of In re Lewis, on habeas corpus, 11 Cal. App. 530, 532, 105 Pac. 774, where the petitioner, an insane patient, was examined under the provisions of section 2168 et seq., Political Code, and wherein he raised the identical point under consideration; the section just named also providing that the patient must be given "a reasonable opportunity for the production and examination of witnesses." We there, among other things, said:

"The determination of what is 'reasonable opportunity' is committed by the statute to the sound discretion of the court, to be exercised in view of the surrounding circumstances of each particular case, and, where it does not appear on the face of the proceedings that such discre-

tion has been abused, the judgment of the court, for the alleged reason that the person adjudged insane has not been given a reasonable opportunity to produce his witnesses and cause them to be examined touching his mental condition, cannot be disturbed."

The statute does not provide that any particular space of time shall intervene between the time at which the order is made fixing a time for the hearing and the time so fixed, and the mere fact that in this case there could have intervened only a few hours between the time of making the order and the time specified therein for the hearing does not necessarily justify the conclusion that the petitioner was not accorded a "reasonable opportunity" to produce and examine his witnesses. Whether the petitioner availed himself of this right by having witnesses produced and examined is not made affirmatively to appear in the record. Indeed, the law nowhere requires that that fact shall be so made to appear. But it is to be assumed that, had the petitioner, having been informed of his rights in that regard, made a demand for the production of witnesses and presented the names of such witnesses, the judge, in obedience to the duty expressly enjoined upon him by the statute, would have given the petitioner ample opportunity to have produced such witnesses, and, if necessary for that purpose, have continued the hearing to some future time. It does not appear in the record that any such demand or request was made by the petitioner.

Upon this point we conclude that upon no view of the record can it be said that the petitioner was denied the "reasonable opportunity" for the production and examination of witnesses to which he was entitled under the statute.

[5] 3. The contention that the petitioner was entitled as of right to a trial by jury is untenable, and it follows, therefore, that section 2185c is not unconstitutional because it omits to provide for a trial by jury in cases arising under its provisions.

The right of trial by jury secured by the Constitution is the right to a jury trial as it existed and was recognized at common law. Koppikus v. State Capitol Commissioners, 16 Cal. 249; Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234; Woods v. Varnum, 85 Cal. 639, 644, 24 Pac. 843; People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; Ex parte Wong You Ting, 106 Cal. 296, 39 Pac. 627; In re Fife, 110 Cal. 8, 42 Pac. 299.

The Koppikus Case involved the question whether an act of the Legislature providing for the construction of the state capitol in Sacramento and investing the state capitol commissioners with the power and authority of appraising the value of the property upon which the capitol building was to be erected and making an award to the owner of the same, in accordance with such appraisement, was unconstitutional, in that it denied to the owner the right to have the issue as to the value of his property passed upon and determined by a jury. The Supreme Court upheld the validity of the statute, saying, through Field, J.:

"The provision of the Constitution that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. * * * It is in this common-law sense that the language has always been regarded by the courts of this state. It is a right 'secured to all,' and 'inviolate forever,' in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several states of the Union. It is a right, therefore, which can only be claimed in actions at law, or criminal actions, where an issue of fact is made by the pleadings. It cannot be claimed in equity cases, unless such issue be specially framed for a jury under the direction of the court. It cannot be asserted upon the issue at law; for that is a matter purely for the court. The fact, therefore, that property and rights of property may be involved in the disposition of a particular case or proceeding does not determine the right to a trial by jury. There must be an action at law, as contradistinguished from a suit in equity, and from a special proceeding, or a criminal action, and an issue of fact joined therein upon the pleadings, before a jury trial can be claimed as a constitutional right."

Under the common law, there was no inquisition precisely like that authorized by section 2185c of the Political Code. The nearest approach thereto were the proceedings, under the writs of de idiota inquirendo and de lunatico inquirendo, which were analogous to the proceeding for like purpose under our law, whereby the question of the insanity or idiocy of one was investigated, with a view of committing him for treatment or safe-keeping, if he were found to be either a lunatic or an idiot. While in the earlier history of the common law, when the profits of the lands of one found to be an idiot or lunatic passed to the crown, the issue was tried by a jury of twelve men, yet in later times, when mental diseases of a nature to impair the will came to be recognized as curable and appropriate subjects of governmental cognizance, proceedings looking to the determination of whether a person was of unsound mind to the extent of being unable to take care of himself and his property rights or of being dangerous to the safety of the public were summarily conducted or prosecuted without the intervention of a jury; due provision being made for the care and preservation of the patient's estate while he remained mentally incompetent and the return of the same and its profits to him if he recovered from his malady, and for the proper disposition thereof should he die a non compos mentis. 3 Blackstone, p. 428; 1 Blackstone, pp. 303–305.

The theory upon which such inquisitions were conducted in a summary manner or without the aid of a jury was doubtless that the proceeding does not involve an inquiry as to whether a crime had been committed, nor was the commitment of the patient in-

tended as a punishment, but that its purpose was for the sole benefit of the patient, by facilitating the proper treatment for his disease, and at the same time protecting his estate from being lost or destroyed by that improvidence which necessarily accompanies a defect of will or understanding or by impositions practiced upon the incompetent by those ever ready to enrich themselves by any means, however unconscionable, that may become available to them. And so it is true as to the proceeding under section 2185c of our Political Code. Said proceeding does not involve the investigation of a criminal act, nor is the detention of the patient for the period prescribed by said section penal punishment or intended as such. And, as was said by the Supreme Court of Iowa, in the case of In re Bresee, 82 Iowa, 573, 48 N. W. 991, where the main question was whether an alleged insane patient was entitled to have the question of her sanity tried by a jury:

"It is purely a special proceeding, and hence, technically, not a 'civil action,' which is defined to be a proceeding in which one party, known as the 'plaintiff,' demands against another party, known as the 'defendant,' the protection of a private right or the redress of a private wrong."

See sections 22 and 30 of our Code of Civil Procedure.

The object of the statute is merely to authorize the state to take charge of and force treatment upon those so far addicted to the intemperate use of alchoholic liquors or narcotics as to have lost the power of self-control or to have become inebriates or dipsomaniacs. The legislation represents in reality the exercise only of the police power, whereby the state may control or correct the individual habits of its citizens where such habits are or may become a menace to the peace, comfort, "good neighborhood," and health of the commonwealth. The proceeding does not involve a trial, but, in analogy to the common law proceeding in insanity cases, is a mere inquisition, by way of a special proceeding, the determination of which should be left, as the law intends, largely to persons possessing the learning of experts, and not to laymen, of whom juries are ordinarily composed, and who do not, nor are expected to, possess the training and learning essential to a just and intelligent solution of a scientific question such as is necessarily involved in a proceeding whose purpose is to ascertain and determine whether a person, from whatsoever cause, is suffering from some serious mental infirmity. But the position here taken is well buttressed by authority.

In Ex parte Ah Peen, 51 Cal. 280, the petitioner, a minor, had been committed to an industrial school in accordance with the provisions of an act of the Legislature of 1858. He claimed that his commitment was illegal because he had been denied the right, guaranteed by the Constitution, to a trial by jury, and that, in denying him said right, the further provision of the Constitution that no person shall be deprived of his liberty without due process of law was violated. The court, rejecting the contention, said:

"It is obvious that these provisions of the Constitution have no application whatever to the case of this minor child. The action of the police judge here in question did not amount to a criminal prosecution, nor to proceedings against the minor according to the course of the common law, in which the right of trial by jury is guaranteed. The purpose in view is not punishment for offenses done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority. Having been abandoned by his parents, the state, as parens patriæ, has succeeded to his control, and stands in loco parentis to him. The restraint imposed upon him by public authority is in its nature and purpose the same which, under other conditions, is habitually imposed by parents, guardians of the person, and others exercising supervision and control over the conduct of those who are, by reason of infancy, lunacy, or otherwise, incapable of properly controlling themselves"—citing Ex parte Crouse, 4 Whart. (Pa.) 9, and Prescott v. State, etc., 19 Ohio St. 184, 2 Am. Rep. 388.

In Re Bresee, 82 Iowa, 573, 48 N. W. 991, supra, it is said:

"It is urged that the appellant [an alleged insane patient] was entitled to a jury trial in the district court, under the constitutional guaranties that the right of trial by jury shall remain inviolate; and in all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury. These provisions are found in sections 9 and 10 of article 1 of the Constitution of the state. In Black Hawk County v. Springer, 58 Iowa, 417, 10 N. W. 791, this court considered the rights of a person charged with insanity to a trial by jury under these provisions of the Constitution, and held that they applied 'only to criminal prosecutions or accusations for offenses against the criminal law, where it is sought to punish the offender by fine or imprisonment.'"

In County of Black Hawk v. Springer, 58 Iowa, 417, 10 N. W. 791 (the case referred to in the Bresee Case), the Iowa court thus expressed itself:

"* * * The inquest of lunacy by a board of commissioners is in no sense a criminal proceeding. The restraint of an insane person is not designed as punishment for any act done. The insane are by the law taken into the care and custody of the state for treatment for their unfortunate infirmity. In our opinion, whatever may be thought of the power of the legislative department of the state to provide a special tribunal for the examination of persons alleged to be insane, the safeguards and limitations provided by our laws for the correction of any abuse which may arise from the acts of the commissioners are ample for the protection of the citizen."

In Crocker v. State, 60 Wis. 553, 556, 19 N. W. 435, the Supreme Court of Wisconsin says that the common-law right of trial by jury, as guaranteed by the Constitutions of that and other states, extends neither to proceedings to commit infants to an industrial school or a house of refuge nor to the determination of the mere insanity of a

party, and in support of this proposition cites Ex parte Crouse, 4 Whart. (Pa.) 9; Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 388; Ex parte Ah Peen, 51 Cal. 280; Petition of Ferrier, 103 Ill. 367, 43 Am. Rep. 10; Milwaukee Ind. School v. Milwaukee Co., 40 Wis. 328, 22 Am. Rep. 702; Gaston v. Babcock, 6 Wis. 503; Shroyer v. Richmond, 16 Ohio St. 455; Hagang v. Cohnen, 29 Ohio St. 82.

But we need not further multiply cases upon the proposition in hand. They are numerous, and, like the cases above examined, all to the effect that, where the state Constitution guarantees the common-law right of trial by jury, only those cases in which that right was habitually exercised according to the course of the common law come within the terms of the guaranty, and that an inquisition of insanity is not one of those cases.

The cases and authorities cited by the learned counsel for the petitioner have reference to cases where the Legislature has provided that the question of insanity shall be tried by a jury. In none of them, except in the case of De Hart v. Condit, 51 N. J. Eq. 611, 28 Atl. 603, 40 Am. St. Rep. 545, is there any declaration approaching the statement that the right to a jury trial in such cases is the common-law right. And in the case mentioned it is merely stated, as we have already explained (quoting Blackstone), that under the old common law, proceedings under a writ of de idiota inquirendo or de lunatico inquirendo were had before a jury, and this for the obvious reason that with the adjudication of the person's idiocy or insanity passed the issues and profits of his estate, during the existence of his infirmity, to the crown. In such a proceeding the property rights of the alleged incompetent were to some extent involved, and quite logically, in harmony with the recognized and zealously guarded polity of the British government, after its establishment upon the conquest of William the Conqueror, with respect to the rights of property and the right to a trial by jury where those property rights are affected or questioned, the natural and appropriate mode for determining whether the subject's property should be taken from him, or, substantially, escheated to the crown in such cases, was by a jury of disinterested persons of good common intelligence. As we have already shown, after provision was made for the safe-keeping and preservation of the incompetent's estate and the issues and profits thereof, to be returned to him upon his restoration or devolved upon his heirs should he die without recovering from his malady, there was no longer allowed a trial of the question of the alleged incompetent's idiocy or insanity by a jury, but the whole question was committed for determination to a court or a committee, under the direction of the court, without the intervention of a jury. And this latter system prevailed long prior to the time when Sir William Blackstone gave to the civilized world his justly celebrated and splendid commentaries on the English common law.

The De Hart Case involved the question whether a statute of New Jersey expressly requiring a jury of 12 men for the determination of the question whether a person was insane or afflicted with some other mental infirmity justifying his detention amounted to a denial to the alleged incompetent of the constitutional right to a trial by jury because it provided that the sheriff should summon 12 instead of 24 persons for that purpose. And, as before intimated, in all the cases where it is held that one charged with insanity is entitled to have the question tried by jury such right is purely statutory or expressly conferred by legislative mandate. Very clearly, if the section of the Code in question here, like our statute governing the investigation of cases of alleged insanity (Pol. Code, § 2174), authorized or required the question of inebriety to be tried by a jury, such requirement, whatever its terms or conditions, if reasonable, would have to be complied with; but the right thus allowed would not be the constitutional or common-law right of trial by jury. But the Legislature has not so ordained as to the trial of questions arising under section 2185c of the Political Code, nor, for reasons already given, does said section violate any of the constitutional guaranties because there is omitted therefrom a provision according to a person charged under its provisions the right of trial by jury. Indeed, if, as the petitioner contends, he is entitled to a trial by jury as of right or by virtue of the constitutional guaranty with respect to trial by jury, it would be altogether unnecessary for the Legislature to declare such right in the statute.

The result of the foregoing views is, obviously, that the writ must be discharged, and the petitioner remanded; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

29 Cal. App. 238

GRIFFITH v. WELBANKS & CO.

(Civ. 1394.)

(District Court of Appeal, Third District, California. Dec. 21, 1915.)

1. SALES ⊂⊃384 — BREACH OF CONTRACT — MEASURE OF DAMAGES—STATUTE.

In an action for breach of a contract to take and market apples, assuming that the jury were justified in finding that plaintiff's loss was due to defendant's failure to perform the contract, and that defendant agreed to pay plaintiff 50 cents per box net for his apples, and not $10 per ton or 23 cents per box, Civ. Code, § 3300, providing that on breach of an obligation arising from contract the measure of damages is the amount which will compensate the injured

party for all detriment proximately caused thereby or which would be likely to result therefrom, furnished the measure of damages, and plaintiff could not recover the full contract price, as the detriment to him at most was the contract price less the expenses he would have incurred had be delivered the apples; and section 3310, relating to the breach of an agreement to pay for personal property, and section 3311, relating to breach of agreement to buy personal property, did not apply.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098–1107; Dec. Dig. ⟸384.]

2. SALES ⟸382—ACTION FOR BREACH—EVIDENCE—DAMAGES.

In such action, where the pleadings presented plaintiff's claim for 50 cents per box net, more than double the amount defendant claimed as the contract price, evidence for defendant that the market value of apples where they were grown, of such kind as were involved, was $12 per ton, was admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1096; Dec. Dig. ⟸382.]

Appeal from Superior Court, Napa County; Emmet T. Seawell, Judge.

Action by Jesse Griffith against Welbanks & Co. Judgment for plaintiff, motion for new trial denied, and plaintiff appeals. Judgment and order reversed.

W. H. Mahony, of San Francisco, for appellant. Dudley D. Sales and Theodore A. Bell, both of San Francisco, and E. S. Bell, of Napa, for respondent.

CHIPMAN, P. J. Plaintiff commenced the action to recover the sum of $1,700 for the breach by defendant of the following alleged contract:

"Agreement.

"This agreement, made and entered into this twenty-third day of September, 1912, by and between Jesse Griffith, of St. Helena, California, and Welbanks & Company, a corporation, with its principal place of business in the city and county of San Francisco, state of California, witnesseth:

"That the said Welbanks & Company agree to purchase and does purchase and the said Jesse Griffith agrees to sell and does sell all number one apples (approximately) 4,000 boxes growing on that certain tract of land leased by said Jesse Griffith at the price of (*ten* [10] *dollars per ton or*) fifty ($.50) cents per box f. o. b. St. Helena.

"Jesse Griffith agrees to nail up all shook, do all the picking and hauling from the orchard to St. Helena, and when apples are ready for shipment, haul same from the packing house and load f. o. b. the cars at St. Helena, California.

"Welbanks & Company agree to supply all the necessary material, viz.: Shook, paper, nails, etc., for the packing of said crop, to haul same from railroad at San Francisco to store, and to furnish the packer for the packing of said crop. (*Pay freight on shook, apples, etc.*)

"It is further understood and agreed that after said charges and cartage have been deducted from the gross proceeds the said Jesse Griffith and Welbanks & Company shall enjoy all profits, share and share alike.

"In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

"[Signed] Welbanks & Co.,
"B. C. Flocton, Sec.
"Jesse Griffith."

It is alleged that the 4,000 boxes of apples mentioned in the contract "were ready for picking, packing, and shipping on or about October 1, 1912, as the defendant then and there well knew, but the defendant for a period of 15 days after said apples became ready for picking, packing, and shipping as aforesaid, willfully failed, neglected, and refused to supply the necessary materials and boxes for the packing of said crop, or to furnish the packer for the packing thereof, and solely by reason of said delay, about 2,500 boxes of said No. 1 apples which remained on the trees unpicked, were destroyed by wind and rain"; alleged that plaintiff was ready and willing at all times to do all the picking, etc., required of him by said contract, but by reason of defendant's said neglect plaintiff was unable "to pick any part of said 2,500 boxes, or to preserve them from destruction by wind and rain as aforesaid"; that there were picked and packed "1,594 boxes of said No. 1 apples," for which defendant has paid plaintiff $300 and no more, and there is now due and owing plaintiff from defendant the sum of $1,700; that plaintiff has fully performed each and every covenant in said contract by him to be performed.

Defendant denied the execution of the contract set out in the complaint, but alleges that, on September 23, 1912, defendant prepared and signed in duplicate a proposed agreement in form similar to that set forth in plaintiff's complaint, except that as proposed the contract read "at the price of ten ($10) dollars per ton or fifty ($.50) cents per box f. o. b. St. Helena," whereas, as changed by plaintiff, it read, "at the price of fifty ($.50) cents per box f. o. b. St. Helena," and there were added to the fourth paragraph the words, "Pay freight on shook, apples, etc." The words "ten ($10) dollars per ton or" were erased by drawing ink lines through them and the added clause was written in by pen. The contract as proposed was typewritten. That as thus changed plaintiff returned one of the duplicate copies of the agreement, with a letter calling attention to the words "pay freight on shook, apples, etc.," but did not call defendant's attention to the alteration by striking out the words "ten ($10) dollars per ton or," and defendant "had no knowledge of the striking out of said words last referred to until on or about the 3d day of January, 1913, when its attention was directed thereto by letter from plaintiff and after all the apples hereinafter described had been shipped, and the contract hereinafter alleged had been performed and executed by the defendant herein." It is then alleged that the document set forth in the complaint is but one of a number of paper writings signed by the parties; that it was not the intent of plaintiff to sell and defendant to buy the apples referred to, but

that the transaction was to be a joint venture, except that plaintiff was to be guaranteed $10 per ton for all No. 1 apples shipped to defendant, and the terms of the agreement actually entered into were as follows: Plaintiff was to harvest the crop and haul it to the packing house to be packed; he was to nail up all shook and to haul all said crops, after it was so packed, to the depot at St. Helena, and place the same aboard the cars for shipment to San Francisco, and to receive in payment therefor $10 per ton, estimated at about 23 cents per box, and it was likewise agreed that the cost of packing, including the materials required therefor together with said $10 per ton or 23 cents per box would be 50 cents per box; that defendant agreed on its part to advance the cost of supplying materials for packing, namely, shook, paper, nails, etc., and the labor and service of packers, advance the cost of freight on shipments by rail and cartage at San Francisco, and to sell the apples at the best market price; that upon making sales all charges, including the material and cost of labor for packing and said guaranteed $10 per ton (or 23 cents per box) of apples and all charges for freight and cartage at San Francisco, were to be deducted from the gross proceeds of sales and the net profits, if any, were to be divided equally between plaintiff and defendant; that the words "price of fifty cents per box f. o. b. St. Helena," as appear in said document set forth in plaintiff's complaint, referred to "the estimated cost of said apples after payment of said $10 per ton to plaintiff and payment of the cost of the material and labor furnished for packing the same for shipment at St. Helena." The answer denies the averments of the complaint as to the alleged number of boxes of apples ready for shipment October 1, 1912, or at any time; denies that defendant refused to supply the necessary materials for boxes; denies that, by reason of any delay on defendant's part to furnish boxes, 2,500 or any number of boxes of said apples remained on the trees unpicked and were destroyed by wind or rain; denies that plaintiff was ready or willing to do the part of the work which he agreed to do; and denies that plaintiff solely or at all was unable to pick any boxes of apples or to preserve them from destruction by wind or rain through any neglect or refusal of defendant; denies that plaintiff packed or delivered to defendant 1,594 boxes of No. 1 apples pursuant to any agreement, or that defendant paid plaintiff any money other than under the agreement set out in the answer; denies that there is any money due plaintiff from defendant other than as alleged in the answer, that plaintiff packed and shipped 1,593 boxes of apples of which only 1,034 were No. 1 apples, and that 559 boxes were smaller in size and of less marketable value, and that defendant sold said 1,593 boxes to the best advantage and realized therefrom $1,228.85 and no more; alleges that defendant paid out on account of said charges certain stated sums, and that the share of the net profits to which plaintiff is entitled is the sum of $231.85, which defendant offered to pay plaintiff prior to the commencement of the action, but plaintiff refused to accept the same, and that defendant paid into court said sum of $231.85. Defendant prays judgment in favor of plaintiff for said last-named sum, and that defendant recover costs of suit. The cause was tried with a jury, and plaintiff had the verdict for $1,200. Defendant appeals from the judgment and from the order denying its motion for a new trial.

Plaintiff estimated that there were 4,500 boxes of No. 1 apples on the trees when the contract was made. In the contract the estimate was 4,000 boxes (approximately). He shipped 1,593 boxes. In his testimony plaintiff testified that, of the apples "blown off the trees on account of wind and rain, I figured from 2,500 to 3,000 boxes were No. 1 apples." Under the contract, plaintiff was to "nail up all shook, do all the picking and hauling from the orchard to St. Helena, and when apples are ready for shipment, haul same from the packing house and load f. o. b. the cars at St. Helena, Cal." Plaintiff testified at some length as to delays in sending packing materials and packers; that there were not enough packers to keep up with the picking and that some of them were incompetent; that by reason of defendant's failure to perform its part of the agreement in these and other particulars the picking and packing ran along so late in the season that about 2,500 or 3,000 boxes of apples were destroyed by wind and rain storms. He testified that 1,593 boxes of apples were packed and shipped and none of them rejected and that he had received on account $300; that his orchard was on Howell Mountain, 8 miles from St. Helena. Other witnesses testified to facts tending to establish plaintiff's contention that the destruction of his crop of apples was attributable to defendant's failure to perform its part of the contract. There was evidence submitted by defendant in conflict with plaintiff's testimony.

[1] Defendant's answer and its evidence was in effect that the contract agreed upon and under which plaintiff and defendant acted was one of profit sharing by which plaintiff was guaranteed $10 per ton or 23 cents per box, and, after the various charges referred to in the contract and the cost of marketing the fruit were deducted, plaintiff and defendant were to share equally whatever profits there might be. Plaintiff testified that there was no such understanding. Defendant called witnesses who testified in support of its contention and introduced letters written by plaintiff to defendant during the

course of the packing and up to the close of the transaction, which seem to support defendant's position. At no time prior to January did plaintiff make any claim for apples destroyed by winter storms or that defendant was responsible for the loss. However, if the jury was justified from sufficient evidence in finding that the loss was caused by defendant's failure to perform its duty under the contract and plaintiff was free from fault, which we do not now deem it necessary to decide, and if the jury were justified from the evidence in finding that defendant agreed to pay plaintiff 50 cents per box net for his apples and not $10 per ton or 23 cents per box, and that there was no agreement to share profits as part consideration for the sale, issues upon which we express no opinion, there remains the question: Was the amount of the verdict justified by the evidence?

It is conceded that in estimating damages the jury allowed 50 cents a box on 3,000 boxes of apples, less $300 paid on account, but took no account of the cost of picking, nailing the shook, and hauling the apples to St. Helena and putting them on board the cars. Plaintiff justifies the verdict on the ground that, as the apples were destroyed, there was no occasion for incurring the expense of these charges, and defendant cannot complain because in any event its liability was to pay 50 cents per box. Except where otherwise expressly provided by the Civil Code, the measure of damages "for the breach of an obligation arising from contract * * * is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things, would be likely to result therefrom." Civ. Code, § 3300. Where the title to personal property is vested in the buyer, the detriment caused by his breach of the agreement to accept and pay for the property "is deemed to be the contract price." Civ. Code, § 3310.

"The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: * * * (2) If the property has not been resold in the manner prescribed by section 3049 (i. e., sold to enforce a lien, not this case), the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it." Civ. Code, § 3311.

Clearly, the title to the property involved in the present case was not vested in defendant, and section 3310 has no application. Where, as here, the property consisted of a growing crop which was destroyed by the elements before it was harvested and was never in a condition to be delivered to the buyer, we do not think section 3311 furnishes the true measure of damages. The just and equitable measure is found in section 3300. Plaintiff was to receive, upon his view of the contract, 50 cents per box for his apples after he had picked, packed, and hauled them to St. Helena and delivered them on board the cars. Upon no just principle can he recover the full contract price, for the detriment to him is at most the contract price less the expenses he would have incurred had he delivered the apples.

In Coburn v. California, etc., Co., 144 Cal. 81, 84, 77 Pac. 771, the contract was for the sale of cement clay at a stated price per cubic yard on delivery. Defendant received a certain quantity and refused to receive any more. After referring to section 3311, Civil Code, the court said:

"Where, however, there is no value, or where under the terms of the special contract the market value is not an appropriate or adequate criterion of damages, it has been said that the measure of damages is compensation for the actual loss suffered. 24 Am. Eng. Ency. of L. 1115. The law seeks to give the complaining party the value of his bargain, to prevent a loss which the fulfillment of the contract would have prevented, to put the injured party, so far as money can do it, in the same position as if the contract had been performed. Id., vol. 8, p. 632. Accordingly, the contract price less the cost of performing the contract was held to be the proper measure of damages when the buyer refused to take all the tomatoes grown on a certain tract of land, it appearing that there was no other market for the tomatoes"—citing cases.

See O'Connell v. Main, etc., Hotel Co., 90 Cal. 515, 27 Pac. 373.

In Allen v. Los Molinos Land Co., 25 Cal. App. 206, 143 Pac. 253, there was a breach of a contract by failing to furnish water for the irrigation of a crop of potatoes, in consequence of which the yield was less than it would have been had sufficient water been supplied. We held in that case that section 3300 of the Civil Code furnished the rule for measuring the damages, namely, the market value of the potatoes at the selling place less the expenses incurred in growing and marketing the crop. Plaintiff offered no evidence of market value at the selling place or elsewhere. The jury had no criterion by which to measure the damages except the contract price of the apples and the estimated quantity destroyed.

In its answer defendant denied the execution of the contract sued upon; denied that in its altered form it expressed the intention of the parties and set forth in much detail what it claimed was the contract as shown by the acts, the verbal agreements, and correspondence of the parties; that the price guaranteed plaintiff was $10 per ton or what both parties estimated would be 23 cents per box, in addition to which plaintiff was to share equally with defendant in the profits. In a letter written by plaintiff to defendant, September 18, 1912, when negotiations were progressing for the sale and purchase of the apples, plaintiff stated that the price for the apples was figured at $10 per ton in enumerating the different items making up 50 cents per box.

[2] Upon the issues as presented by the pleadings, plaintiff claiming 50 cents per box net, more than double the amount defendant claimed was the contract, defendant was entitled to any evidence which would legitimately tend to discredit plaintiff's claim and sustain defendant's claim. Defendant's witnesses testified that the market value of apples at St. Helena, such as were involved, was $12 per ton. The court afterwards struck out this testimony, and defendant excepted to the ruling. We think this was error, for, had the jury believed the testimony of these witnesses, it would have had some tendency to show that plaintiff's claim was unreasonable and that defendant would not have been likely to enter into a contract to pay twice the market value of the apples.

We refrain from discussing the sufficiency of the evidence to sustain the implied finding of the jury that the contract was as contended by plaintiff, for the reason that should another trial be had the evidence may not be the same as at the first trial.

The judgment and order are reversed.

We concur: BURNETT, J.; HART, J.

(29 Cal. App. 253)

IMPERIAL WATER CO. NO. 1 v. WORES et al. (Civ. 1772.)

(District Court of Appeal, Second District, California. Dec. 24, 1915.)

1. WATERS AND WATER COURSES ⊂=157 — WAYS FOR CANALS—ACQUISITION.

A right of way for a canal for waste water of an irrigation corporation may be obtained by an executed parol license.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 185; Dec. Dig. ⊂=157.]

2. WATERS AND WATER COURSES ⊂=157 — WAYS FOR CANALS—ACQUISITION.

An owner of land requested an irrigation corporation to construct a waste ditch along the south side of his land. The corporation constructed the ditch on a diagonal line through the land. The owner, on obtaining knowledge of the facts, protested and informed the corporation that he intended to make use of the ditch to irrigate his land by using some of the waste water. The ditch was completed, and the owner erected a check and gate therein. The corporation removed, when necessary, the check and gate, but replaced the same by a similar and more substantial structure. The check and gate remained in the ditch for some time, and the owner used water for irrigation. *Held*, that the corporation acquired the right to maintain the ditch subject to the owner's right to use the water therein for irrigation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 185; Dec. Dig. ⊂=157.]

3. QUIETING TITLE ⊂=54—COSTS—LIABILITY—"RIGHT TO REAL PROPERTY."

Under Code Civ. Proc. § 1022, subd. 5, providing that costs are allowed of course to plaintiff on a judgment in his favor in an action involving title or possession of real estate, a plaintiff, suing for a decree quieting its title to a ditch for waste water over the land of defendant and obtaining a decree establishing its right to maintain the ditch subject to the right of defendant to use the water therein, is entitled to recover costs, since the right claimed by plaintiff is a right to real property, under the rule that where a right, though originating in a license, exists for the benefit of the licensee's land and has become irrevocable its character is an easement, which is an irrevocable interest in real estate.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 105; Dec. Dig. ⊂=54.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Imperial Water Company No. 1 against Lucy Wores and another. From a judgment, both parties appeal. Modified, amended, and affirmed.

F. P. Willard, of Heber, for plaintiff. Conkling & Brown, of El Centro, for defendants.

CONREY, P. J. At all times mentioned in the complaint the plaintiff was a corporation organized for the purposes of securing water for irrigation and other purposes, and for distribution of the same at cost, among its stockholders only, for use upon lands owned by them within certain described limits in the county of Imperial, and has been engaged in distributing upon said lands a large amount of water which it receives at the southerly boundary of its territory and distributes through a system of canals and ditches. The defendant Lucy Wores, in the year 1905 or prior thereto, became the owner of a tract of land, known as tract No. 74, situated immediately north of the territory watered by the plaintiff's irrigation system. The canal system of plaintiff extends in a northerly direction through its territory, and the canals converge in the northerly part of this territory and discharge their surplus and waste water into a canal designated as the Rose wasteway. Prior to the year 1906, there was a well-defined water course known as the Salton river, later called the Alamo river, which ran across a portion of tract 74, but in a more northerly direction than that taken by the present Rose waste canal. This water course carried the overflow water from the Colorado river whenever any was discharged, and also carried the rainwater which fell, when any such rainwater did fall, over a considerable part of the territory covered by the water system of the plaintiff. Such rainfall and overflow water was thus carried over and through tract 74 to lower lands lying farther to the north. Since March 1, 1904, plaintiff has continuously conveyed and discharged waste water from its canal system across and beyond said tract 74.

At all times mentioned in the complaint the defendant Charles R. Wores was the agent or representative of the defendant Lucy Wores in the transactions referred to herein. In the years 1905 and 1906 the defendants complained to plaintiff of the discharge and flow of waste and excess water going through

plaintiff's Rose canal from the south and complained that the water was flooding tract 74, and requested the plaintiff to construct a ditch or canal from the said Rose wasteway south of tract 74 in such a way as to prevent the flooding of tract 74, and requested that such canal be constructed along the south line of tract 74 from the southwest corner of that tract easterly past its southeast corner to a deep gulch known as the Alamo cut-off. In April, 1906, after making surveys, the plaintiff concluded to build such waste canal, not along the south side of tract 74, but upon a diagonal line running through that tract northeasterly. Thereupon it proceeded to construct the canal upon such diagonal line and completed the work in December, 1906. The defendants were without knowledge of the selection of this diagonal route, or that plaintiff intended constructing the canal through the tract, until the same was partially constructed. They gave no prior consent thereto other than their request for the construction of a canal along the south line of their tract, as before stated. In April, 1906, at a time after the commencement of the construction of this canal or ditch, the defendants learned of the work that was going on and protested to plaintiff and objected to the place where the canal was being constructed. Shortly thereafter the defendant Lucy Wores notified plaintiff that she intended to make use of this canal herself for the purposes of conducting waste water over and irrigating her land. The canal having been completed, plaintiff began to use it as a wasteway for its surplus water, and ever since has so continued without interruption, except as will be herein stated. In January, 1908, defendants placed an obstruction consisting of a check and gate so arranged that they could dam up the water flowing in this waste ditch and divert the water therefrom so as to irrigate a portion of tract 74. In January, 1909, defendants commenced to irrigate and cultivate this land and have ever since continued so to do, and have irrigated such land by checking up the water in the waste canal and diverting the water therefrom, thereby causing the banks of the Rose wasteway to overflow and discharge water upon the roads, fields, and crops of those adjoining that canal to the annoyance and detriment of the plaintiff and its stockholders. The plaintiff and its officers and directors have at all times known that the defendants have obstructed this waste canal and used the water therefrom for irrigation, and until shortly prior to the commencement of this action never made any objection thereto. The action was commenced by filing of the complaint herein on June 26, 1912. About one year prior thereto plaintiff removed the check theretofore placed in the canal by the defendants, in order that plaintiff might clean out the canal, but immediately thereafter plaintiff replaced said check by a similar structure more substantial than that theretofore placed in the canal by the defendants. This replacement was made by the plaintiff for the convenience of the defendant Lucy Wores and in order that she might continue to irrigate her said land. The Rose Wasteway is a necessity to the canal system of the plaintiff, and it is impracticable to operate and maintain plaintiff's system without such wasteway or some available substitute therefor. Shortly before the 20th day of June, 1912, the plaintiff entered upon said canal and tore out the check and gate which it had constructed as above stated and destroyed the same. Two days later the defendants re-entered upon the canal and by the erection of a barbed wire fence excluded and ejected the plaintiff therefrom and placed a temporary check in the canal (near the place from which the former check had been removed) for the purpose of enabling them to divert water from the waste canal for irrigation, as they had been accustomed to do.

The plaintiff by this action seeks a decree quieting its title or right to the use of said wasteway across the land of the defendants, and enjoining the defendants from maintaining any obstruction which will in any manner interfere with the free ingress or egress of the plaintiff or its employés for the purpose of cleaning, repairing, or inspecting the wasteway, and further enjoining the defendants from obstructing in any way or for any purpose the flow of water therein. Upon sufficient evidence the court found the facts to be as we have stated them, and likewise found:

"That since the construction of said wasteway across the said tract 74, the defendant Lucy Wores has consented to the maintenance thereof subject to her right to use the same for irrigation in the manner in which she has used the same as aforesaid, and has not consented otherwise."

In accordance with its conclusions of law following the findings of fact, judgment was rendered to the effect that:

"Upon the restoration and reconstruction by plaintiff of the check torn out and destroyed about the 1st of June, 1912, and in substantially the same condition, location, and position as the same existed at the time the same was removed therefrom and destroyed by plaintiff, and not otherwise, plaintiff is entitled to use the waste canal described in the complaint, across the lands of defendant Lucy Wores, and to discharge its surplus waters therethrough in the same manner that it has been accustomed to discharge the same, subject always to the right of the defendant Lucy Wores to obstruct and divert such waste water by means of said check or irrigating so much of said tract 74 as she has been accustomed to irrigate previous to the said June 26, 1912, and no more. It is ordered and adjudged that in diverting the said waste water defendant shall not check said water to any higher level than that to which she checked the same prior to June 26, 1912. It is further ordered that any check placed in the said wasteway by plaintiff shall be so constructed as to permit all water in excess of that being diverted by defendant to flow down the said wasteway without interference, and that when not in use such check and obstruction shall be so removed as to permit the free flow of water and

the scouring of the channel of said wasteway above said check of all deposits of silt. It is ordered and adjudged that plaintiff is entitled to convenient ingress and egress from the said canal for the purpose of cleaning and caring for the same, and that such right extends over the strip of ground 80 feet in width; that is to say, 40 feet on each side of the center line of said canal. It is further adjudged and decreed that the defendant Lucy Wores is entitled to enter upon the said strip of land at all times for the purpose of maintaining, repairing, and caring for the said check in the said canal so used by her for the purpose of diverting water therefrom for the irrigation purposes aforesaid, and for the purposes of making such diversion of water. It is further ordered and decreed that defendant Lucy Wores recover her costs therein taxed at $——."

The plaintiff appeals from certain specified portions of this judgment, including in the appeal substantially all of it, except the sentence defining plaintiff's right of way and its right of access thereto. The defendants appeal generally from the judgment. The record consists of the judgment roll and the notices of appeal.

[1] The plaintiff claims that it is entitled to this wasteway because at considerable expense it was constructed under a parol license and under circumstances which should now estop the defendants from destroying its efficiency. We have no doubt that a right of way may be thus obtained by virtue of an executed parol license. The circumstances being sufficient to create an estoppel, "the license becomes in all essentials an easement." Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940; Stoner v. Zucker, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704.

[2] The request made by the defendants that the plaintiff construct a waste ditch along the south side of their land was not a consent to the construction of such a ditch diagonally through such land. Knowledge by the owner that the work was being done without her permission was promptly followed by a protest from her, and this of course indicates that she did not consent thereto and was giving no license therefor. Following this, however, she informed the plaintiff that she intended to make use of the ditch for the purpose of irrigating her land by using thereon some of the waste water flowing through the ditch. This constituted by implication a consent that the plaintiff might build the ditch. On the other hand, if, without any other or different consent of the owner (and such seems to be the fact), the plaintiff completed the construction of its ditch, it may reasonably be inferred that the plaintiff intended thereby to consent to such use of the ditch by the defendants. That this was the understanding on the part of the plaintiff is evidenced by the fact that subsequently, when it found that a check and gate had been arranged in the ditch for irrigation purposes by the defendants, and when it became necessary for plaintiff temporarily to remove this obstruction in the course of repairs to the ditch, it immediately thereafter replaced the check by a similar and more substantial structure and so placed the same for the convenience of the defendants in order that they might continue to irrigate their land. Under these circumstances, when the plaintiff on or about the 1st of June, 1912, destroyed the gate theretofore established by it, this was a wrongful denial of a limitation under which its continuing right to maintain the ditch exists. Plaintiff's counsel contends that the facts found do not authorize a judgment requiring the plaintiff to restore and reconstruct the check torn out by it from the ditch. The judgment does not require the plaintiff to do anything; it merely imposes upon it the condition that it must do a certain thing as a necessary incident to the enforcement of a certain right. It is required to do equity in a matter incidental to its right to have affirmative relief in equity. Having complied with that condition, it is permitted to discharge its surplus water through the ditch in the same manner that it has been accustomed to discharge the same, and suitable provision is made for the free flow of the water, subject only to the temporary checking of that flow during times of irrigation of the land of the defendants by the use of such waste water.

It should be distinctly understood that this case does not attempt to settle or determine any right or claim of the defendants to have any water continue to flow through the Rose canal or ditch or across said tract 74. We are dealing solely with the ditch or canal itself and the right of the defendants to a certain limited use of the ditch for the diversion of water therefrom whenever such water is by the plaintiff permitted to flow therein.

[3] Plaintiff objects to the provision in the decree that the defendant Lucy Wores recover costs, and insists that the costs should be allowed in favor of the plaintiff. We are referred to Code of Civil Procedure, section 1022, subdivision 5, which provides that costs are allowed of course to the plaintiff upon a judgment in his favor in an action which involves the title or possession of real estate. Although the suit is in equity and includes the right to an injunction, it is primarily an action to quiet title to a right in real property. It has been held that where the plaintiff has any judgment in his favor in an action to quiet title, though it be for only a part of the property, the costs should be in favor of the plaintiff. Sierra Union, etc., Co. v. Wolff, 144 Cal. 430, 77 Pac. 1038. And there seems no doubt that the right claimed by the plaintiff herein is a right to real property. Lower Kings R. W. D. Co. v. Kings R. & Fresno C. Co., 60 Cal. 408. It is true that a mere license revocable in its nature would not amount to an interest or estate in the land. Emerson v. Bergin, 76 Cal. 197, 201, 18 Pac. 264. But where the right, al-

though originating in a license, exists for the benefit of the licensee's land and has become irrevocable, its character becomes that of an easement which is an interest in real property within the meaning of the Code section above mentioned. Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470; Stoner v. Zucker, supra.

Concerning the plaintiff's claim that the defendants had not maintained a check in the canal and had not used the ditch for a period of five years, and therefore that the defendants had not acquired any prescriptive right therein, a sufficient answer is that the right of the defendants, so far as recognized by the judgment herein, is not based upon adverse use, but solely upon the condition inhering in the plaintiff's right of way as we have construed it in this opinion.

The judgment is modified by striking therefrom the provision contained therein allowing costs to the defendant Lucy Wores, and the court below is directed to further amend the judgment by allowing costs to the plaintiff. As so amended, the judgment shall stand affirmed.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 266

SCHEELINE et al. v. PEZZOLA et al.

(Civ. 1410.)

(District Court of Appeal, Third District, California. Dec. 27, 1915.)

1. INTOXICATING LIQUORS ⟸329 — ACTIONS FOR PRICE—EVIDENCE.

In an action by wholesale liquor dealers to recover for liquors sold to defendants for use in a saloon in P. county, wherein there was an ordinance prohibiting any person from engaging in such business without a license and denying licenses to persons not citizens of the United States, it was error to exclude evidence that, when the first sale was made, one of the plaintiffs knew that the business which was to be conducted in the name of one of the defendants was for himself and the other defendant, that such other defendant was not permitted to engage in the business or hold a license because he was not a citizen, and that it was a violation of the ordinance for such defendant to engage in such business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 474–481; Dec. Dig. ⟸329.]

2. INTOXICATING LIQUORS ⟸327 — SALES — VALIDITY OF CONTRACT.

Pen. Code, § 435, provides that every person who carries on any business, etc., in which a license is required without taking it out is guilty of a misdemeanor. Civ. Code, § 1668, provides that all contracts which have for their object a violation of law are against the policy of the law. Plaintiffs, wholesale dealers, sold liquors to S. and A. for use in conducting a saloon in P. county, in which county an ordinance prohibited any person from engaging in such business without a license, and no person could obtain a license who was not a citizen. A. was not a citizen, and plaintiffs had an understanding with S. that he was to make application for the license and conduct the business for A., and that, if the license was issued, the liquor was to be supplied to A. or to both S. and A. *Held*, that the contract of sale was invalid, and there could be no recovery of the price.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 467–472; Dec. Dig. ⟸327.]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Henriette Scheeline and others, a copartnership doing business as Roth & Co., against S. A. Pezzola and another. Judgment for plaintiffs, and defendants appeal. Reversed.

L. N. Peter, of Quincy, for appellants. H. B. Wolfe, of Quincy, for respondents.

BURNETT, J. The appeal is from a judgment for $1,023.25, and costs.

The following statement made by appellants is not disputed and seems to be substantially accurate: Respondents are a wholesale liquor firm engaged in the business of selling intoxicating liquors. They made certain sales of such liquors to appellants to be used by the latter in conducting a saloon in Plumas county. When the orders were placed with respondents for the delivery of the liquors, there was an ordinance in said county prohibiting any person from engaging in the saloon business without a license, and no person could obtain a license who was not a citizen of the United States. Appellant A. Pezzola was not such citizen. The facts were known to respondents. Respondent Edwin S. Scheeline had an understanding with appellant S. A. Pezzola whereby the latter was to make application to the board of supervisors of said county for a liquor license in his own name and conduct the business for appellant A. Pezzola, and it was understood that in case said license was issued the liquor was to be supplied to A. Pezzola or to both appellants. S. A. Pezzola made the application, the license was issued to him, and thereafter respondents furnished liquors, charging the sales on their books to both of the appellants, but all bills were made out against S. A. Pezzola. Said Edwin S. Scheeline testified:

That he understood "at the time that A. Pezzola, Steve Pezzola's father, was not a citizen of the United States, and not entitled to engage in the liquor business under the ordinance of Plumas county; that S. A. Pezzola was running the business for his parents in his own name; they were unable to get a license."

[1] Appellants contended that it thus appeared that there was a conspiracy, participated in by respondents, to violate or circumvent the law, and therefore that respondents were wrongdoers, and would not be aided in a court of justice to reap any advantage from their unlawful contract, and appellants sought still further to develop the situation, as is shown by the following quotation from the transcript:

"Q. You understood it was in violation of the liquor ordinance of this county at that time? Mr. Wolfe: Objected to as irrelevant,

immaterial, and incompetent. The Court: Sustained. Mr. Peter: Will your honor hear me on that? The Court: I can't see how it is material. Mr. Peter: I want to develop that there was a conspiracy here to violate the law, and this plaintiff was a party to it, and they cannot take advantage of their own wrong, and the court will leave them where they left themselves. The Court: I don't think there is anything in that; I will hear the evidence."

His answer was:

"All I understood that they were violating the order was the fact, if A. Pezzola should have the license, he couldn't have a license; they got the license for him."

Afterward the court sustained an objection to this question:

"You understood that under the law, under the liquor ordinance of this county and laws of the state, you had no right, no one had a right, to engage in the liquor business without a license, did you?"

Counsel for appellants then stated that he offered to prove by the witness:

"That at the time he made the first sale testified to by him that he knew and understood that all the business, that the business, which was thereafter to be conducted in the name of S. A. Pezzola, was for himself and A. Pezzola; that A. Pezzola was not permitted to engage in the business, to hold a license under the liquor ordinance of Plumas county, because he was not a citizen of the United States; * * * and that he knew the fact of A. Pezzola engaging in the business was a violation of the ordinance."

The court, however, held it to be immaterial. In this we feel satisfied the court was in error.

[2] The law is well settled as to matters of this character, and is aptly set forth in many quotations made by appellants from various authorities. The Penal Code of this state, in section 435, provides that:

"Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor."

And that any contract having for its object the violation of the law is against public policy is expressly provided in section 1668 of the Civil Code.

The decisions are collated in 6 R. C. L. p. 692 et seq., and we may content ourselves with quoting section 98, as follows:

"At no time in the history of the common law were contracts in violation of law regarded as valid. Individuals were never allowed to stipulate for iniquity. A contract, though it may be based on consent, derives its obligatory force from the sanction of the law. It would therefore be anomalous, indeed, if the law were to sanction contracts which violate the law. The law which prohibits the end, will not lend its aid in promoting the means designed to carry it into effect. It will not promote in one form that which it declares wrong in another. The whole doctrine relating to illegal contracts is founded on a regard for the public welfare. In fact, it has been asserted that the maintenance of this doctrine is essential to the preservation of the state. It may therefore be said to be a fundamental principle of the law of contracts that a contract must have a lawful purpose, and that transactions in violation of law cannot be made the foundation of a valid contract."

As to the particular fraudulent contract before us it is sufficient to quote from Cyc. as follows:

"Where a license or certificate is required by statute as a requisite to one practicing a particular profession, an agreement of a professional character without such license or certificate is illegal and void. * * * The same is held where a license is required for the carrying on of a particular trade or business, as in the case of a wholesale or retail liquor dealer. * * * In such instances agreements made without the requisite license are generally held to be void." 9 Cyc. 478.

"Where the illegal sale of liquor enters into any contract as an inseparable part of its consideration, or the terms or conditions of the contract are inseparably connected with the illicit traffic in liquors, it is against public policy and immoral, and therefore void." 23 Cyc. 334.

The showing made was sufficient to bring the case within the purview of the foregoing principle. It appears with reasonable certainty that plaintiff conspired with defendant S. A. Pezzola to circumvent the said ordinance, and therefore the law will not aid in the collection of the claim. Besides, appellants sought unavailingly to make more apparent the invalidity of the contract.

The judgment is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 321

HOUGHTON v. DICKSON. (Civ. 1760.)

(District Court of Appeal, Second District, California. Jan. 5, 1916.)

1. PHYSICIANS AND SURGEONS ⊂⊃18 — ACTIONS FOR NEGLIGENCE — SUFFICIENCY OF EVIDENCE.

In an action against a physician and surgeon, evidence *held* insufficient to show negligence in treating a fracture of one of the bones of the arm, though the fractured bone failed to unite, or in failing to discover a dislocation of the other bone of the arm, there being no expert testimony as to any want of care or skill, but only evidence of the failure of the bone to unite and the failure of defendant to discover the dislocation.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34–41, 43–46, 48; Dec. Dig. ⊂⊃18.]

2. PHYSICIANS AND SURGEONS ⊂⊃14—DEGREE OF SKILL AND CARE REQUIRED.

The implied contract on the part of a physician and surgeon is that he possesses that reasonable degree of learning and skill possessed by others of his profession, and that he will use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 21–30; Dec. Dig. ⊂⊃14.]

3. PHYSICIANS AND SURGEONS ⊂⊃16—DEGREE OF SKILL AND CARE REQUIRED.

If a physician and surgeon possesses the reasonable degree of learning possessed by others of his profession and in the treatment of an injury exercises ordinary care and skill in applying it, he is not liable for results that follow.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31; Dec. Dig. ⊂⊃16.]

4. Physicians and Surgeons ⇐18 — Actions for Negligence—Presumptions.

In the absence of evidence to the contrary, the law will presume the exercise of a reasonable degree of care and skill by a physician and surgeon.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34–41, 43–46, 48; Dec. Dig. ⇐18.]

5. Evidence ⇐508 — Expert Testimony — Exercise of Care by Physician.

Whether a physician and surgeon called upon to set a fracture of one of the bones of the arm should, in the exercise of ordinary and reasonable care and skill, have discovered a dislocation of the other bone of the arm was a question for expert testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2311; Dec. Dig. ⇐508.]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by A. O. Houghton against C. B. Dickson. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

R. P. Jennings and Jennings & Horton, all of Los Angeles, for appellant. J. L. Fleming and W. S. Knott, both of Los Angeles, for respondent.

SHAW, J. This is an action to recover damages alleged to have been sustained by plaintiff as the result of negligent surgical treatment administered to him by defendant.

The case was tried by a jury which rendered a verdict in favor of plaintiff, in accordance with which judgment was entered against defendant in the sum of $3,500. The appeal is from the judgment and an order denying defendant's motion for a new trial; his chief contention being that the evidence was insufficient to justify the verdict.

[1] It appears that on January 25, 1911, due to the kick of a horse, the ulna of plaintiff's right arm was broken, and that, after receiving emergency treatment, he, on the day following the injury, placed himself in the care of defendant, who was a physician and surgeon and who undertook the treatment of the injured arm. The negligence of defendant is predicated, not only upon the alleged fact that in setting and treating the fracture there was a lack of care and skill by reason of which the fractured bone failed to unite, but that the bone known as the radius was at the time, or at a later date during the treatment, dislocated at the elbow, which fact defendant, by reason of his failure to exercise ordinary care and skill, failed to discover or properly treat. On January 26th, after an examination of the fractured arm with a fluoroscope, defendant set the arm, using splints to retain the broken bones in place. On the following day he discovered that it would be necessary to wire the fractured ends of the bone and had plaintiff go to a hospital, where the operation of wiring was performed by defendant. After the operation, defendant dressed, bandaged, and otherwise treated the arm until March 29th, on which date plaintiff consulted Dr. Rowley, who found a dislocation, at the elbow, of the bone known as the radius; that there had been no union of the ends of the fractured bones; that the wire used in securing the same had broken, and that pus had developed in the wound, all of which conditions, except the formation of pus in the wound, were indicated by an X-ray photograph of plaintiff's arm taken on said last-mentioned date. At this time plaintiff placed himself in the care of Dr. Rowley, who treated the injured arm until about May 1st, when he and Dr. Lewis operated upon the arm by cutting off the head of the radius, declared necessary in order to reduce the dislocation, and reset and wired the fractured bone, which, however, as under defendant's treatment, from some cause unknown to Drs. Rowley and Lewis and contrary to their expectations, failed to unite. While plaintiff by his evidence shows in detail just what defendant did in operating upon the arm and in the treatment thereof while under his professional care, he produced no evidence tending to prove that defendant, either in performing the operation or treatment administered thereafter, was guilty of negligence. The condition of the arm on March 29th—that is, the dislocation of the radius; the fact that the wire intended to retain in place the fractured bones had broken; failure of the fractured bones to unite, and suppuration of the wound—was not, in the absence of other proof, sufficient evidence that there had been a want of ordinary care and skill on the part of defendant in treating plaintiff's injuries. In short, the record merely shows what defendant did in caring for plaintiff professionally, the condition of the arm existing on and prior to March 29th, when plaintiff placed himself in the care of Dr. Rowley, and what he and Dr. Lewis thereafter did professionally to effect a cure. Indeed, not only is there no evidence of negligence on the part of defendant, but the evidence of both Dr. Rowley and Dr. Lewis, who, by the way, were the only witnesses called on behalf of plaintiff who were competent to testify whether or not defendant had exercised reasonable care and skill in treating plaintiff's injury, tends to prove the contrary. This evidence was to the effect that the nature of the fracture was such as to demand the wiring of the bones, and that the wire used was such as surgeons generally used in such cases; that in operating upon the fracture they used like wire, which in the adjusting thereof likewise broke. Dr. Lewis said:

"After I operated on the bones they did not unite with a bony union, and have never united."

And, further:

"I did not see anything in the condition of the bones at the fracture, referring to the location of the holes in which the wires had been placed or the manner in which the wires were

there, that would indicate that the operation which had been performed by Dr. Dickson was in any way improperly performed. * * * The condition of pus frequently follows an operation, especially operations upon bone. * * * That is true even with the utmost use of surgical care"

—and that he certainly expected, in performing the operation and his wiring of the bones, they would make a perfect union, in which, however, he was disappointed, since the result was to secure a ligamentous union only, and that he did not know what caused such condition.

[2-5] The implied contract on the part of defendant was, not only that he possessed that reasonable degree of learning and skill possessed by others of his profession, but that he would use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he was employed (Bonnet v. Foote, 47 Colo. 282, 107 Pac. 252, 28 L. R. A. [N. S.] 136), and if he possessed such reasonable degree of learning, and in the treatment of plaintiff's injury exercised ordinary care and skill in applying it, he is not liable for results that followed (Wurdemann v. Barnes, 92 Wis. 206, 66 N. W. 111; Sims v. Parker, 41 Ill. App. 284; Staloch v. Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. [N. S.] 712). In the absence of evidence to the contrary, the law will presume the exercise of a reasonable degree of care and skill. State v. Housekeeper, 70 Md. 162, 16 Atl. 382, 2 L. R. A. 587, 14 Am. St. Rep. 340.

"No presumption of the absence of proper skill and attention arises from the mere fact that the patient does not recover." Haire v. Reese, 7 Phila. (Pa.) 138.

"A physician is not a warrantor of cures." Ewing v. Goode (C. C.) 78 Fed. 442.

In McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 873, it is said:

"Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done."

Quoting again from McGraw v. Kerr, supra:

"The authorities are practically uniform in holding * * * that as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony."

Whether or not plaintiff's elbow was dislocated at the time when he first called upon defendant is not disclosed; indeed there is no evidence as to when the dislocation occurred, or as to what caused it. It is a subject purely for conjecture. While one witness states that a blow upon the arm, if of sufficient force and in the right direction, might dislocate it, there is no evidence that such blow was given, or that the dislocation was caused by the kick of the horse which broke the bone of the arm. Indeed, from aught that appears to the contrary, the dislocation might have been caused by the enfeebled condition of the muscles and ligaments following continued nonuse of the arm and the carrying of it bandaged and in splints. But assuming that it was dislocated at the time when defendant undertook the treatment of the fractured bone, or that it occurred thereafter during the treatment, such fact alone does not show that defendant was lacking in ordinary care and skill in not discovering such condition. No evidence whatever was offered on the part of plaintiff showing that, if it did exist at such time, defendant was negligent in his failure to make such discovery. So far as appears, he was called upon to set the fractured bones. No intimation was given him of any injury to the elbow. Whether or not defendant should, under the circumstances, in the exercise of ordinary and reasonable care and skill, have discovered such condition, assuming it to have existed, was a question for expert testimony, and none was offered. Conceding that Dr. Rowley, as stated by him, had no difficulty on March 29th in discovering the dislocation, nevertheless this fact does not show a want of ordinary care and skill on the part of Dr. Dickson in failing to discover it, since Dr. Rowley, by reason of superior learning and advantages, may have been a man possessing far more than ordinary skill in his profession. In James v. Crockett, 34 New Brunswick, 540, it is said:

"A surgeon does not undertake to perform a cure, nor does he undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes a fair, reasonable, and competent degree of skill, and in an action against him by a patient, the question for the jury is whether the injury complained of must be referred to a want of a proper degree of skill and care in the defendant or not."

To the same effect is Spain v. Burch, 169 Mo. App. 94, 154 S. W. 172.

The evidence wholly fails to show any lack of care and skill on the part of defendant in setting and treating the fractured bone of plaintiff's arm, and likewise fails to show when the dislocation of the elbow occurred, or that a physician in the exercise of ordinary care and skill in treating plaintiff, should, under the circumstances shown, have discovered the dislocation and treated the same.

The judgment and the order denying defendant's motion for a new trial are reversed.

We concur: CONREY, P. J.; JAMES, J.

29 Cal. App. 309

HILBORN v. SOALE et al. (Civ. 1776.)

(District Court of Appeal, Second District, California. Jan. 3, 1916. Rehearing Denied by Supreme Court March 2, 1916.)

1. FRAUDULENT CONVEYANCES ⇐299—SUITS TO SET ASIDE—EVIDENCE.

In a judgment creditor's action to set aside a conveyance by a husband to his wife of his alleged interest in land purchased with the wife's money, and conveyed to the husband and wife as joint tenants with the right of survivor-

ship, the trial judge was required to take into consideration all of the circumstances to determine therefrom the actual intent of the parties, though the testimony of the parties negatived any intention on the part of the wife to make a gift to the husband of an interest in the land.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 876–890; Dec. Dig. ⊂⊃299.]

2. APPEAL AND ERROR ⊂⊃1001—REVIEW OF QUESTIONS OF FACT—FRAUDULENT CONVEYANCE.

In such action a judgment setting aside the conveyance could not be disturbed if there was some substantial evidence upon which to found it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. ⊂⊃1001.]

3. FRAUDULENT CONVEYANCES ⊂⊃299 — TRANSACTIONS BETWEEN HUSBAND AND WIFE.

A judgment setting aside a conveyance from the husband to the wife in a suit by the judgment creditor was supported by evidence, where the wife had determined to leave the title to th property in such form that the husband upon her death should secure her interest in it, as a gift of the joint interest was thereby effectuated beyond her power to recall it after the recovery of a judgment, and, if the gift had become effectual, there could be no return gift made by the husband which would have the effect of defeating the claims of creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 876–890; Dec. Dig. ⊂⊃299.]

4. APPEAL AND ERROR ⊂⊃1042—HARMLESS ERROR—RULINGS ON PLEADINGS.

In a judgment creditor's action to set aside an alleged fraudulent conveyance from the judgment debtor to his wife, the complaint alleged the entire history of the transaction upon which the judgment was obtained, including a recitation of fraudulent acts committed by the judgment debtor. A motion to strike out these matters was denied. *Held* that, while it was not necessary to set out the history of the litigation or an abstract of the pleadings, these matters would have appeared upon the introduction of the judgment roll in evidence, and, though defendants admitted the entry of judgment, the technical error in the ruling was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110–4114; Dec. Dig. ⊂⊃1042.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Grace Hilborn against Carl B. Soale and husband. From a decree in favor of plaintiff, defendants appeal. Affirmed.

E. J. Fleming and S. L. Carpenter, both of Los Angeles, and Bennett & Cary, of Pasadena, for appellants. Frank L. Muhleman, Jones & Evans, and Earl T. Miller, all of Los Angeles, for respondent.

JAMES, J. Plaintiff, a judgment creditor of defendant Wilson H. Soale, instituted this action to have a certain deed and conveyance executed by said defendant to his codefendant declared null and void, as having been made without consideration and for the purpose of preventing satisfaction of plaintiff's judgment. The decree was rendered as prayed for, and both defendants appealed.

[1-3] In the year 1908 the appellants purchased certain real property in the county of Los Angeles, for which a consideration of $8,000 was paid; this money, so the evidence showed, being at the time of the investment the separate property of appellant Carl B. Soale, who is the wife of appellant Wilson H. Soale. A contract of purchase was first entered into on the part of these appellants as vendees, in which contract the amount of money mentioned was agreed to be paid as a consideration for the transfer, and the character of deed mentioned in this contract as required to be given was a "grant" deed. Both of these appellants signed the contract of purchase, and when the deed was made out it contained the recital that the grantors did "grant to Carl B. Soale and Wilson H. Soale, her husband, as joint tenants with the right of survivorship," the property of which a description followed. This deed was recorded on the 21st day of July, 1908, in the office of the county recorder. On August 6, 1912, judgment was rendered in favor of respondent herein against appellant Wilson H. Soale. On the following day, and before this judgment was entered so as to become a lien against real property standing in the name of said appellant, appellant Wilson H. Soale made his deed, which purported to transfer to his wife all of his interest in the real property. Respondent, his judgment creditor, upon the entry of her judgment, caused execution to issue and a levy to be made against the interest of her judgment debtor in the real property, and then brought this action to have the conveyance of Soale to his wife set aside. Appellants in their answer denied that Wilson H. Soale had any interest in the real property at all, and alleged that the same had been at all times subsequent to the purchase thereof the sole and separate property of Carl B. Soale. This issue was decided adversely to their claims, and the question is presented here as to whether the evidence heard was sufficient to sustain the judgment declared by the court. On behalf of respondent it is insisted that there is ample evidence to support the finding of the trial court that appellant Wilson H. Soale, at the time respondent obtained her judgment against him, held a joint tenant's interest in the property, which he had acquired by gift from his wife. This contention makes it necessary that the evidence be examined in detail. It must be admitted at the outset that, in so far as the express declarations of appellants. are shown to have been given in testimony, such declarations negative wholly the claim that there was an intention on the part of the wife to make a gift to her husband of an interest in the real property. The trial judge, however, in making up his conclusions, was required to take into consideration all of the circumstances surrounding

the transaction and determine from them as to what the intent of the parties really was. Title Insurance, etc., Co. v. Ingersoll, 153 Cal. 1, 94 Pac. 94; Reed v. Reed, 135 Ill. 482, 25 N. E. 1095; Brunner v. Title Ins. & Trust Co., 26 Cal. App. 35, 145 Pac. 741. And if upon this review it may be said that there was some substantial evidence upon which to found the judgment as entered, such judgment cannot be disturbed. As before mentioned, it appeared that both appellants signed the contract of purchase, and, in so far as their relation to that contract is concerned, it would appear to an unadvised third party that they were taking a joint ownership in the property. The wife testified that she gave no direction as to what form the deed was to take, and the husband, when asked regarding any direction which he gave affecting that matter, was stopped by an objection from his counsel, and this objection was sustained by the court. At any rate, it did appear that in the following year, about April, the wife, so she testified, learned of the condition of the deed as to its form, and knew that it made her husband the joint tenant in the property with herself. When asked whether, if plaintiff had not obtained a judgment against her husband, she would have required any change to be made in the deed, she expressed uncertainty, and left her testimony as to that particular subject to a fair inference to be drawn by the court that she would not have required any change to be made. At any rate, she testified that, when her husband told her of the fact that judgment had been obtained against him by this respondent, she requested him to make the deed to her, which he did immediately. It fairly appeared also that the appellants kept their bank account in a form so that it could be drawn from by either party. We have, then, it shown in proof that the appellants jointly engaged to purchase the real estate mentioned in the pleadings and that they received a deed by which their interests were declared to be joint, with right of survivorship. As to who gave the direction to have the deed made in this somewhat unusual form seems immaterial, because the wife, when she learned that it had been so made, raised no objection to it until three years had elapsed, and at the trial fairly intimated that she never would have objected to it had it not been that judgment was obtained against the husband. If she had determined to leave title to the property in such a form as that the husband upon her death should secure her interest in it, then we think a gift of the joint interest was effectuated beyond her power to afterwards, and after a judgment creditor had reduced a claim against her husband to judgment, recall. If the gift had become effectual, then there could be no return gift made by the husband which would have the effect of defeating the claims of his creditors. Taking all of the facts and circumstances shown in evidence, we think that it must be said that the judgment finds some support in proof, and that it should be affirmed.

[4] In respondent's complaint filed in this action she alleged as preliminary matter the entire history of the alleged transaction upon which she obtained her judgment, which included a recitation of fraudulent acts committed by the appellant Wilson H. Soale. A motion to strike out these matters was made and denied, and a bill of exceptions prepared to cover that ruling. Of course, the material thing to be shown by the respondent, the plaintiff, was that she occupied the relation of a judgment creditor. It was not necessary to set out the history of the litigation or an abstract of the pleadings of the action in which the judgment was obtained. Nevertheless, as respondent suggests, the introduction of the judgment roll on making proof of the judgment would have shown in substance the same matters which it was sought to have stricken out of her complaint in this action. The fact that appellants admitted the entry of judgment does not render any technical error of the court made by the ruling on the motion prejudicial.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

29 Cal. App. 289

BAKERSFIELD & KERN ELECTRIC RY. CO. v. HAY et al. (Civ. 1934.)

(District Court of Appeal, Second District, California. Dec. 31, 1915.)

MUNICIPAL CORPORATIONS ⟸108 — ORDINANCES — REFERENDUM—PETITIONS—SUFFICIENCY—"GENERAL ELECTION."

The words "general election," in the Bakersfield city charter adopted at November, 1914, election, which provides for referendum elections, and declares that a petition protesting against the passage of an ordinance shall be signed by electors of the city equal in number to 25 per cent. or more of the vote "cast at the last general election," refer, when the provision is considered in connection with other provisions of the charter relating to elections, to the last general municipal election, and, where no general municipal election has been held since the adoption of the charter, the question of the sufficiency of a referendum petition depends on the number of votes cast at the last general municipal election preceding the adoption of the charter.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. ⟸108.

For other definitions, see Words and Phrases, First and Second Series, General Election.]

Petition for writ of prohibition by the Bakersfield & Kern Electric Company against George W. Hay and others. Demurrer to petition sustained, and writ of prohibition denied.

Short & Sutherland, of Fresno, and Borton & Theile, of Bakersfield, for petitioner. E. F. Brittan and Walter Osborn, both of Bakersfield, for respondents.

PER CURIAM. Prohibition. On the 20th day of September, 1915, the city council of the city of Bakersfield adopted an ordinance relating to the regulation and control of the operation of automobile busses within that city. Within 30 days thereafter there was filed with the city clerk an instrument protesting against the passage of the ordinance. This protest was signed by 880 electors of the city. The council, having declared this protest sufficient to require a referendum vote upon said ordinance, have ordered an election and referendum thereon to be held on the 11th day of January, 1916. The petitioner claims that the protest is insufficient to authorize such election or to cause a suspension of the ordinance, and in support of this claim alleges that the protest does not contain the names of a sufficient number of electors. The respondents have filed a general demurrer to the petition herein, and it has been stipulated that the case may be disposed of in accordance with our decision upon that demurrer.

The present charter of the city of Bakersfield was adopted by the electors of that city at an election held on the 7th day of November, 1914, and, after its approval by the Legislature, was filed with the secretary of state on January 23, 1915. Stats. 1915, p. 1552. Section 32 of the charter provides for referendum elections, and it is there required that a petition protesting against the passage of an ordinance must be "signed by electors of the city equal in number to twenty-five per centum or more, of the entire vote cast at the last general election." It is further provided that:

"The council shall submit the ordinance to the electors of the city either at the next general municipal election, or at a special election, and such ordinance shall not go into effect unless a majority of the electors voting on the same shall vote in favor thereof. The provisions of article VII respecting the forms and conditions of the petition and the mode of verification and certification and filing, and the ballot to be used, shall be substantially followed, with such modifications as the nature of the case may require."

The petitioner contends that the general election referred to in section 32 is the last general state election, and not the last general municipal election. It is conceded that, if the required number is to be tested by the vote cast at the last general municipal election, the number of signatures upon the protest was sufficient; and it is shown by appropriate allegation in the petition that the entire vote cast within the city of Bakersfield on the 3d day of November, 1914, at the general election held on said date, at which a Governor was elected, was 6046.

Section 67 of the charter is in article 7 relating to elections, and provides that within ten days after the charter shall have been ratified by the Legislature, and the necessary certified copies thereof have been filed and recorded, "the governing body of the city of Bakersfield shall call a nominating election and a general election, under the provisions of this charter, to elect officers as herein provided." The officers thus elected are to hold office until their successors are elected and qualified; and it is provided that "a general election shall be held on the second Tuesday of April of the year 1917, and each odd-numbered year thereafter," etc.

Reading together the several sections of the charter which have relation to the question at issue, we are satisfied that the words "general election," as contained in section 32, are there used in the same sense in which the same words are used in section 67, and that they refer to the last general municipal election.

The petition herein directs the court's attention to the fact that at the nominating election held on April 6, 1915, in the city of Bakersfield councilmen were elected in three of the seven wards of the city, that (except members of the board of education, as to which the district includes territory outside the city limits) no other officers than councilmen were required to be elected under the provisions of the charter, and that at the so-called general election held on May 7, 1915, no election was held in the said three wards. For this reason petitioner contends that there was no general election. Even if this were conceded, it would not aid the case of petitioner. If no general municipal election was held by the city of Bakersfield since the adoption of this charter, the test would relate back to the last general municipal election preceding the adoption of the charter. Petitioner does not deny that under such test the protest to which this petition refers would be found sufficient.

There is a general law entitled "An act to provide for direct legislation by cities and towns, including initiative and referendum." Stats. Ex. Sess. 1911, p. 131. Conceding that that act does not apply to the city of Bakersfield, counsel for petitioner argue that the referendum provisions of the city charter are modeled upon the terms of that statute, and that, notwithstanding some differences between the charter provision and the provisions of the statute, the court should apply the rule that one statute founded upon another is deemed, in so far as it follows the terms of the previous statute, to adopt also its meaning. The statute provides for referendum petitions which shall be signed by qualified electors of the city or town "equal to ten per cent of the entire vote cast therein for all candidates for Governor of the state at the last preceding general election at which a governor was voted for." The argument is not convincing. We have no evidence that the referendum provisions of the charter were drawn from those of the statute to which counsel refer; and, even if they were so derived, the failure to copy words distinctly defining the last preceding general election as a state election serves to indicate that the charter framers preferred that the protest against the adoption of an ordinance

should be signed by at least 25 per cent. of the number of electors voting at the last general municipal election, rather than that the test should be 10 per cent. of the entire vote cast at a state election.

The demurrer is sustained, and the petition for writ of prohibition herein is denied.

29 Cal. App. 793

BAKERSFIELD & KERN ELECTRIC RY. CO. v. HAY et al. (Civ. 1933.)

(District Court of Appeal, Second District, California. Dec. 31, 1915.)

Petition for writ of mandate by the Bakersfield & Kern Electric Railway Company against George W. Hay and others. Demurrer to petition sustained, and application for peremptory writ denied.

Short & Sutherland, of Fresno, and Borton & Theile, of Bakersfield, for petitioner. E. F. Brittan and Walter Osborn, both of Bakersfield, for respondents.

PER CURIAM. In response to an alternative writ issued herein, the respondents have filed a general demurrer. The facts are the same and the questions presented for decision are the same as in Bakersfield & Kern Electric Railway Co. v. George W. Hay et al. (Civil No. 1934) 155 Pac. 132, petition for writ of prohibition, in which decision has been filed this day. For the reasons stated in the opinion filed in that case, the demurrer is sustained, and the application for peremptory writ of mandate herein is denied.

29 Cal. App. 52

JOHNSON v. DIXON FARMS CO. (Civ. 1382.)

(District Court of Appeal, Third District, California. Nov. 27, 1915. Rehearing Denied by Supreme Court Jan. 26, 1916.)

1. SALES ⟸353—ACTION ON CONTRACT—COMPLAINT.

A complaint averring that plaintiff sold hay to defendant, and that defendant promised to pay the amount on given dates, but failed, states a cause of action on a contract of sale, without an averment of delivery for, as Civ. Code, § 1721, defines sale as a contract by which for a pecuniary consideration called a price one transfers an interest in property, delivery is not essential in all cases to the possession of title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 995–1004; Dec. Dig. ⟸353.

For other definitions, see Words and Phrases, First and Second Series, Sale.]

2. JUDGMENT ⟸106—DEFAULT—ANSWER.

Where the complaint was verified, the answer, to state a defense, must, under Code Civ. Proc. § 446, also be verified, so where an unverified answer was filed, plaintiff is entitled to have it stricken on motion and default judgment entered, or, in the absence of an order striking the answer, to a judgment for want of an answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180–197; Dec. Dig. ⟸106.]

3. APPEAL AND ERROR ⟸1170—REVERSAL—DISREGARD OF ERROR.

Where the original verified complaint stated a cause of action and plaintiff was entitled to judgment because the answer was not verified, error in allowing an amendment to the complaint is harmless and should be disregarded under Const. art. 6, § 4½, where the amount claimed in the amended petition was the same as that claimed in the original petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540–4545; Dec. Dig. ⟸1170.]

4. SALES ⟸353—ACTION FOR PRICE—PLEADING.

As forms of action were abolished by Code Civ. Proc. § 307, and section 452 requires pleadings to be liberally construed with a view to substantial justice, a complaint, averring that plaintiff sold hay of given value to defendant, but the defendant defaulted in its agreement to pay on dates specified, states a cause of action for goods sold and delivered, though no delivery of the hay was averred, the common-law distinction between an action for goods bargained and sold and goods sold and delivered being abolished, and averments of sale implying a delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 995–1004; Dec. Dig. ⟸353.]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Martin Johnson against the Dixon Farms Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied in Supreme Court, 155 Pac. 136.

T. T. C. Gregory, Thomas A. Allen, and Dan Hadsell, all of San Francisco, for appellant. W. U. Goodman, of Fairfield, for respondent.

HART, J. This is an appeal by the defendant from the judgment on the judgment roll alone.

By the filing of a verified complaint, the plaintiff brought the action to recover from the defendant judgment for the sum of $609, alleged to be due the former from the latter by reason of a transaction which is stated in the complaint as it was originally filed as follows:

"That on or about the 1st day of December, 1913, plaintiff sold to said defendant fifty-three tons of hay at twelve dollars per ton, amounting to six hundred and nine dollars; that said defendant promised to pay said plaintiff the said amount as follows: One-half thereof to be paid on the 1st day of January, 1914, and one-half on the last day of January, 1914."

It is then alleged that the defendant "failed and neglected to pay said amount at said times, and that the said amount, and the whole thereof, still remains due, owing and unpaid."

The defendant demurred to the complaint on both general and special grounds. The special grounds of demurrer are that the complaint is uncertain, ambiguous, and unintelligible, because it does not appear therein, nor can it be told therefrom, whether the defendant was required to pay for the hay before or after delivery, or whether the hay has been delivered to the defendant, etc. The demurrer was overruled, and thereafter, in due time, the defendant filed an unverified answer or a general denial to the complaint.

The judgment recites that the defendant was not represented at the trial, but it is

stipulated that, during the course of the trial (evidence having been taken), the plaintiff was permitted by the court to add to the charging part of the complaint, above quoted, the words, "and delivered," inserting said words therein immediately after and following the word "sold." By the addition so made, the complaint was made to read:

"That on or about the 1st day of December, 1913, the plaintiff sold *and delivered* to said defendant" the hay, etc.

A copy of the complaint as so altered or of the language added thereto as indicated was not served on the defendant or its counsel.

[1] The position of the defendant is that the action was intended as one for goods sold and delivered, but that the complaint failed to state such a cause of action because it omitted to allege that the goods alleged to have been sold had been delivered, and that therefore the demurrer should have been sustained. It is further contended that the alteration made in the complaint at the trial by inserting therein the words, "and delivered," so that a cause of action for goods sold and delivered was stated, constituted an amendment of that pleading, and that therefore it was, under the terms of section 432 of the Code of Civil Procedure, entitled to be served with a copy of such amendment or the complaint as amended, thus giving it the opportunity to which it is entitled by virtue of said section to exercise its right to answer or demur to the amendment or the complaint as amended within the ten days allowed thereby.

We can see no reason for doubting that the complaint, in its original draft, stated a cause of action on a contract of sale. A "sale" is defined by our Code to be "a contract by which, for a pecuniary consideration, called a price, one transfers an interest in property." Civ. Code, § 1721; 35 Cyc. 25. In other words, a sale is the transfer of the title to a thing from one to another for a consideration. Thus it is plain that a contract of sale and the title to personal property thereby transferred may be consummated without a delivery of the property to the vendee, the rule requiring the possession of such property to be delivered to the vendee to render the sale valid as against the creditors of the vendors being one of evidence only and in no way enters into the contract of sale as an element thereof, so far as the parties thereto are themselves concerned. It is hence very clear that the complaint, in its original draft, having alleged that the plaintiff sold the hay to the defendant, that the latter promised to pay for the same in two installments on specified dates, and that it defaulted in its promise so to pay, at the least stated a cause of action on the contract of sale so pleaded, and that, therefore, the demurrer was properly overruled.

[2] The complaint having been verified, it was necessary for the defendant, to have stated a defense to the cause of action set up in the complaint, to have filed a verified answer. Code Civ. Proc. § 446. This it failed to do, having, as seen, merely filed an unverified answer, and the "answer" so filed constituted no defense to the cause of action pleaded by the plaintiff. The plaintiff was therefore entitled to have the answer stricken out on motion and a judgment by default thereupon entered, or, in the absence of an order striking the answer out, to a "judgment for want of an answer." McCullough v. Clark, 41 Cal. 298; Hemme v. Hays, 55 Cal. 337; Hearst v. Hart, 128 Cal. 327, 328, 60 Pac. 846.

[3] Thus it is to be observed that the plaintiff, under his complaint as it was originally filed, was entitled to and properly awarded judgment for the sum for which he sued, and that by the alleged amendment of his complaint as indicated he could have obtained judgment for neither more nor less, nor, indeed, have obtained any different relief from that originally prayed for and which he finally received. In other words, he was admittedly entitled to judgment for the amount sued for on the contract of sale, whether the goods were or were not delivered. We cannot, therefore, perceive wherein the defendant could derive any benefit from a decision returning the cause to the court below for further proceedings, assuming that the alteration of the complaint in the respect shown may truly be said to have resulted in changing the cause of action or amounted to an amendment of the pleading in a material particular. Indeed, we are of the opinion that, in view of the peculiar state of the record in this cause, the appeal here should be considered and decided under the light and according to the spirit and intent of the recent amendment of section 4½ of article 6 of the Constitution, for we cannot say that the order allowing the purported amendment of the complaint has resulted in a miscarriage of justice.

[4] But we may, we think, safely take another view of the question presented. While it would, of course, always be the better practice and responsive to the rules of good pleading, in an action for goods sold and delivered, to specifically and directly allege the fact of delivery as well as the fact of sale, we cannot bring ourselves to the belief that the fact of delivery is not necessarily implied from the averment that the hay was sold to the defendant, and therefore we think the complaint in this case, as it was originally drafted and filed, sufficiently stated a cause of action for goods sold and delivered.

A word or a phrase should be interpreted according to the connection in which it is used and the general purpose for which it is employed in particular instances. While in a contract of sale the phrase, "goods sold," might not necessarily imply that the goods had been delivered, it seems to us that delivery would necessarily be implied therefrom

where the phrase is used in a pleading in an action to recover the price for which the goods were sold. As used in common parlance, the phrase, "goods sold," would be understood as goods sold and delivered to the buyer. And it is difficult to conceive a statement in a pleading, in an action to recover the price or consideration, that goods had been sold without, at the same time and as a part of the same concrete thought, conceiving the fact of the delivery of the possession of the chattel to the vendee, in whom the title thereto had been vested eo instanti upon the consummation of the sale. So, we are of the opinion that the allegation in the complaint that the plaintiff sold the hay to the defendant necessarily carried with it the implication that he delivered it to the defendant, and that this is sufficient as against the attack against the complaint upon any of the grounds set out in the demurrer. From this it would follow that the insertion of the words, "and delivered," in the complaint as above explained was unnecessary, and did not have the effect of adding anything to the complaint or changing the cause of action already pleaded.

Most assuredly, as counsel for the defendant maintain, under the old common-law system of pleading, as we find it expounded by Mr. Chitty and Mr. Stephens and other eminent juristic writers, the construction to which we feel justified in subjecting the complaint here would not be permissible. Under the common law, there were two different actions growing out of the sale of personal property, to wit: (1) An action for goods bargained and sold, where the goods had been sold but not delivered, and there had been a complete sale and the property in the commodity sold had become vested in the defendant, there having been an actual acceptance of the same by him; (2) an action for goods sold and delivered, in which case it was requisite to directly allege the delivery as well as the sale of the article. That system of pleading and procedure, however, required a literal observance of its rules and the slightest technical departure therefrom, either as to the form of the action or the pleading of the facts essential to the statement of a cause of action in a particular form, would leave the party without a standing in court. Form was, in other words, held paramount to substance under that system of pleading, procedure, and practice—so much so, indeed, that that notion finally became responsible for the development of the more liberal ideas which directly forced the invention of the more elastic legal actions of case and assumpsit and, indeed, the body of equitable remedies which now adorn the jurisprudence of all civilized countries.

But, under the reformed procedure, substance is no longer subordinated to form, and, under that system (in this state), there is but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs. Code Civ. Proc. § 307. And, as to the viewpoint from which pleadings shall be considered, the rule is that, in their construction, for the purpose of determining their effect, their allegations must be liberally construed, with a view to substantial justice. Code Civ. Proc. § 452. Therefore, where, under the old common-law system, a pleading would crumble under the weight of a demurrer, under the advanced or reform system, which concerns itself more with substance, the same pleading might reasonably and justly be held sufficient to state a cause of action for the particular relief prayed for. So, measuring the scope of the complaint in this action by our own rules of pleading, we do not hesitate to say, as we have already declared, that from the averment that the plaintiff sold the hay to the defendant, the fact of delivery is implied, and this, while not the strictly proper manner of stating a case for goods sold and delivered, is, nevertheless, sufficient.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

29 Cal. App. 52

JOHNSON v. DIXON FARMS CO.

(Sac. 2476.)

(Supreme Court of California. Jan. 26, 1916.)

COSTS ⟸260—FRIVOLOUS APPEAL—DAMAGES.

Where an appeal is manifestly destitute of merit and taken for delay, the appellant may be penalized by the imposition of damages for frivolous appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983–996, 1002, 1003; Dec. Dig. ⟸260.]

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Martin Johnson against the Dixon Farms Company. A judgment for plaintiff being affirmed by the District Court of Appeal (155 Pac. 134), defendant moves for rehearing. Motion denied.

T. T. C. Gregory, Thomas A. Allen, and Dan Hadsell, all of San Francisco, for appellant. W. U. Goodman, of Fairfield, for respondent.

ANGELLOTTI, C. J. The application for a hearing of this cause in this court after decision by the District Court of Appeal of the Third District is denied.

In denying such application we deem it proper to say that the appeal was properly disposed of by the District Court of Appeal on the first ground stated in the opinion. What was said in support of a second ground for affirmance, commencing with "but we may, we think, safely take another view of the question presented," is not at all essential to the maintenance of the judgment of the District Court of Appeal, and while not

intimating any view as to the correctness thereof, we do not desire to be understood by our denial of the application as approving the same. The appeal in this case was manifestly destitute of merit, and the District Court of Appeal would have been well warranted in penalizing appellant by the imposition of damages for a frivolous appeal, taken purely for delay, as asked by respondent's counsel in his brief.

We concur: HENSHAW, J.; LAWLOR, J.; MELVIN, J.

27 Cal. App. 498

PEOPLE v. KNOWLES. (Cr. 297.)

(District Court of Appeal, Third District, California. May 27, 1915. Rehearing Denied by Supreme Court, July 26, 1915.)

1. WITNESSES ⟸293½—PRIVILEGES AGAINST SELF-INCRIMINATION — STATUTORY PROVISIONS.

Pen. Code, § 1324, as added by St. 1911, p. 485, providing that a person who is an offender may be compelled to be a witness and testify against another person for an offense of which both are guilty, and he shall not be exempt from prosecution for such offense where he testifies voluntarily or fails to ask to be excused from testifying on the ground that his testimony may incriminate himself, applies to a person who is believed to be implicated with third persons in a crime investigated by the grand jury, and he is within the protection of the statute.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1011; Dec. Dig. ⟸293½.]

2. WITNESSES ⟸297 — PRIVILEGES OF WITNESSES—CRIMINAL PROSECUTIONS.

A witness cannot, under Pen. Code, § 1324, as added by St. 1911, p. 485, refuse to testify in a criminal case, though his testimony may incriminate him, but, if he demands that he be excused on that ground, he is not liable thereafter to prosecution, and one objection to a question is sufficient to protect a witness from prosecution, but if he testifies voluntarily, or if he fails to ask to be excused from testifying, his testimony may be used against him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1011, 1026–1037; Dec. Dig. ⟸297.]

3. WITNESSES ⟸293 — PRIVILEGES AGAINST SELF-INCRIMINATION—CONSTITUTIONAL PROVISIONS—IMMUNITY FROM PROSECUTION.

Pen. Code, § 1324, as added by St. 1911, p. 485, declaring that a person who is himself an offender may be compelled to be a witness and give testimony against another for an offense of which both are guilty, but where he demands to be excused from testifying on the ground that his testimony may incriminate him his testimony shall not be used against him except for perjury, nor shall he be liable thereafter to prosecution for the offense with reference to which his testimony was given, gives complete immunity to a witness presenting a demand to be excused, and is therefore not violative of Const. art. 1, § 13, declaring that no one shall be compelled in any criminal case to be a witness against himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1009–1014; Dec. Dig. ⟸293.]

4. CRIMINAL LAW ⟸42 — IMMUNITY—SELF-INCRIMINATION—STATUTORY PROVISIONS.

A witness who was brought by subpœna before the grand jury, and sworn, and told what the offense was with which he and others were charged and about which the investigation was had, and that the grand jury could not compel him to testify, but that he could voluntarily make a statement, which could be used against him if detrimental to him, was not accorded the rights given by Pen. Code, § 1324, as added by St. 1911, p. 485, and an indictment against him, returned after he testified, will be quashed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45–48; Dec. Dig. ⟸42.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

J. H. Knowles was indicted, and from an order granting a motion to dismiss after the jury had been impaneled and the cause was about to proceed, on the ground that the grand jury had not complied with the law, the People appeal. Affirmed.

Rehearing denied in Supreme Court, 155 Pac. 140.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. J. B. Curtin, of Sonora, for respondent.

CHIPMAN, P. J. Defendant was indicted and brought to trial for the crime of bribery. After a jury had been impaneled and the cause was about to proceed, counsel for defendant moved the court to dismiss the action—

"upon the ground that the grand jury, finding the indictment, did not comply with section 1324 of the Penal Code. The Court: I think the objection made by counsel is well taken. I can see no escape from the result. Further proceedings are quashed in the matter, and the motion granted. Mr. Hardin (district attorney): I give notice under section 1240 that the people appeal from the order of the court. Mr. Curtin: The motion being granted, I now ask that the indictment be dismissed and the jury discharged. The Court: It is so ordered. Mr. Hardin: I want the appeal to apply to both of these—the order granting the motion and the order dismissing the indictment."

Before the indictment was found defendant was brought before the grand jury of Tuolumne county as a witness upon a subpœna. We quote from the bill of exceptions:

"Defendant now offers in evidence the records and proceedings before the grand jury at the time the indictment herein was found and returned against defendant, which record is as follows: 'J. H. Knowles, called, sworn, and examined, testified as follows: Mr. Hardin: Mr. Knowles, the grand jury at this time is investigating a charge, or into a matter that occurred in Jamestown here a few months ago, which affects to a certain extent Mr. V. A. Solari, yourself, and David Martinez, the investigation being of the alleged charge of offering to an officer a bribe and that officer receiving a bribe in connection with the granting to David Martinez of a liquor license. Now, then, of course, you being one of the parties mentioned in the investigation, why, the grand jury can't require or compel you to make any statement if you don't want to do it, but voluntarily you can make a statement, if you want to, but you can't be compelled to make a statement, but you can do so voluntarily. Of course, any statement made can be used against you, if it is detrimental to you. Now, in view of that, do you care to make any statement to the grand jury in reference to that matter? Mr. Knowles: I do.'

"For the purpose of shortening this transcript, it is admitted that Mr. Knowles, defendant herein, was then and there, as a witness under oath,

examined by the district attorney and by several of the grand jurors as to all the matters and facts alleged in the indictment, and that his testimony was material to the inquiry then pending, and in which testimony said defendant detailed all the conversations and interviews he ever had with the Martinez Bros. and Supervisor Solari relative to the liquor license mentioned in the indictment herein."

It was conceded at the argument that the testimony given by the defendant did, in fact, incriminate himself as well as the others charged in the indictment, and was the testimony on which, in part, the indictment was found.

A motion was made by respondent to dismiss the appeal on the ground that the order is not appealable. We incline to the belief that the point is not well taken, but from our view of the case it is not necessary to decide it, since, conceding that the order was appealable, we are constrained to hold that whatever it may in effect be it must be affirmed.

[1] Section 1324 is a new section added to the Penal Code in 1911 (Stats. 1911, p. 485). It reads as follows:

"A person hereafter offending against any of the provisions of this Code, or against any law of this state, is a competent witness against any other person so offending, and may be compelled to attend and testify and produce any books, papers, contracts, agreements or documents upon any trial, hearing, proceeding or lawful investigation or judicial proceeding, in the same manner as any other person. If such person demands that he be excused from testifying or from producing such books, papers, contracts, agreements or documents on the ground that his testimony or that the production of such books, papers, contracts, agreements or documents may incriminate himself, he shall not be excused, but in that case the testimony so given and the books, papers, contracts, agreements and documents so produced shall not be used in any criminal prosecution or proceeding against the person so testifying, except for perjury in giving such testimony, and he shall not be liable thereafter to prosecution by indictment, information, or presentment, or to prosecution nor punishment for the offense with reference to which his testimony was given, or for or on account of any transaction, matter or thing concerning which he may have testified or produced evidence, documentary or otherwise.

"No such person shall be exempt from indictment, presentment by information, prosecution or punishment for the offense with reference to which he may have testified as aforesaid, or for or on account of any transaction, matter or thing concerning which he may have testified as aforesaid, or produced evidence, documentary or otherwise, where such person so testifying or so producing evidence, documentary or otherwise, does so voluntarily, or when such person so testifying or so producing evidence fails to ask to be excused from testifying or so producing evidence, on the ground that his testimony or such evidence, documentary or otherwise, may incriminate himself; but in all such cases, the testimony or evidence, documentary or otherwise, so given may be used in any criminal prosecution or proceeding against the person so testifying or producing such evidence, documentary or otherwise.

"Any person shall be deemed to have asked to be excused from testifying or producing evidence, documentary or otherwise, under this section, unless before any testimony is given or evidence, documentary or otherwise, is produced by such a witness, the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation, shall distinctly read this section of this Code to such witness, and the form of the objection by the witness shall be immaterial, if he in substance makes objection that his testimony or the production of such evidence, documentary or otherwise, may incriminate himself, and he shall not be obliged to object to each question, but one objection shall be sufficient to protect such witness from prosecution for any offense concerning which he may testify, or for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, upon such trial, hearing, proceeding or investigation."

Appellant contends, and by a rather ingenious course of reasoning endeavors to show, that the "section was intended to apply to a person who is a witness 'against any other person,'" and not to one who is himself charged with the offense being inquired into. We do not feel inclined to pursue appellant's argument on the point, for we think it is quite obvious that the section was intended to apply to just such a witness as we have here who was believed to be implicated with others in the crime being investigated. Appellant further contends that the notice given the witness by the district attorney was sufficient compliance with the statute; that his answer, after what the district attorney said to him, "had the effect of taking the case entirely away from the operation of section 1324, Penal Code"; that, when the reason for the rule ceases, "the rule is no more applicable than if it had ceased to exist."

[2] The true meaning and intent of this section may be expressed in much briefer form than as enacted.

The first paragraph declares that a person who is himself an offender may be compelled to be a witness and give testimony against another person for an offense of which both are guilty, and he shall not be excused from testifying on the ground that his testimony, might, even though he may demand to be excused, incriminate him, but in such case, except for perjury, his testimony shall not be used against him, nor shall he be liable thereafter to prosecution for the offense with reference to which his testimony was given.

The second paragraph declares that no such witness shall be exempt from prosecution or punishment for such offense where he testifies voluntarily, or fails to ask to be excused from testifying on the ground that his testimony may incriminate himself, but his testimony so given may be used against him.

The third paragraph then provides that:

Such witness "shall be deemed to have asked to be excused from testifying * * * unless before any testimony is given * * * the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation, shall distinctly read this section of this Code to such witness, and the form of the objection by the witness shall be immaterial, if he in substance makes objection that his testimony * * * may incriminate himself, and he shall not be obliged to object to each question, but one ob-

jection shall be sufficient to protect such witness from prosecution for any offense concerning which he may testify."

To paraphrase the section still more briefly, a witness can no longer refuse to testify in a criminal case, though his testimony may incriminate himself, but, if he demands that he be excused on that ground, he shall not be liable thereafter to prosecution. If, however, he testifies voluntarily, or if he fails to ask to be excused from testifying on the ground above stated, his testimony may be used against him. But he is deemed to have asked to be excused from testifying "under this section, unless before any testimony is given * * * the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation, shall distinctly read this section of the Code to such witness." And one objection to a question shall be sufficient to protect such witness from prosecution.

[3] The Constitution provides that no person shall "be compelled in any criminal case, to be a witness against himself." Article 1, § 13. When, however, the statute gives the witness complete immunity from prosecution for the offense with reference to which his testimony is given, he cannot refuse to answer. Ex parte Clarke, 103 Cal. 352, 37 Pac. 230; Ex parte Cohen, 104 Cal. 524, 38 Pac. 364, 26 L. R. A. 423, 43 Am. St. Rep. 127; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

In the present case the statute gives complete immunity and is not violative of the Constitution. When the Legislature enacted this law, the protection given by the Constitution to a witness called upon to testify with reference to matters which might incriminate himself was, presumably, in its mind, and it was careful to provide with considerable particularity the proceeding by which a person may be compelled to testify against himself and under what circumstances he should enjoy complete immunity for thus serving the state and the cause of justice. It is perhaps not wide of the mark to say that the legislation was inspired by the conditions existing prior to its enactment, where there was a miscarriage of justice because of the constitutional shield given the witness who might believe that his testimony would implicate himself. There was no power to compel him in such case to testify, and no power to grant him immunity from prosecution if he did testify. In enacting this statute the Legislature pointed out the precise mode to be followed, which, if not followed, the witness was deemed to have asked to be excused from testifying, and his testimony was not to be used against him in any proceeding. Whether the section should be read to the witness by one of the persons mentioned in the section to perform that office, and not by any other person, whether it would satisfy the law if, for example, the district attorney should by direction of one of such mentioned persons read the section to the witness, or whether it would be sufficient if one of such persons, or the district attorney, should call attention to the section and state its provisions in substance, are questions we do not find it necessary to decide. We venture to suggest, however, that a very easy and simple thing to do is to read the section as it directs shall be done and thus avoid all question. The view taken by the Attorney General would cast upon the appellate court what might be sometimes a difficult duty of determining in each case by construction of the language that may happen to be used, whether, in effect, it substantially measured up to what the section required and gave the witness the information to which he was entitled. It must be admitted that the safer course would be to follow the direction given and read the section to the witness. However this may be, it seems quite clear to our minds that the essential provisions of the statute must be stated to the witness and stated correctly. For certainly a declaration that the witness is deemed excused unless the section —all of it—is distinctly read to him can mean no less than that all its substance must at least be told the witness.

[4] Now, what are the facts? The defendant was brought before the grand jury by a subpœna as a witness, and was sworn before anything was said to him. He did not appear voluntarily, and had he testified without having claimed his constitutional privilege, and had not been informed as to his rights, his testimony could not have been used against him. People v. O'Bryan, 165 Cal. 60, 130 Pac. 1042, and cases there cited. The defendant was told what the offense was with which he and others were charged and about which the investigation was being made. He was then told the grand jury could not compel him to testify—a statement directly contrary to what the statute would have told him. He was told that he could voluntarily make a statement, and again told that he could not be compelled to do so. He was not told the very important provision of the statute that a statement voluntarily made could be used against him. What he was told was: "Of course, any statement made can be used against you if it is detrimental to you." Prior to the enactment of this section that might have been true. But in the broad sense as stated it is not now true. The district attorney probably meant to be understood as saying, but did not say it, that any statement made by him voluntarily could be used against him. He was not told that, if he failed to ask to be excused on the ground that his testimony might incriminate him, it could be used against him; nor was he told that he was deemed excused unless the section was read to him. In fact, all the district attorney told him was what his rights were before this section was enacted, but it fell far short of explaining to

him his rights under the new section of the Penal Code. We do not think defendant was given that information which the statute intends should be given a witness called under the circumstances which surrounded the defendant at the time he was called as a witness.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

PEOPLE v. KNOWLES. (Cr. 1951.)

(Supreme Court of California. July 26, 1915.)

1. CRIMINAL LAW ⊂⊃1024—APPEALS BY PEOPLE—STATUTORY PROVISIONS.

An appeal by the people does not lie except in the cases specified in Pen. Code, § 1238, enumerating the cases in which an appeal may be taken by the people.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599–2614; Dec. Dig. ⊂⊃ 1024.]

2. CRIMINAL LAW ⊂⊃1024—APPEALS BY PEOPLE—STATUTORY PROVISIONS.

An order granting a motion to dismiss the prosecution of accused on the ground that the grand jury finding the indictment against him did not comply with Pen. Code, § 1324, relating to the immunity of witnesses against self-incrimination, is not appealable within section 1238, enumerating the cases in which the people may appeal, including the right to appeal from an order setting aside an indictment, where the motion to dismiss was made on the trial after issue joined on the merits, and was not based on any ground specified as cause for setting aside an indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599–2916; Dec. Dig. ⊂⊃ 1024.]

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

J. H. Knowles was indicted. From an order dismissing the prosecution, the People appealed to the District Court of Appeal of the Third Appellate District; and from an order of affirmance, the People apply for a rehearing in the Supreme Court. Denied.

For opinion of the District Court of Appeal, see 155 Pac. 137.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. J. B. Curtin, of Sonora, for respondent.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District is denied. In denying the application we deem it proper to say that we do not express or intimate any opinion as to the correctness of the views expressed by the District Court of Appeal as to the effect of section 1324, Penal Code, under the circumstances of this case as the same are shown by the opinion.

[1, 2] It is apparent to us that the appeal should have been dismissed on the ground that the order appealed from was not an appealable order. The cases in which an appeal may be taken by the people are specifically set forth in section 1238, Penal Code, and it is well settled that such an appeal will not lie except in a case so specified. The order here appealed from was both in form and in substance and effect one dismissing the action against this defendant. The only subdivision of section 1238, Penal Code, that could by any possibility be suggested as including the order before us is subdivision 1, which provides that an appeal may be taken by the people "from an order setting aside the indictment or information." As we have said, the order under consideration here was one granting a motion to dismiss the action. The motion therefor was made on the trial, after issue joined on the merits by plea of not guilty, and was not based on any ground specified in our law as cause for setting aside an indictment, but was designed solely to prevent the further prosecution of the action for the reason stated in the opinion of the District Court of Appeal. The order here made was based solely on the ground specified in the motion. The appeal here cannot be held to be an appeal from an order setting aside an indictment within the meaning of subdivision 1 of section 1238, Penal Code. The superior court had the power to dismiss the action, and, the Legislature having restricted the right of appeal by the people to certain specified cases of which this is not one, there can be no review of its action. The case is like many others under our law, one in which the superior court is the ultimate tribunal as long as it does not exceed its jurisdiction, and where error in the exercise of its jurisdiction may not be reviewed by any other tribunal.

As the practical effect of a dismissal of the appeal is the same as the affirmance of the order appealed from, and as any expression of views as to the statute discussed in the opinion as applied to the circumstances of this case would be obiter, no reason appears why the application for a hearing in this court should be granted.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

27 Cal. App. 508

PEOPLE v. ANTONETTI. (Cr. 299.)

(District Court of Appeal, Third District, California. May 27, 1915. Rehearing Denied by Supreme Court, July 26, 1915.)

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Carlo Antonetti was indicted, and from an order of dismissal, the People appeal. Affirmed. Rehearing denied in Supreme Court 155 Pac. 141.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. J. C. Webster, of Sonora, for respondent.

PER CURIAM. Defendant was jointly indicted with one J. Ruffino for having unlawfully sold intoxicating liquor in violation of the local option law. Ruffino was found guilty, and judgment entered that he pay a fine of $150 or be imprisoned in the county jail for one day for each $2 of said fine. He paid the fine and was discharged. When Antonetti was called for trial he moved that the action be dismissed on the same ground as was urged in the case of People v. Knowles (Crim. No. 297) 155 Pac. 137, this day decided.

It appears from the bill of exceptions that defendant was subpœnaed to appear before the grand jury of Tuolumne county. We quote from the bill of exceptions: "Carlo Antonetti, called, sworn, and examined, testified as follows: Mr. Hardin: Mr. Antonetti, the grand jury are at this time considering the alleged charge, a charge against you for the sale and delivery of liquors within the Third supervisorial district in violation of what is known as the local option law, and testimony has been placed in here to that effect, delivering liquors at your place of business to parties there, and conducting a room whereby other parties could go and drink liquors upon the premises. Now, the grand jury can't require of you any testimony whatever, as you are one of the parties, one of the defendants named, and can't compel you to make any statement, and any statement you might make, of course, would be free and voluntarily made, and could be used against you if detrimental to you, but the grand jury at this time are desirous of giving you an opportunity of making a statement, if you desire to. In view of this, do you wish to make any statement in connection with this matter? A. I never did sell anything. Q. To get this settled first, do you wish to say anything? The grand jury can't compel you to say anything unless you want to. Do you want to make a statement in connection with this matter? A. I don't got nothing to do with the wine nor nothing else. I be only a partner running the boarding house. I never sell any wine, nothing of the kind. Q. Do you wish to make a statement to that effect—your connection with the business? A. I haven't got nothing to do with the wine, anything of the kind. Q. Do you want to make a statement to that effect to the grand jury? A. Yes."

He was then examined at great length, and, concededly, his testimony was used as the basis for the indictment against him.

In all essential particulars the case does not differ from People v. Knowles, and the questions presented are the same.

Upon the authority of that case, the order is affirmed.

27 Cal. App. 508

PEOPLE v. ANTONETTI. (Cr. 1953.)

(Supreme Court of California. July 26, 1915.)

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Carlo Antonetti was indicted, and the People applied to the Supreme Court for a hearing after decision by the District Court of Appeal affirming an order of dismissal. Denied.

For opinion of the District Court of Appeal, see 155 Pac. 141.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. J. C. Webster, of Sonora, for respondent.

PER CURIAM. The application for hearing in this court after decision by the District Court of Appeal of the Third District is denied, for the reasons stated in our opinion filed in denying such a petition in the case of People v. Knowles, (Crim. No. 1951) 155 Pac. 140.

27 Cal. App. 510

PEOPLE v. SOLARI. (Cr. 300.)

(District Court of Appeal, Third District, California. May 27, 1915. Rehearing Denied by Supreme Court July 26, 1915.)

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

V. A. Solari was indicted, and from an order of dismissal, the People appeal. Affirmed. Rehearing denied in Supreme Court, 155 Pac. 141.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. J. C. Campbell, of San Francisco, and J. C. Webster, of Sonora, for respondent.

PER CURIAM. Defendant was indicted for the same crime involved in People v. Knowles (Crim. No. 297) 155 Pac. 137, this day decided. When the case came on for trial defendant moved to dismiss the indictment on the same ground urged in the Knowles Case, and a like order was made as in that case. The people appeal from the order.

Solari was brought before the grand jury as a witness by subpœna, as was Knowles, and after he was sworn the district attorney made a statement to the witness substantially the same as he made to Knowles, to which he replied: "I am willing to make a statement." Then follows his testimony, comprising some 30 odd pages of the transcript, and it is admitted that the indictment was based upon this testimony, at least in part.

Upon the authority of the decision in People v. Knowles (Crim. No. 297) 155 Pac. 137, the order is affirmed.

27 Cal. App. 510

PEOPLE v. SOLARI. (Cr. 1954.)

(Supreme Court of California. July 26, 1915.)

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

V. A. Solari was indicted for crime, and the People applied to the Supreme Court for a hearing after decision by the District Court of Appeal affirming an order of dismissal. Denied.

For opinion of the District Court of Appeal, see 155 Pac. 141.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. J. C. Campbell, of San Francisco, and J. C. Webster, of Sonora, for respondent.

PER CURIAM. The application for hearing in this court after decision by the District Court of Appeal of the Third District is denied, for the reasons stated in our opinion filed in denying such a petition in the case of People v. Knowles (Crim. No. 1951) 155 Pac. 140.

27 Cal. App. 507

PEOPLE v. BIGELOW. (Cr. 298.)

(District Court of Appeal, Third District, California. May 27, 1915. Rehearing Denied by Supreme Court July 26, 1915.)

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

J. O. Bigelow was indicted for crime, and

from an order of dismissal, the People appeal. Affirmed.

Rehearing denied in Supreme Court, 155 Pac. 142.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. J. C. Webster and F. P. Otis, both of Sonora, for respondent.

PER CURIAM. Defendant was indicted for having violated the local option law. Before the indictment was found he was subpœnaed to appear as a witness before the grand jury, as in the case of People v. Knowles (Crim. No. 297) 155 Pac. 137, this day decided. When before the grand jury the district attorney informed him of the nature of the charge against him then under investigation, to which he added: "Now, of course, the grand jury can't require of you any testimony being you are an interested party, or compel you to testify; they can simply give you an opportunity to explain this matter away, if you wish. Of course, any testimony you give is really considered a free and voluntary statement on your part, and not compulsory, and if any testimony is given it can be used against you if it is detrimental in any manner. Now, with this statement, do you wish to make a statement in connection with this matter? Mr. Bigelow: I would like to; I would be willing to." His testimony then follows, and was used in finding the indictment.

When brought to trial defendant made a motion to dismiss the indictment and discharge defendant, upon the ground stated in People v. Knowles, and the court granted the motion. The appeal is from this order and presents the same questions involved in People v. Knowles. If there is any substantial difference between that case and the present one, it tends to strengthen the view we have taken in the Knowles Case and to confirm the opinion we have felt constrained to express.

The order is affirmed.

27 Cal. App. 507

PEOPLE v. BIGELOW. (Cr. 1952.)

(Supreme Court of California. July 26, 1915.)

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

J. O. Bigelow was indicted, and the People applied to the Supreme Court for a hearing after a decision by the District Court of Appeal affirming an order of dismissal. Denied.

For opinion of the District Court of Appeal, see 155 Pac. 141.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. J. C. Webster and F. P. Otis, both of Sonora, for respondent.

PER CURIAM. The application for hearing in this court after decision by the District Court of Appeal of the Third District is denied, for the reasons stated in our opinion filed in denying such a petition in the case of People v. Knowles (Crim. No. 1951) 155 Pac. 140.

28 Cal. App. 761

PEOPLE v. RICHMAN. (Cr. 418.)

(District Court of Appeal, Second District, California. Nov. 12, 1915. Rehearing Denied by Supreme Court Jan. 10, 1916.)

1. CRIMINAL LAW ⟸393—IMMUNITY—NONINCRIMINATING TESTIMONY—STATUTES.

Pen. Code, § 1324—providing that an offender may be compelled to testify against another like offender, provided that if he demands to be excused from testifying, on the ground that his testimony may incriminate him (which he shall be deemed to do unless the section is read to him), he shall not be liable to prosecution for the offense or any transaction relative to which he testifies, but that he shall not be exempt from such prosecution, where he testifies voluntarily—is designed to enable testimony of persons implicated in a crime to be obtained without violating Const. art. 1, § 13, providing that no person shall be compelled in a criminal case to be a witness against himself; and therefore his testimony, if not incriminating himself, does not prevent his prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871–874; Dec. Dig. ⟸ 393.]

2. CRIMINAL LAW ⟸393—SELF-INCRIMINATION.

Statement in a stipulation, on motion to dismiss information against defendant for participation in a fight, that he on prosecution of another for participation therein testified "as to matters and things concerning" it, and was "required to and did testify concerning it," does not show his testimony incriminated himself, so as to prevent, under Pen. Code, § 1324, his prosecution therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871–874; Dec. Dig. ⟸ 393.]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

E. Richman was convicted, and appeals. Affirmed.

Wright & Winnek, of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Appellant was, by an information filed in the superior court of San Diego county, charged jointly with Richard Richman with having committed the crime of assault with a deadly weapon upon the person of Daniel W. Johnson. The assault was alleged to have been committed on or about the 24th day of October, 1914. At the trial the jury returned verdicts finding Richard Richman not guilty and finding E. Richman guilty of having committed a simple assault. Upon this verdict appellant was sentenced to serve a term of imprisonment in the county jail. This appeal was taken from the judgment.

Appellant contends that because he was called and examined before another court concerning matters affecting the transaction set forth in the information in this case, without having first had read to him section 1324 of the Penal Code, no further proceedings could be taken against him, and that the court was without authority to pronounce the judgment as entered. This proposition was urged in the court below, first upon a motion to dismiss the proceedings, and later by request for an instruction to be given to the jury. It appears from the record as presented by the reporter's transcript that the Richmans, who were father and son, and Johnson, the complainant in this case, had some dispute concerning their rights to use water from a pumping plant. On October 24th an altercation occurred which resulted

in physical force being resorted to between the parties. This prosecution was thereupon instituted, and later Richard Richman caused to be filed a complaint in the justices' court charging Johnson with a similar crime as that which the latter had preferred against him. The hearing on the charge so preferred by Richman came on before the justice of the peace, and the two Richmans were called as witnesses and testified at that examination. On March 27, 1915, after the information was filed in this case and the defendants had entered their pleas thereto, the defendants presented a motion to dismiss. The ruling of the court was adverse to them. In the minute order in which was recorded the facts as to the hearing on the motion was contained the following recitation:

"Come the people by H. V. Mather, Esq., deputy district attorney, and come the defendants herein by counsel, Leroy A. Wright, Esq., and it is stipulated in open court that subsequent to October 24, 1914, the day on which the fight occurred between defendants and Daniel W. Johnson, the defendants E. Richman and Richard Richman were examined by deputy district attorney of San Diego county in the case of the People of the State of California, Plaintiff, v. Daniel W. Johnson, charged with assault upon E. Richman and Richard Richman, and that at said preliminary hearing an inquiry was being conducted as to the fight that occurred on October 24, 1914. That both of the defendants in the above-entitled case were examined by the district attorney as to the matters and things concerning said fight and said defendants were required to and did testify concerning the same. That prior to the defendants being sworn and prior to their testifying section 1324 of the Penal Code of the state of California was not read to them, nor was its substance stated to them, and without said section being read or its substance stated to said defendants they and each of them did voluntarily testify concerning the offense for which they are prosecuted in this case. That said testimony was given on the 9th day of February, 1914."

[1, 2] Section 1324 of the Penal Code, the provisions of which were relied upon by the appellant to support his motion to dismiss, provides that a person offending against any of the provisions of the Penal Code, or other law of the state, is a competent witness against any other person so offending; that he may be compelled to attend and testify at any trial or other judicial proceeding in the same manner as any other person, with the proviso that, if such witness demands that he be excused from testifying on the ground that his testimony may incriminate him, he shall not be excused, but in that case the testimony so given shall not be used in any criminal prosecution or proceeding against the person testifying, except for perjury in giving such testimony, and "he shall not be liable thereafter to prosecution nor punishment for the offense with reference to which his testimony was given, or for or on account of any transaction, matter or thing concerning which he may have testified or produced evidence, documentary or otherwise." The section then proceeds to provide that no person shall be exempt from prosecution for the offense with reference to which he may testify, or for or on account of any transaction concerning which he may have testified, where he does so voluntarily, or where he fails to ask to be excused from testifying, "on the ground that his testimony or such evidence, documentary or otherwise, may incriminate himself, but in all such cases, the testimony or evidence, documentary or otherwise, so given may be used in any criminal prosecution or proceeding against the person so testifying or producing such evidence." This provision then follows:

"Any person shall be deemed to have asked to be excused from testifying or producing evidence, documentary or otherwise, under this section, unless before any testimony is given or evidence, documentary or otherwise, is produced by such a witness, the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation, shall distinctly read this section of this code to such witness. * * *"

The whole purpose of this enactment seems to have been to enable prosecuting officers to obtain the testimony of persons implicated in a criminal transaction. Under the provisions of section 13, art. 1, of the Constitution, no person may be compelled to give testimony against himself. The protective force of the constitutional provision applied to cases where the testimony sought from a party involved in a criminal transaction may tend in some way to fasten the crime upon him. In order to furnish a means by which testimony of an interested party, even though it might tend to incriminate him, might be obtained in aid of the prosecution of other persons, the Legislature has provided that such testimony may be compelled, but that when it is extracted in this mandatory way the person giving the self-incriminating testimony may not be subjected to prosecution for the offense concerning which he has furnished evidence against himself. Under the construction which we feel impelled to give to the provisions of the section, it would seem that, in order to make the objection presented by the appellant available and of force, it must be shown that the testimony given by the appellant at the preliminary examination of Johnson was of an incriminating nature. Aside from the reference found in the minute order hereinbefore quoted, as to the nature of the testimony so given, there is nothing in the entire transcript which shows what the testimony, if any, of appellant, as given before the committing magistrate in the Johnson Case, was, either in detail or substance. The son, Richard Richman, testified that he and his father were called in that case to the witness stand, and that he (Richard Richman) testified therein. The record of the trial is wholly silent as to whether this appellant gave any testimony at all at that preliminary examination. So we revert to the contents of the minute order for the purpose of determining this question. In that order it is recited that the district

attorney stipulated that at the preliminary examination of Johnson this appellant was examined "as to matters and things concerning said fight, and said defendants were required to and did testify concerning the same," and that section 1324 of the Penal Code was not read to them, nor its substance stated. It should be remembered that the prosecution at no time offered in this trial any of the testimony alleged to have been given by the appellant at the preliminary examination of Johnson. So we are left to determine only as to whether, where a person testifies relative to occurrences which are concerned in the matter of a criminal charge pending against him, he is, because of that fact alone and regardless of the character of his testimony so given, thereafter exempt from any prosecution growing out of any occurrence about which he has testified, unless before giving his testimony he has read or stated to him what is provided by section 1324 of the Penal Code. At the outset in this opinion we have suggested what we conceive to be the true design out of which section 1324 of the Penal Code was originated; that was, to enable testimony of an interested party to be secured without violating the constitutional provision which gives to every person the right to refuse to incriminate himself by his testimony. If no incriminating testimony is given, then, of course, the constitutional provision is not violated; neither should any exemption from prosecution follow in favor of a person who has not so been compelled to furnish evidence against himself. The mere statement in the stipulation that the appellant testified before the magistrate "as to matters and things concerning said fight, and said defendants were required to and did testify concerning the same," in no wise warrants the conclusion that the testimony so given was of an incriminating nature. The likelihood is that, if we may indulge in speculation, the testimony given was entirely exculpatory of any offense committed on the part of appellant. Appellant has cited the case of People v. Knowles, 155 Pac. 137. Nothing is said in that decision which is out of harmony with the views that we have herein expressed. We may call attention to one paragraph in the opinion:

"It was conceded at the argument that the testimony given by the defendant did in fact incriminate himself, as well as the others charged in the indictment, and was the testimony on which, in part, the indictment was founded."

In the case now under review the condition of fact which was presented in the Knowles Case, and which we deem most material to give point to appellant's contention, was entirely wanting.

For the reasons given, it is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; SHAW, J.

172 Cal. 102

BUSH v. ALLEN. (L. A. 3515.)

(Supreme Court of California. Feb. 10, 1916.)

1. APPEAL AND ERROR ⟸612 — RECORD — TRANSCRIPT OF EVIDENCE.

A party expecting to appeal under the alternative method prescribed by Code Civ. Proc. § 941a et seq., and have his record prepared according to the procedure prescribed must see to it that the official phonographic reporter is present at the trial, in order that a transcript of the evidence and proceedings may be furnished, and the judge may refuse to affix his signature on the ground that there was no phonographic report of the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694–2701; Dec. Dig. ⟸ 612.]

2. APPEAL AND ERROR ⟸671 — QUESTIONS REVIEWABLE—RECORD.

Where the transcript under the clerk's signature alone is in the record on appeal under Code Civ. Proc. § 941a et seq., the court may consider only the judgment roll.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. ⟸ 671.]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by George M. Bush against Nellie G. Allen, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals. Affirmed.

Works & Jordan and Eugene D. Williams, all of Los Angeles, for appellant. Shaw & Stewart, of Los Angeles, for respondent.

HENSHAW, J. Plaintiff brought his action to quiet title. Defendant answered and cross-complained, asserting title in herself. The court found the allegations of the complaint to be true and the allegations of the answer to be untrue, and gave its decree quieting title in favor of plaintiff. From that judgment defendant gave notice of appeal, and attempted to appeal pursuant to the provisions of section 941a et seq. of the Code of Civil Procedure. The clerk prepared the transcript, consisting of the judgment roll, stipulations of facts, and certain exhibits.

There was no certificate of the judge, as contemplated and required by section 953a of the Code of Civil Procedure. Upon appellant's attention being called to this fact in the brief of respondent on appeal, appellant sought and obtained an order of this court authorizing the trial judge to affix his certificate to the transcript in so far as he found it correct.

[1] Upon application to the trial judge so to affix his certificate, objection was made by respondent, upon the ground that there was no phonographic report of the trial, and that the judge's certificate is properly affixed only when there is a phonographic reporter present at the trial, and that phonographic reporter has prepared his transcript of the evidence and proceedings in accordance with law. Such is the settled law upon this matter of procedure. Totten v. Barlow, 165 Cal. 378, 132 Pac. 749. The judge thereupon refused to affix his certificate, basing his refusal upon the ground indicated. Thereupon an application for mandate was made to the Court of Appeals to compel him so to do. The matter was there heard on demurrer to plaintiff's petition, setting up the foregoing facts. The Court of Appeals held that:

"If a party to an action expects to take his appeal under the alternative method and have his record prepared according to the procedure affecting that method, then he must see to it that the official phonographic reporter is present at the trial in order that a transcript of the evidence and proceedings may be furnished by the one officer whose duty it is to prepare it."

The application for mandate was denied. Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730.

[2] Under the law of the case thus made we have before us a transcript under the clerk's certificate alone and are empowered to consider only the judgment roll. No error appears upon the face of the judgment roll. Indeed it is not contended that there is any such error, and the judgment appealed from is therefore affirmed.

We concur: MELVIN, J ; LORIGAN, J.

(172 Cal. 98)

BARLOW v. BARNES. (L. A. 3624.)

(Supreme Court of California. Feb. 10, 1916.)

1. HUSBAND AND WIFE ⟸341—ALIENATION OF AFFECTIONS—CRIMINAL CONVERSATION.

A cause of action for criminal conversation may exist independent of a cause of action for alienation of affections; it being immaterial whether the husband's marital rights were invaded with his wife's consent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1128; Dec. Dig. ⟸341.]

2. EVIDENCE ⟸215—LETTERS.

In an action for alienation of affections and criminal conversation, letters which it was claimed were sent by plaintiff's wife to defendant are not admissible in evidence, where it was established that they did not reach him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 754–759; Dec. Dig. ⟸215.]

3. PLEADING ⟸381—ISSUES AND PROOF.

Where irrelevant averments were not stricken from the answer, defendant was entitled to introduce evidence in support of them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1238, 1253–1279; Dec. Dig. ⟸381.]

4. HUSBAND AND WIFE ⟸333, 348—CRIMINAL CONVERSATION—ACTIONS—EVIDENCE.

In an action for alienation of affections and criminal conversation with plaintiff's wife, where it was alleged the acts occurred in the daytime, evidence that plaintiff frequently gambled all night on the circus train upon which he, defendant, and his wife rode, is admissible as bearing on the conduct and relationship of the parties.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1124, 1132, 1133; Dec. Dig. ⟸333, 348.]

5. APPEAL AND ERROR ⟸926—REVIEW—PRESUMPTION.

Where all the evidence was not brought up, the admission of evidence will, under the rule that every intendment is in favor of the regularity of the procedure in the lower court, be presumed justified by reason of the admission of other evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1279, 2899, 3729, 3730, 3735–3747; Dec. Dig. ⟸926.]

6. APPEAL AND ERROR ⟸1056 — REVIEW — HARMLESS ERROR.

In an action for alienation of affections and criminal conversation, the rejection of evidence as to defendant's wealth, if erroneous, was harmless, where verdict was for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. ⟸1056.]

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Fred A. Barlow against Al. G. Barnes. From a judgment for defendant, plaintiff appeals. Affirmed.

Murphey & Poplin, of Los Angeles, for appellant. Leo V. Youngworth and Horace S. Wilson, both of Los Angeles, for respondent.

HENSHAW, J. [1] Plaintiff sued defendant, charging upon two separate causes of action. The first prayed damages for the alienation of the affections of plaintiff's wife. The second prayed damages for defendant's criminal intercourse with her. The gravamina of these two actions are, of course, essentially different. A cause of action for alienation of affection may exist where there has been no criminal conversation, and, upon the other hand, where criminal conversation is the basis of a right of action, alienation of the wife's affection is not a necessary element of the offense. "Her sexual intercourse with another is an invasion of his rights, and it is immaterial whether this invasion was obtained by force or by the consent of the wife." Bedan v. Turney, 99 Cal. 653, 34 Pac. 442; Colwell v. Tinker, 169 N. Y. 531, 62 N. E. 668, 58 L. R. A. 765, 98 Am. St. Rep. 587;

Evans v. O'Connor, 174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 316.

[2] Trial was had before a jury, which rendered its verdict in favor of defendant. He had answered by denial of the matters charged in the complaint, which, in addition to those above indicated, were that defendant, the owner of a circus traveling about the country, had induced plaintiff and his wife to go with them, and had induced plaintiff to accept employment under him, to the end that he might the more conveniently accomplish his corrupt design. Defendant further affirmatively alleged that plaintiff is the brother of his (defendant's) wife; that defendant is a part owner in the circus; that through the importunities of his wife he was induced to grant to her brother the concession to sell peanuts in and around the circus; that plaintiff thus joined the circus, accompanied by his wife; that plaintiff is a ne'er-do-well and a gambler, and does not support himself nor his wife; they have been supported by defendant's wife; that an estrangement had sprung up between defendant and his own wife; and that defendant's wife instigated her brother, plaintiff herein, to make these groundless charges and institute this trumped-up action against him. Trial was had upon these pleadings. Plaintiff offered in evidence three letters addressed to George Alphaeus. Defendant's name is Alphaeus George Barnes Stonehouse. These letters were placed in the United States post office at Klamath Falls, Or., postage prepaid, addressed to George Alphaeus at different towns where, it is said, his circus was by the writer of the letters thought to be. Admittedly these letters were never delivered, but were returned to the writer at Klamath Falls, where they had been posted. These letters the court refused, under objection, to admit in evidence. Its ruling was proper. There was not only no evidence that the letters were received by the defendant, but there was positive evidence that they were not received. Making no account of the minor objections advanced by respondent in support of the court's ruling, as that the handwriting was not shown to be that of plaintiff's wife, and the addressee of the letters was not shown to be the defendant, upon broader ground the letters were not entitled to admission. Not having been received by defendant nor in any way assented to or acted upon by him, they amounted, at the most, but to the utterances of the wife, not to, but concerning, her absent lover. They had no more legal competency against the defendant than her declarations to her husband not made in the presence of the defendant would have had. They were not admissible under section 1881 of the Code of Civil Procedure. See Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223. The case is quite different from that presented by Dalton v. Dregge, 99 Mich. 250, 58 N. W. 57, where letters written by the wife and received by the defendant were admitted in evidence, as the court points out, under circumstances refuting any presumption of collusion between the wife and the husband.

[3-5] The court permitted inquiries of the witnesses touching plaintiff's habits of gambling—of playing poker all night on the train when the circus was in transit, as often as two or three nights a week. It is urged that the character and the habits of the husband, where no consent to the wife's infidelity is shown, have no place before the jury as a defense to the action. 8 Cyc. p. 270, and notes. But defendant had alleged these very matters in his answer. No motion had been made to strike them out. The evidence, moreover, had specific bearing upon the conduct and relationship of the parties upon the circus train and in the car, where it appears plaintiff sought to prove that these illicit acts of intercourse by defendant with his wife were committed, and committed in the daytime. And finally upon this point it may be said that appellant has not brought up all the evidence for review, but has asked us to consider merely certain specific rulings of the court in admitting and rejecting evidence. Every intendment being in favor of the regularity of the court's procedure, it will, if necessary, be inferred that other evidentiary matters in the case made this particular evidence pertinent, competent, and admissible.

[6] The final point made by appellant is that the court erred in sustaining the defendant's objection to the attempt of plaintiff to show defendant's wealth. We need not enter into a consideration of this matter. That consideration could only be of value to plaintiff in the event that he was entitled to a verdict from the jury. But, as he has shown no reason why the verdict of the jury given against him should be disturbed, the objection becomes absolutely inconsequential upon this appeal.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

178 Cal. 76

SAN BERNARDINO COUNTY v. STATE BOARD OF EQUALIZATION OF CALIFORNIA et al. (L. A. 3545.)

(Supreme Court of California. Feb. 8, 1916.)

1. MUNICIPAL CORPORATIONS ⇐967—TAXATION—CAR COMPANIES OPERATING IN STATE—PROPERTY EXEMPT FROM LOCAL TAXATION.

Property of a car company operating in the state, consisting of land and a manufacturing pre-cooling and repairing plant, located thereon, with railroad tracks and other incidents necessary thereto, all of which is used in the conduct of its business, is exempt from local taxation under Const. art. 13, § 14, par. A, providing that taxes therein provided for shall be

entirely for the state, and in lieu of all other taxes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2062–2067; Dec. Dig. ⊂⊃967.]

2. MUNICIPAL CORPORATIONS ⊂⊃967—TAXATION—EXEMPTIONS—CAR COMPANIES—"OPERATIVE PROPERTY."

Such property is "operative property," and therefore exempt within St. 1911, p. 534, § 8, defining operative property and exempting it from local taxation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2062–2067; Dec. Dig. ⊂⊃967.]

3. TAXATION ⊂⊃200 — CONSTITUTIONAL AND STATUTORY PROVISIONS — SUBSTITUTION OF TAXES—"EXEMPTION."

The provision in Const. art. 13, § 14, par. A, in St. 1911, p. 530, for taxing property of a corporation by collecting a percentage of their gross earnings, is not an "exemption" from taxation, but is merely a change in the method thereof.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 319; Dec. Dig. ⊂⊃200.

For other definitions, see Words and Phrases, First and Second Series, Exemption.]

4. MUNICIPAL CORPORATIONS ⊂⊃967—TAXATION—EXEMPTIONS.

The words in Const. art. 13, § 14, par. A, and St. 1911, p. 530, relieving public service and certain other corporations from local taxation, must be given fair and reasonable interpretation, without any definite leaning to the side of the taxing power.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2062–2067; Dec. Dig. ⊂⊃967.]

5. MUNICIPAL CORPORATIONS ⊂⊃967—TAXATION—"OTHER PROPERTY"—EXEMPTIONS.

The words "other property," in Const. art. 13, § 14, and St. 1911, p. 530, providing for taxation of certain property, are not limited, under the doctrine of ejusdem generis, to a previous enumeration of specific things, but are to be construed with respect to the use that is made of such other property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2062–2067; Dec. Dig. ⊂⊃967.

For other definitions, see Words and Phrases, First and Second Series, Other.]

In Bank. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the County of San Bernardino against the State Board of Equalization of the State of California and another. From a judgment for defendants, plaintiff appeals. Affirmed.

R. B. Goodcell, of San Bernardino, for appellant. Henley C. Booth, of San Francisco, for respondents.

MELVIN, J. The state board of equalization held that certain property of the Pacific Fruit Express Company, located at Colton and comprising a "pre-cooling plant," was exempt from local taxation because of the provisions of section 14, art. 13, of the Constitution of this state. Being dissatisfied with the decision of the board the authorities of San Bernardino county decided to test the correctness of the conclusion reached by the equalizers, and the result was this action, founded upon an agreed statement of facts, pursuant to the provisions of section 1138 of the Code of Civil Procedure. The superior court sustained the action of the state board of equalization, holding the property not subject to local taxation, and this appeal is from the judgment.

By the agreed statement of facts it appears that the Pacific Fruit Express Company comes within the meaning of paragraph A, § 14, art. 13, of the Constitution and of the act approved April 1, 1911, providing for the separation of state from local taxation (Stats. 1911, p. 530), and that said company, being a car company operating in this state, pays 3 per centum of its gross receipts as prescribed by that act. From the statement we also learn that the express company prepares and operates cars of its own, and that under a contract with the Southern Pacific Company it agrees, for certain considerations, to supply the railroad company refrigeration and refrigerator cars as the said Southern Pacific Company may require. The property sought to be submitted to local taxation belongs to the Pacific Fruit Express Company, and consists of land, and a manufacturing, pre-cooling, and repairing plant located thereon, which, with the personal property therein contained, is used by the said express company for the following purposes:

"The manufacture of ice for the icing and re-icing of refrigerator cars containing perishable commodities transported by Southern Pacific Company; the pre-cooling of perishable commodities in cars owned by said Pacific Fruit Express Company for the purpose of putting such commodities into proper condition to be transported over the rails of said Southern Pacific Company; the repair of cars used for the transportation of perishable commodities and belonging to said Pacific Fruit Express Company; the tracks necessary to and which do connect said plant with the railroad of said Southern Pacific Company; said services of icing, re-icing, pre-cooling, and repairing—were and are all done and performed by said Pacific Fruit Express Company in the carrying out of its contract with said Southern Pacific Company."

[1, 2] The sole question before us, therefore, is whether in contemplation of law the property described in the quotation above is "operative property." Section 8 of the statute of 1911, to which reference is made above, defines "operative property" which is exempted from local taxation by the terms of the act. In the case of express companies this includes the franchises, cars, trucks, wagons, horses, harness, and safes, and in the case of refrigerator car companies the definition covers the franchises, cars, and other rolling stock. But section 8 of the act also contains the following language:

"Provided, that the operative property of the companies enumerated in this section, shall also include any other property not above enumerated that may be reasonably necessary for use by said companies exclusively in the operation and conduct of the particular kinds of business enumerated in section two of this act."

This is merely the legislative definition of the "other property" specified in the constitutional provision under which the statute was passed. Even without the statute the expression in the Constitution would sustain this judgment. That the property here described comes within this definition we are fully persuaded.

[3] Appellant's counsel insists that the statute of 1911 is one providing for an exemption of property from taxation, and that therefore it should be strictly construed. But the constitutional and statutory provisions for taxing the property of certain corporations by collecting a per centum of their gross earnings is not an exemption. It is merely a change in the method of taxation. We need not here discuss this matter elaborately, because the origin and purpose of such taxes have been fully considered by this court in an opinion written by Mr. Justice Henshaw, in Pacific Gas & Electric Co. v. Roberts, 168 Cal. 423, 143 Pac. 700.

[4] The words relieving public service and certain other corporations from local taxation must be given fair and reasonable interpretation "without any definite leaning to the side of the taxing power." City and County of San Francisco v. Pacific Telephone & Telegraph Company, 166 Cal. 249, 135 Pac. 971; Hartford Fire Insurance Co. v. Jordan, 168 Cal. 285, 142 Pac. 839. This court has followed the liberal interpretation given by the Supreme Court of the United States to the federal Workingmen's Compensation Act in classifying instrumentalities which are used in interstate commerce. Southern Pacific Company v. Pillsbury, 50 Cal. Dec. 246, 151 Pac. 277. A similarly broad and reasonable policy should be followed in deciding questions relating to property which the state claims the exclusive right to tax. The prime requisite for property properly classified as "operative" is that it shall be used in the conduct of the business of one of the corporations enumerated in subdivision (a), § 14, art. 13, of the Constitution. Lake Tahoe Ry., etc., Co. v. Roberts, 168 Cal. 553, 143 Pac. 786. It will be seen that all of the property here in question is so employed. The express company is engaged in the business of shipping in refrigerated cars and furnishing such cars to the railroad company, and its plant for pre-cooling, repairing, etc., is an essential part of its equipment.

[5] There is no force in the argument of appellant's counsel that under the rule designated by the expression "ejusdem generis," the general words of the Constitution and the statute with respect to "other property" are limited by the previous enumeration of specific things. He says that the land and the "pre-cooling plant," not being of the same nature and quality as franchises, cars, rolling stock, wagons, horses, harness, and safes, are not within the meaning of the words "other property." In Pacific Gas & Electric Co. v. Roberts, supra, it was held that motor vehicles used exclusively by a public service corporation in its business are exempt from the tax provided by the "motor vehicle act." The measure of the taxing power of the local authorities, applied in all of the cases, is not the quality or the nature of the property so much as its use. For example, in San Diego & Arizona Railway Co. v. State Board of Equalization, 165 Cal. 561, 132 Pac. 1044, the use, and not merely the kind, of property governed our conclusion that it was "operative." The Interstate Commerce Commission has held that where a common carrier undertakes the transportation of perishable commodities in refrigerated cars, the icing and, when necessary, the reicing, of the cars are just as essential as the hauling of the freight —that the ice is not merely an incident to the service of transportation, but is a part of the service itself and is inseparable therefrom. In re Charges for the Transportation and Refrigeration of Fruit, 11 Interstate Commerce Com. Reports, 129. In the case at bar the functions performed by means of the Pacific Fruit Express Company's property in San Bernardino county are all so intimately connected with the furnishing of refrigerated carriage of perishable articles as to be, in contemplation of law, a part of the transportation itself.

Even under statutes exempting railroad property from taxation (which according to the authorities must be strictly construed), buildings, repair shops, and other instrumentalities reasonably incident to the proper and convenient carriage of passengers and commodities are included within the exemption. See 37 Cyc. 918, and cases cited. And there is stronger reason why similar adjuncts to the safe transmission of products requiring refrigeration should be removed from the local taxing power by the constitutional and statutory provisions which we have before us in this case, because we are bound to give them liberal construction.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

172 Cal. 70

McGIBBON v. SCHMIDT. (L. A. 3563.)

(Supreme Court of California. Feb. 8, 1916.)

1. PLEADING ⇐32—CONTRACT OF PRINCIPAL SIGNED BY AGENT.

Where a complaint alleges the legal effect of a contract signed by an authorized agent, the contract may be pleaded as that of the principal without mentioning the agency.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 53–57; Dec. Dig. ⇐32.]

2. PRINCIPAL AND AGENT ⇐189—CONTRACT OF PRINCIPAL SIGNED BY AGENT—PROOF.

In such case, execution of a contract by the principal, if denied, may be sustained by prov-

ing its signing and delivery by the agent and his authority to do so.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 713–717; Dec. Dig. ⟸ 189.]

3. Appeal and Error ⟸1039 — Harmless Error—Admission of Evidence.

Though the complaint for the specific performance of a contract signed by an agent for the sale of realty be defective in failing to show that the contract was authorized by defendant, the overruling of an objection to the introduction of evidence on the ground that the complaint does not state a cause of action, if error, is not prejudicial, when it appears that defendant was cognizant of the case against him and met it on the facts alleged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075–4088; Dec. Dig. ⟸ 1039.]

4. Equity ⟸72—Commencement—Delay—Laches.

Delay in bringing an action does not constitute laches unless prejudice results.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207, 210–220, 225, 226; Dec. Dig. ⟸ 72.]

5. Specific Performance ⟸105 — Action — Laches.

Where a vendor of land tendered a deed containing conditions not authorized under the agreement of purchase, and the purchaser, considering the imposing of such conditions a termination of the contract, sued to recover the purchase money paid by her, and was nonsuited, the vendor contending that the contract was in force, her delay of 18 months after the judgment of nonsuit in suing for specific performance of the contract *held* not to constitute laches.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325–341; Dec. Dig. ⟸ 105.]

6. Vendor and Purchaser ⟸75—Time of Performance—Reasonable Time.

Where a contract for the sale of realty does not fix the time of final payment, a reasonable time is allowed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 113–118, 126; Dec. Dig. ⟸75.]

7. Vendor and Purchaser ⟸334—Remedy of Buyer—Recovery of Payment—Breach of Rescission of Contract.

An action by a purchaser to recover the amount paid on a contract as for money had and received, not based on fraud, cannot be maintained except by proof that the contract was rescinded, or that defendant was guilty of a breach thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959–980; Dec. Dig. ⟸334; Contracts, Cent. Dig. § 1203.]

8. Appeal and Error ⟸934 — Judgment — Reasons Not Appearing in Record—Presumption.

A judgment of nonsuit in such an action, in the absence of any reason for it shown in the record, will be presumed to have been based upon plaintiff's failure to prove a cause of action; that is, a rescission, termination, or breach of the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777–3782; Dec. Dig. ⟸ 934.]

9. Election of Remedies ⟸11—Mistake as to Remedy—Estoppel.

Where a party to a contract for the sale of realty institutes an action to recover the amount paid thereon and suffers a nonsuit for failure to prove a rescission or breach of the contract, he is not estopped by his election from availing himself of an action for specific performance, since the remedy first elected was one to which he was not entitled.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 14; Dec. Dig. ⟸11.]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Isabella McGibbon against Fred Schmidt. From a decree for specific performance and an order denying defendant a new trial, he appeals. Decree and order affirmed.

Davis, Kemp & Post, of Los Angeles, for appellant. Lewis R. Works, John D. Works, C. Hughes Jordan, and Eugene D. Williams, all of Los Angeles, for respondent.

SHAW, J. This is an action to compel specific performance of an alleged contract, whereby defendant agreed to convey to the plaintiff a certain lot situated in Los Angeles. The court below gave judgment for the plaintiff, and decreed specific performance of the contract. The defendant appeals, both from the judgment and from an order denying his motion for a new trial.

The complaint alleges that on November 26, 1906, the plaintiff and defendant entered into a written contract, whereby it was agreed that the defendant should convey to the plaintiff lot 132 in the Schmidt Heights tract, situate in the county of Los Angeles. It further alleges:

"That said contract was in fact signed by one Oscar E. Schmidt, but the said Oscar E. Schmidt was acting for the defendant, and said contract was in fact the contract of the defendant, duly authorized by him."

The contract in question is as follows:

"$100.00 Los Angeles, November 26, 1906.

"Received from Isabella McGibbon, per James D. McGibbon, the sum of one hundred dollars, making in all eight hundred dollars, which amount is the first payment on lot 132 in the Schmidt Heights tract; next payment of principal being due December 1, 1907, amounting to eight hundred dollars, and interest, to start from December 1, 1906, at six per cent. on sixteen hundred dollars, interest payable every three months. [Signed] Oscar E. Schmidt."

Interest payments of $24 each were made thereafter on May 31, September 3, and November 26, 1907, by checks drawn in favor of the defendant, but delivered to Oscar E. Schmidt by James D. McGibbon, who represented the plaintiff, his sister, in all her transactions relating to the lot in controversy. Two of these checks were indorsed by the defendant. They were as follows:

"Merchants National Bank of Los Angeles.

"No. 303. Los Angeles, Cal. May 31, 1907.

"Pay to order of Fred Schmidt, $24 00/100, twenty-four 00/100 dollars, Int. to June 1, 1907 —$1,600, on bal. purchase price, being $1,600,

on lot 132, Schmidt Heights tract, owned by Isabella McGibbon. Jas. D. McGibbon."
"[Indorsed] Fred Schmidt."

"Merchants National Bank of Los Angeles.
"No. 331. Los Angeles, Cal. Sept. 3, 1907.
"Pay to order of Fred Schmidt, $24 00/100, twenty-four 00/100 dollars Int. to Sept. 1st on $1,600 00/100, Deferred payments on lot 132, Schmidt Heights tract, belonging to Isabella McGibbon. Jas. D. McGibbon."
"[Indorsed] Fred Schmidt."

In June, 1907, James McGibbon requested that a deed be made to Isabella McGibbon, in accordance with the contract, upon the giving of a mortgage by her for the balance of the purchase money unpaid. A deed was accordingly prepared by the attorney for defendant containing building restrictions, to which McGibbon objected. Nothing further was done in regard to the execution of the deed or mortgage. December 12, 1907, the attorney for the defendant wrote to the plaintiff and to McGibbon, requesting that the payment of the purchase money and interest due December 1, 1907, be made immediately, but no further payments were or have been made. On May 11, 1908, plaintiff began an action to recover of defendant the purchase money and interest theretofore paid. A judgment of nonsuit was entered against her in that action on May 13, 1909. The precise reason for such judgment does not appear in the record. On November 12, 1910, 1 year and 6 months after such judgment was entered against her, she tendered the defendant the balance of the purchase money and interest due under the contract, and demanded a deed without restrictions or conditions, which was refused. She began this action to compel a conveyance by the defendant November 25, 1910.

[1-3] The defendant did not demur to the complaint. At the trial he objected to the introduction of evidence, on the ground that the complaint did not state a cause of action, and his objection was overruled. This ruling is the basis of the first assignment of error. It is claimed that the complaint does not show that the contract relied upon was signed by the defendant; that the allegation above quoted, to the effect that the contract signed by Oscar E. Schmidt was "in fact the contract of the defendant, duly authorized by him," is a mere conclusion of law and insufficient as a pleading of fact. Where a pleading alleges a contract according to its legal effect, which may be done under our system (Stoddard v. Treadwell, 26 Cal. 303), the contract, if it is executed by an agent duly empowered, may be pleaded as if it were the contract of the principal, without mentioning the agency (31 Cyc. 1626). In such case the execution, if denied, may be sustained by proof of signing and delivery by the agent, supported by proof of his authority. But where, as is the case here, the pleading shows that the agent alone signed the contract sued on, we are not prepared to say that the further statement that it "was in fact the contract of the defendant, duly authorized by him" is not faulty, as being a conclusion of law. Upon the facts proven as above recited, the complaint might well have stated that the contract, as signed by the agent, was afterwards, in writing, ratified and confirmed by the defendant, by means of the aforesaid checks indorsed by him. But even if we concede that the complaint was defective in this particular, and that the defect may be reached without a special demurrer, we do not deem the ruling sufficient cause for reversal. The defendant was not misled or at all prejudiced by the failure of the complaint to state the facts more elaborately. He appears to have been entirely cognizant of the case against him and to have met it as far as the existing facts would allow. If error at all, it was error without prejudice.

[4-6] It is next insisted that there was such a lack of diligence upon the part of the plaintiff in the prosecution of this action as to constitute laches. The rule is well settled that mere lapse of time does not constitute laches unless accompanied by circumstances from which the defendant or some other person may be prejudiced, or such lapse of time that prejudice may be reasonably supposed to occur if the remedy is allowed. Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467; Cook v. Ceas, 147 Cal. 618, 82 Pac. 370. No laches can therefore be attributed to the plaintiff in this case unless it appears that because of the delay of 18 months in bringing the action it might result in serious wrong to grant the relief requested. There is nothing in the case to indicate that the defendant has been injured by the delay, or that his defense was rendered more difficult thereby. Furthermore, there was some excuse for the delay. The offer of June, 1907, to perform the agreement in a modified form, was made before its maturity. This offer was met by the tender, on behalf of the defendant, of a deed containing conditions not provided in the agreement of sale, and which defendant had no right to insert or to demand. The plaintiff seems to have considered this as a termination of the agreement, and accordingly, she sued to recover the purchase money she had paid. So far as appears, she did this in good faith. The defendant refused to return the purchase money, defended that action, and obtained a judgment of nonsuit against the plaintiff. This judgment was not rendered until May 12, 1909. Up to that time at least, the defendant himself was insisting that the agreement was in force, else he should have returned the purchase money paid, since it is not claimed that plaintiff had taken possession. This suit was begun 18 months thereafter. The agreement itself did not fix any time for the making of the final payment. In such cases the law allows a reasonable time. The court found that plaintiff acted with reasonable diligence in offering performance and in beginning the

action. We cannot say that this finding is contrary to the evidence. The plaintiff cannot, therefore, be deemed guilty of laches.

[7-9] It is next claimed that plaintiff was put to her election either to recover the purchase money or to insist upon a performance of the contract, and that by bringing the former action, even though unsuccessful therein, she is estopped to insist upon this action for specific performance. This claim is based upon the well-settled rule that where two inconsistent, concurrent remedies are available, the party is confined to the remedy which he first prefers and adopts. Parke v. White, 101 Cal. 37, 35 Pac. 442; Holt Mfg. Co. v. Ewing, 109 Cal. 357, 42 Pac. 435; Agar v. Winslow, 123 Cal. 587, 56 Pac. 422, 69 Am. St. Rep. 84; Liver v. Mills, 155 Cal. 459, 101 Pac. 299; Rodermund v. Clark, 46 N. Y. 354. The action to recover the purchase money was not based on fraud. It was in the form of an action for money had and received. It could not have been successfully maintained except by proof that the contract had been rescinded, or that defendant had been guilty of a breach thereof. The judgment of nonsuit was therefore, as we must presume, based upon the fact that no rescission, termination, or breach of the contract had been proven, and that it was still in force; that the plaintiff had no remedy such as she sought to enforce by that action. As was said in Agar v. Winslow, supra, 123 Cal. 591, 56 Pac. 422, 69 Am. St. Rep. 84:

"If plaintiff was mistaken and undertook to avail himself of a remedy that he was never entitled to, this does not prevent him from subsequently availing himself of a remedy that he is entitled to under the facts of the case."

The defendant is placed in no worse position by reason of the unsuccessful prosecution of that action. There is consequently no estoppel. There is substantial evidence in the record in support of each finding. No other questions are raised requiring consideration.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 80

UNITED RAILROADS OF SAN FRANCISCO v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 7565.)

(Supreme Court of California. Feb. 9, 1916.)

1. MANDAMUS ⊂⊃60—JUDICIAL PROCEEDINGS —ENFORCEMENT OF INJUNCTION.

Where a temporary prohibitory injunction is granted, and the defendant appeals, and continues to perform the acts inhibited, a writ of mandate will issue to compel the superior court to cite and punish for contempt a violation of the temporary injunction.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 70, 71; Dec. Dig. ⊂⊃60; Contempt, Cent. Dig. § 216.]

2. APPEAL AND ERROR ⊂⊃488—SUPERSEDEAS —APPEAL FROM MANDATORY INJUNCTION.

Although an appeal will stay the effect of a mandatory injunction, it will not stay the operation of a prohibitory injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2277, 2278; Dec. Dig. ⊂⊃ 488.]

3. APPEAL AND ERROR ⊂⊃488—SUPERSEDEAS —"PREVENTATIVE RELIEF"—"INJUNCTION."

Civ. Code, § 3368, defines "preventative relief" as being given "by prohibiting that which ought not to be done," and Code Civ. Proc. § 525, defines an "injunction" as a "writ or order requiring a person to refrain from a particular act." The plaintiff street railroad corporation secured a temporary injunction prohibiting the defendant municipal street railway from running an excess number of cars over its tracks and loops. The defendant appealed and continued to operate its cars as before, claiming that the injunction was mandatory in character, although prohibitory in terms, as it required the defendant to do a positive act by relinquishing an incorporeal hereditament which it had acquired by continued use of the tracks in the manner objected to. *Held*, that the injunction was essentially prohibitory in character, as it merely restrained continuing trespasses and improper use of possession, and its operation was not superseded by an appeal, and a writ of mandate would issue to compel the superior court to cite and punish for contempt.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2277, 2278; Dec. Dig. ⊂⊃ 488.

For other definitions, see Words and Phrases, First and Second Series, Injunction.]

Lawlor, J., dissenting.

In Bank. Original petition for a writ of mandate by the United Railroads of San Francisco against the Superior Court in and for the City and County of San Francisco and another. Writ issued.

See, also, 151 Pac. 129.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for petitioner. Matt I. Sullivan and Geo. Lull, both of San Francisco, for respondents.

HENSHAW, J. The United Railroads brought its action to enjoin the city and county of San Francisco, operating a municipally owned electric street railway, from using a portion of its tracks, poles, and wires owned in common with the municipality, and of its terminal loops owned by it exclusively, with cars in excess of the number which plaintiff contended defendant was entitled under contract to use. The trial court granted an injunction pendente lite, in terms requiring the defendant to desist and refrain from operating this excess number of cars upon the tracks and around the loops. Defendant promptly appealed from this order granting the injunction pendente lite, and continued to use the property as it had been doing. Plaintiff proceeded in the superior court to cause the mayor of San Francisco and the members of the city's board of public works and the superintendent of the municipal railways of the city to be cited and

punished in contempt for violation of the injunction pendente lite. The trial court refused to issue the citation in contempt, and this original writ of mandate was sued out to compel the superior court to perform what petitioner conceives to be that court's manifest duty in the premises.

[1] It is well settled that in proper cases the superior court should so cite and punish for disobedience to its orders, including injunctions, and it is equally well settled that mandate is the proper remedy where the court refuses to hear and decide such a contempt proceeding. Merced Mining Co. v. Fremont, 7 Cal. 130; In re Wilson, 75 Cal. 580, 17 Pac. 698; Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006; In re Tirey L. Ford, 160 Cal. 334, 116 Pac. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267.

[2] The justification of the court's refusal to proceed, it is declared, rests in the fact that the operation of the injunction pendente lite was stayed by the appeal taken from it. It is well settled, indeed conceded, that an appeal does not stay the operation of a preventive injunction. Equally well settled is it that an appeal does stay the operation of a mandatory injunction. The argument is that the injunction here under review belongs to the latter class.

Equities are weighed in granting or refusing a temporary injunction, and are to be considered in interpreting it. What are those equities in this case? Fairly to review them the consideration must be divorced from the fact that the defendant is a municipally owned railroad and a popular institution of the city of San Francisco, and the case considered as in every proper judicial aspect it is, simply a controversy between two private street railroad litigants. So considering it, no difficulty will be experienced in determining what are the equities. Street railroad A. contends that by contract it has agreed to permit street railroad B. to use a portion of its tracks owned in common and of its terminal loops owned by it exclusively for a limited number of cars, and asks to have street railroad B. restrained from using its property with cars in excess of the contract number. If A. is right, then the injury which it is suffering is clear, and lies in the unwarranted invasion and use of its property, in its depreciation by wear, in the illegal congestion and hampering of its own traffic, and in its monetary loss occasioned by its rival carrying passengers who otherwise would patronize A.'s cars. A temporary injunction is granted. What now are the equities? If the injunction is prohibitive, B. is wholly and fully protected, until final determination, by the bond which A. is compelled to give. Every dollar of loss which B. may sustain will thus be made good. But what is A.'s position if this injunction is mandatory? B. takes an appeal from the injunction pendente lite, and stays its operation without filing any undertaking, and proceeds to make free use of A.'s property without the slightest security. This continues until judgment on the merits, when the injunction is made permanent. Again B. appeals, and again destroys the purpose and effect of the injunction pending appeal, and still continues, without security to A., to injure it financially and deprive it of valuable property rights. And this is precisely the result in this case. Defendant has continued to use the property pending this decision, and, while this phase of it has been held here under advisement, the cause has been tried and determined on its merits in the superior court, and plaintiff has been awarded a permanent injunction, from which, of course, an appeal will be taken. If this be a mandatory injunction, petitioner will thus be compelled, without hope of recoupment, to bear great financial loss until final determination of the controversy. A consideration of the broad equities thus outlined will not serve to change in the slightest the character of the injunction, but they aid in understanding the true character of the relief awarded, its nature and necessity.

[3] To destroy all of plaintiff's rights pending the final determination of this litigation, or, putting it conversely, to give the defendant all that it claims, the justice of which claims is denied by the trial court, we are asked to hold that this is a mandatory injunction. In terms it simply forbids defendant to use the tracks and loops with an excess number of cars. To the common understanding this would appear to be an order to defendant to stop doing something, not to compel it to do something else, and no more mandatory in character than an order telling a man to desist from throwing his rubbish in his neighbor's vacant lot. But it is said that, while merely prohibitive in terms, it is really mandatory in effect, and compels defendant to surrender real property, or something in the nature of it, an incorporeal hereditament, of which he has possession by the use of the excess cars. Of course, no case is cited—none can be cited—which holds that an injunction such as this under review calls for the surrender of the possession of real property. But it is argued that the principle of the cases dealing with an actual order to surrender possession of realty is applicable to this case.

Thus a very narrow shoe is elastically stretched to fit the defendant's very large foot. Let us apply then the same principle to a parallel case in which a great city is not defendant. A. is the owner of land. B. is engaged in the trucking business. A. for a limited period of time licenses B. to use a convenient short cut across his land as an easement or private right of way with power to confer similar rights upon another. B. in turn licenses C. (who is in the same

business) to use this private right of way to the extent of operating across it 10 trucks a day. Soon C. is operating 50 trucks. B. protests. C. is obdurate. B. seeks to enjoin C. from driving more than 10 trucks a day over this right of way. It is a gross interference with B.'s business. The court finds B.'s contention well founded, and C. to be acting without right, and forbids C. from employing more than 10 trucks. What is the difference between the two cases? Nothing in principle, nothing in fact, saving that in the actual case here presented a large municipality is the party defendant. And what would have been the answer in the supposititious case had C. appealed and contended that the appeal stayed the operation of the injunction because it was mandatory? Unhesitatingly C. would have been told that every separate act of his in causing one of his excess trucks to be driven over B.'s right of way was a trespass subjecting him to an action at law; that it is one of the peculiar provinces of equity to restrain and forbid by injunction precisely such repeated acts of trespass where the loss sustained is difficult of admeasurement, and where the legal redress involving a multiplicity of suits is wholly inadequate; that an injunction restraining trespass is not mandatory; it is strictly prohibitory within the exact language of section 3368 of the Civil Code, which defines "preventive relief" as being given "by prohibiting a party from doing that which ought not to be done." And equally is it within the explicit definition of an "injunction" found in section 525 of the Code of Civil Procedure, where it is defined as "a writ or order requiring a person to refrain from a particular act." In Georgia (Florida Yellow Pine Co. v. Flint River Naval Stores Co., 140 Ga. 321, 78 S. E. 900), where mandatory injunctions may not be granted at all, this precise question arose in an injunction granted to restrain continuing trespasses upon plaintiff's land, and the contention was made that the restraining injunction was mandatory in character. The contention was disposed of by the Supreme Court of Georgia in the following language:

"The court restrained the defendants from going upon the land, and from cutting, boxing, and working the timber. Inasmuch as the defendants were already upon the land, engaged in cutting, boxing, and working the timber, it is contended that the injunction was mandatory in character. We do not think so. The scope of the court's order was, not to require the defendants to do a particular act, but to refrain from cutting and boxing the timber."

In Longwood Valley Railroad Co. v. Baker, 27 N. J. Eq. 166, defendants by a dam had caused the impounded water of a millpond to rise above a certain height. The injunction restrained defendants from maintaining the water above a specified height. It was contended that, as the dam was already built, this was mandatory, in that it compelled defendants to lower the height of their dam or to construct a spillway. The court answered:

"The objection cannot be sustained. The injunction is against causing the water to rise any higher than it was accustomed to rise on the day designated. The injury was a continuing injury from day to day. The millowners were not required to reduce their dam, but to refrain from raising the water beyond a certain height."

In Moore v. Clear Lake Water Works, 68 Cal. 146, 8 Pac. 816, complaint was made of a continuous wrongful diversion of water against plaintiff's rights, and an injunction was sought. It was granted. This court was not embarrassed over the question of its being a mandatory injunction. It was tacitly conceded to be a prohibitive injunction. Says this court:

"Here the plaintiff complains of a continuous wrongful act and consequent infringement of his rights, and therefore prays for an injunction to stay such continuous injury, and it is only in a court of equity and by means of an injunction that an adequate remedy can be had."

To the same purport is Conkling v. Pacific Improvement Co., 87 Cal. 296, 25 Pac. 399. Here, in effect, it was asserted that the injunction was mandatory, in that at the time of the commencement of the action "the diversion by the six-inch pipe was complete, and for that reason injunction could not properly issue." Says this court:

"But, conceding that the six-inch pipe had been put in and the diversion of the water had taken place at the time that the amended complaint was filed, * * * and conceding that the diversion had actually taken place, the act of carrying the water away from its natural channel, if wrongful, was a continuous act, against which an injunction might issue. * * * The continued diversion of the water was the material thing to be enjoined, and not the putting in of the pipe."

Returning to the argument of the city, it is this: That the right to use the rails of the United Railroads is an incorporeal hereditament, an interest in real property which can be enjoyed only by use, and the possession of which can be manifested only by running the cars over the tracks from time to time; that as the city had been thus for several months operating its excess cars over these tracks, under claim of right, and had not been at any time actually prevented by the United Railroad from so doing, the city was in legal possession of the interest claimed, and consequently the injunction, though prohibitory in form, requiring it merely to cease operating such cars, is, in effect, an order directing the city to relinquish its possession of the incorporeal hereditament, and therefore mandatory in character.

If this argument were valid, it would put an end to the universally established doctrine that equity enjoins by preventive injunction the commission of repeated trespasses affecting realty where legal redress would require a multiplicity of actions or where the wrongful use, if permitted to continue, would eventually ripen into a right by prescription. The application for an injunction would be met by the statement that the defendant had been in actual use of the right claimed, that this was equivalent to legal possession there-

of, and that injunction will not lie to oust one who is in peaceable possession, since there is an adequate remedy at law by an action to recover possession. That such doctrine cannot be maintained is apparent. The answer is that the continual entry without right upon the land of another is not possession thereof. It is nothing more nor less than a series of continuing trespasses, each a wrongful act, and no one nor all of those acts become rightful until by the lapse of time necessary to establish title by prescription the trespasser has become the legal owner of the right to use the way. Chattanooga, etc., Co. v. Felton (C. C.) 69 Fed. 277; Coatsworth v. Lehigh, etc., Co., 156 N. Y. 454, 51 N. E. 301; Hooper v. Dora Coal Mining Co., 95 Ala. 235, 10 South. 652; Lake S., etc., Co. v. Felton, 103 Fed. 227, 43 C. C. A. 189.

There is no magic in the phrase "maintaining the status quo" which transforms an injunction essentially prohibitive into an injunction essentially mandatory. The phrase is commonly employed in discussing mandatory injunctions compelling the surrender of possession of realty by the actual peaceable occupant at the time the injunction has been secured. Indeed, the phrase has been defined to mean "the last actual peaceable, uncontested status which preceded the pending controversy." There was no such uncontested possession here. It is undisputed that petitioner protested before beginning its action, protested vigorously against the misuse of it property, and only brought its action when its protests were disregarded. It is not easy to perceive what more the plaintiff should have done in the assertion and maintenance of its rights. Nor, upon the other hand, can it be perceived how the conduct of the city officials conferred upon the city any new rights. When in New York the creation of a new right was asserted, upon a similar state of facts, the Supreme Court of that state found no difficulty in declaring:

"But this failure and acquiescence amounted to simply a license for the time being, and was not sufficient to create any permanent and irrevocable right." Chapman v. Syracuse Rapid-Transit Ry. Co., 25 Misc. Rep. 626, 56 N. Y. Supp. 250.

Sufficient has been said, we think, to show that, when the character of an injunction is subjected to review before a higher tribunal, that tribunal, in the exercise of its equitable jurisdiction, seeks first to determine the nature and adequacy of the relief granted. It will not condemn an injunction even if it be mandatory in character; for injunctions of this character, when they afford the only adequate means of relief to a petitioner, are steadily growing in favor. 1 Joyce, Injunctions, § 101; 1 Beach, Injunctions, § 101. So, too, the court will not destroy the relief granted by any excessive astuteness in selecting some minor mandatory feature of the injunction and holding that that should control the consideration of the nature of the relief awarded. What essentially are the features of this injunction? The defendant is not compelled to surrender any possession. It retains its possession. But it is forbidden from making what the court has determined to be an illegal and improper use of that possession.

There are but few jurisdictions where appeals, even when appeals are permitted, are allowed to operate to stay the effect even of a mandatory injunction. In this state such an appeal does so operate. But in other states where a similar rule prevails the courts have been swift in holding that the character of a prohibitive injunction was not transformed and made mandatory because it incidentally involved the doing of an affirmative act. A man has unlawfully diverted the water of a stream above his neighbor's land. The neighbor seeks to enjoin this diversion, and the court grants the prohibitive injunction restraining him from further diverting the water. But he had already diverted it, and to comply with this injunction requires him either to shut down his headgate or fill in the diverting ditch. Here is compulsion upon him to do an affirmative act. Yet the Supreme Court of Georgia, like this court, found no difficulty in declaring that this incidental fact did not change the character of the injunction. Goodrich v. Georgia R. & Banking Co., 115 Ga. 340, 41 S. E. 659. In Georgia, as has been said, the granting of a mandatory injunction is absolutely prohibited. In Merchants' & Miners' Trans. Co. v. Granger, etc., 132 Ga. 167, 63 S. E. 700, the injunction restrained the defendant "from refusing to receive and carry the lumber of the plaintiffs in the order in which it is duly tendered for shipment." It was contended that this was not a preventive injunction, but was strictly mandatory in character, since its effect was to compel the defendants to do the affirmative act of taking and receiving and shipping the lumber. The Supreme Court of Georgia declared:

"While under the Code * * * an injunction will not issue to compel a person to perform an act, yet the court may grant an order the essential feature of which is to restrain, although in yielding obedience to the restraint the defendant may incidentally be compelled to perform some act."

The same principle is announced in Falcon v. Boyer, 157 Iowa, 745, 142 N. W. 427, in the following language:

"While an injunction is issued primarily to restrain, and not to compel, an act, defendant may be required to do some affirmative act necessary to effectuate the principal purpose of the order."

In Fairfield Floral Co. v. Bradbury (C. C.) 87 Fed. 415, the postmaster had changed the usual course of business of his office. An injunction was sought to prevent the continuance of such interruption. It was argued that the injunction would be mandatory because it would compel the postmaster to do things other than those he was performing. The circuit court disposed of the contention in the single sentence:

"If, incidentally, this would compel the postmaster to perform some minor things which, in the ordinary course of business, he would perform, this would not render it a mandatory injunction."

And we may properly conclude this discussion by a quotation from one of our own early cases (Merced Mining Co. v. Fremont, 7 Cal. 130):

"But when a party is restrained by injunction, he is not injured in contemplation of law, as he is already secured by the undertaking. If, on the contrary, an appeal, with an undertaking of $300, would have the effect of staying the injunction itself, then the plaintiff would have no remedy, and the writ be idle. It would entirely destroy the usefulness of this writ. A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction."

Sufficient, we think, has been said to show what other courts have declared to be the true principle governing the construction of injunctions. In this state the same principle was at a very early date pointed out, as appears from the quotation in Merced Mining Co. v. Fremont, supra.

It thus conclusively appears that in its essence this injunction is prohibitive and restrains continuous acts of trespass upon plaintiff's property. Clute v. Superior Court, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54, relied on by respondents, was the case of a defendant, manager of the plaintiff hotel corporation, who was in managerial control of plaintiff's hotel and of its servants and employés. He was holding possession under claim of contract right. He disputed the right and power of the plaintiff to represent the corporation or to oust him from his position. The injunction in terms restrained him "from interfering with, or directing, or attempting to direct or control the employés of said corporation." The conclusion which this court reached was so plain and impregnable that there was no dissent from it, and that conclusion was that the defendant by this injunction was, in effect, ordered to surrender possession and management of the hotel property to plaintiff. It was a most manifest case of a mandatory injunction couched in prohibitive terms. To find in this case authority for holding the injunction in the present case to be mandatory passes comprehension. If this be a mandatory injunction, then must every injunction restraining waste and trespass be equally mandatory.

As little pertinency is there in the argument that after the issuance of the injunction the defendant continued in the enjoyment of its alleged rights. It continued this enjoyment only by the open defiance on the part of the mayor and other municipal officers to which we have adverted, and a complete answer to this is found in the language of the Court of Appeals of New York, in Sixth Avenue R. R. Co. v. Gilbert E. R. R. Co., 71 N. Y. 430:

"It would seem to be preposterous that a party could * * * be deprived of the whole fruit of the judgment by the lawless act of the defeated party pending an appeal, without remedy, that he must stand by and without possibility of redress, see the subject-matter of the litigation destroyed, so that, if he succeeds in affirming the judgment, it will be a barren victory."

Let mandate issue as prayed for.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.

SLOSS, J. I concur in the judgment. While the question is not to my mind free from doubt, I have come to the conclusion that the injunction should be viewed as prohibitive rather than mandatory.

The solution of the problem is not greatly aided by an examination of the authorities cited on either side; for in none of them was there presented a set of facts at all like those before us here. A mandatory injunction is one which commands affirmative action by the defendant. The character of the order as mandatory or prohibitive is not determined by the form of words in which it is cast. Affirmative action may be required by phrases which on their face purport to prohibit. An injunction which restrains directors of a corporation from refusing to recognize the plaintiff as one of their number is mandatory, because in effect it compels them to recognize him. Foster v. Superior Court, 115 Cal. 279, 284, 47 Pac. 58. An injunction which prohibits a defendant in possession of tangible real or personal property from interfering with the plaintiff's taking of possession is mandatory, because it compels the defendant to turn over his possession to the plaintiff. Clute v. Sup. Ct., 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54. The Clute Case is the one upon which the respondents place their main reliance, but I do not think the doctrine of that decision can be extended to fit the requirements of the present situation. Here the defendant is not required to transfer the possession of tangible real or personal property. The defendant was claiming the right to run its cars over certain tracks. This right was disputed, and its exercise enjoined. If we take words in their ordinary meaning, it is difficult to see that any affirmative action is required by an order which merely prohibits a defendant from operating cars over a certain route. The fact that the defendant had for some time been enjoying its asserted right to so run cars does not change the character of the order. If this were not so, almost any injunction against the doing of repeated acts would be mandatory if the performance of the acts had begun and been carried on for any considerable time prior to the application for the injunction. For example, an injunction against the continued operation of a cement plant to the injury of plaintiff's adjacent orange grove (Hulbert v. California Cement Co., 161 Cal. 239, 118 Pac. 928, 38 L. R. A. [N. S.] 436), or against the operation of a ferry claimed to have been conducted in in-

fringement of the plaintiff's franchise rights (Vallejo Ferry Co. v. Solano Aquatic Club, 165 Cal. 255, 131 Pac. 864, Ann. Cas. 1914C, 1197), or one restraining a smelting company from permitting fumes from its works to blow over and upon neighboring lands (People v. Selby S. & L. Co., 163 Cal. 84, 124 Pac. 692, 1135, Ann. Cas. 1913E, 1267), could be regarded as mandatory. But, although in each of the cases just referred to the plaintiff's right to an injunction was bitterly contested, it does not appear to have occurred to the learned counsel representing the various defendants that the injunctions were mandatory, and that their effect could, for this reason, be stayed pending appeal.

I agree, therefore, that this injunction does not command affirmative action, but prohibits the repetition of acts found by the court to be unlawful. It is not made mandatory by the fact that the commission of such acts had gone on for some time before the commencement of the action.

ANGELLOTTI, C. J. I concur in the judgment and in the opinion of Mr. Justice SLOSS. While at first inclined to the view that the facts of this case made applicable the doctrine of the decision in Clute v. Superior Court, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54, consideration of the question in the light of the foregoing opinions has satisfied me that the cases are not analogous in principle. It is only upon the theory that the injunction here involved requires something in the nature of a surrender of real or personal property that such cases as the Clute Case can be held to apply. The argument of respondents, of course, is that such is the situation here, and the facts shown by the record are such as to give some degree of plausibility to the argument made. But I have finally concluded that the argument is not well based. So far as "possession," within the meaning of the rule, may be said to substantially exist as to the municipality, it is not at all affected by the injunction, and the municipality is not required by its terms to abandon or yield possession of anything. The "possession" of the municipality continues unimpaired. The question presented by the proceeding is simply one of the extent of the use the municipality may make of the property, part of which it owns and possesses in common with petitioner, and part of which is owned exclusively by petitioners. Admittedly this is a matter regulated entirely by a contract between the parties, and it is claimed by petitioner and adjudicated for the purposes of the injunction pendente lite that the municipality is violating the terms of the contract by operating cars over the railway tracks that it has no right to so operate in view of the contract. The injunction substantially forbids a use found by the court to be unwarranted in view of the contract, and, of course, forbids this on the theory that the unwarranted use complained of, and found to exist, the operation over the railway of cars that the contract gives it no right to operate thereon, is simply a trespass.

LAWLOR, J. I dissent. Upon the record before us it seems to me that there can be no question but that the injunction changes the status of the city and county of San Francisco in relation to its claim of right to operate the C and D cars over the outer tracks on Market street and the loop on the Embarcadero—a right which had been peacefully enjoyed with the apparent acquiescence of petitioner for some months prior to the commencement of the action. To disturb such a status involves the exercise of mandatory authority.

And "it is thoroughly settled that, while an injunction which merely has the effect of preserving the subject of the litigation in statu quo is not suspended by an appeal (Merced Min. Co. v. Fremont, 7 Cal. 130; Heinlen v. Cross, 63 Cal. 44; Swift v. Shepard, 64 Cal. 423 [1 Pac. 493]; Dewey v. Superior Court, 81 Cal. 64 [22 Pac. 333]; Rogers v. Superior Court, 126 Cal. 183 [58 Pac. 452]), a mandatory injunction, i. e., one which compels affirmative action by the defendant, cannot be enforced pending a duly perfected appeal (Foster v. Superior Court, 115 Cal. 279 [47 Pac. 58]; Mark v. Superior Court, 129 Cal. 1 [61 Pac. 436]; Schwarz v. Superior Court, 111 Cal. 106 [43 Pac. 580]; Stewart v. Superior Court, 100 Cal. 543 [35 Pac. 156, 563]). If an injunction, though couched in terms of prohibition, is mandatory in effect, a proceeding by the court issuing it to punish a violation as a contempt is in the nature of process for the enforcement of the affirmative feature of the writ. * * * If the injunction compels him affirmatively to surrender a position which he holds, and which, upon the facts alleged by him, he is entitled to hold, it is mandatory." Clute v. Superior Court, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54.

See, also, Hagen v. Beth, 118 Cal. 330, 50 Pac. 425.

As to the C and D cars, it was sought to compel the said city and county to abandon the use and occupation of the tracks, which would have had the result of placing the petitioner in the precise position it seeks through a permanent injunction.

On the score of the equities involved, it is to be kept in mind that, if the legal effect of the injunction was to make it prohibitory, its enforcement would have worked a serious injury, not alone to the said city and county, but to the public at large, by reason of the interference with the expeditious transportation of passengers to and from the Panama-Pacific International Exposition, to which service these cars were particularly dedicated. And, as the proceeding may involve the liberty of the persons sought thereby to be brought before the superior court, any doubt touching the question of the character of the injunction should be resolved against the petition.

172 Cal. 815

SUTTER ST. RY. CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 7566.)

(Supreme Court of California. Feb. 9, 1916.)

In Bank. Original petition for a writ of mandate by the Sutter Street Railway Company against the Superior Court in and for the City and County of San Francisco and another. Writ issued.

See, also, 151 Pac. 134.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for petitioner. Matt I. Sullivan and Geo. Lull, both of San Francisco, for respondents.

PER CURIAM. Upon the authority of United Railroads of S. F. v. Superior Court, etc. (S. F. No. 7565) 155 Pac. 463, this day decided, it is ordered that a writ of mandate issue as prayed for.

I dissent: LAWLOR, J.

171 Cal. 234

GRAY v. PACIFIC SUCTION CLEANER CO. (S. F. 6253.)

(Supreme Court of California. Oct. 11, 1915. Rehearing Denied Nov. 8, 1915.)

1. MASTER AND SERVANT ⟸40—BREACH OF EMPLOYMENT CONTRACT — DAMAGES — MITIGATION—BURDEN OF PROOF.

Where, in an action for damages for breach of a contract of employment, the defendant undertook to show in mitigation of damages that it offered to reinstate plaintiff in his position, the burden was on defendant to show the good faith of the offer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 47–49; Dec. Dig. ⟸ 40.]

2. MASTER AND SERVANT ⟸40—FINDING OF COURT—EVIDENCE—SUFFICIENCY.

Evidence in an action for damages for breach of a contract of employment *held* to support the finding of the court that defendant's offer to reinstate plaintiff in his position was made in bad faith.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 47–49; Dec. Dig. ⟸ 40.]

Department 1. Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by William B. Gray against the Pacific Suction Cleaner Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bishop, Hoefler, Cook & Harwood and Finlay Cook, all of San Francisco, for appellant. W. M. Cannon and T. C. Judkins, both of San Francisco, for respondent.

SHAW, J. The plaintiff sued to recover damages for his alleged wrongful discharge from service under a contract whereby the defendant employed him for one year, beginning February 1, 1909, at $250 a month, payable at the end of each month. The findings, in effect, state that the plaintiff was wrongfully discharged on June 9, 1909, that his salary had been paid up to the end of May, 1909, that plaintiff had obtained other employment during the remainder of the year, from which he received $1,000, and that he was entitled, as damages, to the difference between the agreed salary for the eight months and the $1,000 received from the other employment, together with interest on the balances for each month. Judgment was accordingly given in his favor for the sum of $1,000 and $138.70 interest. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

[1, 2] In its defense the defendant undertook to prove, in mitigation of damages, that on June 19, 1909, it offered to take plaintiff back in its service under the contract aforesaid, and to allow the salary to continue as from June 1, 1909, and that the plaintiff refused to accept said offer. The claim is that this offer and refusal defeats the right of plaintiff to recover anything more than nominal damages for the technical breach. The findings state that:

"It is not true that the defendant ever in good faith requested or notified plaintiff to resume his duties in the service or employment of said defendant."

This, if correct, would defeat the attempt to mitigate the damages by the offer of reemployment. The defendant claims that the finding is contrary to the evidence. The evidence on the subject is altogether inferential and circumstantial, but, upon the whole case, we cannot say that the finding was not justified by the evidence. When the contract was made, one John Lee, Jr., was president of the company and the principal stockholder therein. It was at his instance that the plaintiff was employed. He was in the active management of the company for the ensuing two months, and during that period the plaintiff's salary was promptly and regularly paid. Some time in April Lee disposed of part or all of his stock and ceased to control the company's affairs, although he remained president until about June 1st. In the meantime the company was managed and controlled by Otto H. Mohr. At the end of April the plaintiff was given a check for his April salary, which, at his request, was made payable to one Roeder. The check was dishonored, plaintiff had to make it good, and was subsequently reimbursed by Lee. The company paid only $100 of the May salary, and thereupon, about June 8th, the plaintiff began an action for the recovery of the remaining $150 and caused an attachment to issue thereon against the company. The next day he was discharged without cause. Two days afterwards he began this action for damages for the wrongful discharge. Lee resigned as president and disposed of his stock therein to Mohr about the 1st of June. Upon the issuing of the attachment, and knowing himself to be personally liable for a part of the debt, Lee immediately repurchased the stock from Mohr, and again became the president

of the company, and took the active management thereof, and paid the attachment claim. On June 18th he wrote to plaintiff, asking him to call at the company's office. The plaintiff called on June 19th, whereupon Lee declared that he had never been discharged, and asked him to resume his place as an employé of the company. The negotiations then took the form of letters between plaintiff and the defendant; Lee conducting the correspondence of the defendant. Five letters passed between them. In his letter of June 19th, Gray, after stating that the failure to pay his salary was sufficient cause for him to leave the defendant's service, and that his discharge was without cause, stated his position as follows:

"I am willing to waive the breach of my contract of employment with you, and report promptly for duty, provided you give me satisfactory security for the payment of my salary when due. You can readily understand that I cannot waive any rights I now have, and still have constant difficulty in obtaining my salary when earned. * * * Otherwise, I will stand on my rights and endeavor to enforce my suit against you. * * * Your company has in many other ways failed to live up to the letter and spirit of my contract of employment, but I deem it unnecessary to mention them here."

To this, on June 23d, the company answered as follows:

"The company's position is this: That you have never been discharged from your employment, and that your contract for services is in full force and effect, and notwithstanding the fact of your having secured the contract under representations which will not appeal to the court, we are perfectly willing to waive that defense, and have you report and perform your duty as an employé of the company. If you will do so, we do not ask you to waive any rights that you ever had, and expressly agree that your original contract has not been terminated. While there would ordinarily be no objection to secure the payment of your salary under the contract, we will not, as a matter of principle, permit you, our employé, to dictate any new terms of employment. This you may consider as a final refusal on the part of this company to comply with the new terms of employment which you now believe you can impose; but nevertheless, and notwithstanding the large expense to which you have subjected this company, we will say that, while we cannot accept your proposal to resume your duties upon the conditions mentioned in your letter, your position is still open to you under the terms of your original employment. We make this proposition in good faith, and if you refuse it we shall, of course, be obliged to secure the judgment of the court as to the duties of an employé under the facts which will be disclosed on the trial of the case."

On the 28th, Gray replied that he had no fear of any defense the company might have growing out of any representations he had made, that he did not care to resume employment from which he had been discharged, if he should be required to sue monthly for his salary, reiterating his demand for security, and stating that he understood the proposition of the company in its letter of June 23d to be:

"That I shall resume my duties with your company, waiving the breach of contract created by my discharge, and take the chances of collecting my salary when due. This proposition I refuse."

In the next letter, on July 2d, the company stated that plaintiff well knew that Lee was now in control of all the stock and was amply able financially to pay the salary when due, and that in view of this fact:

"We cannot but look upon the reasons for your refusal to resume your duties with this company under your contract, which is still in full force and effect, as a subterfuge. You are wholly mistaken when you assume or pretend to understand our letter of June 23, 1909, as requesting on your part a waiver of the breach of contract claimed by you. We expressly now state that we do not care to have you waive any rights that you ever had or now have as an employé of the company, but we do demand that you immediately resume your employment under your contract and that you discharge your duties required of you thereunder."

The final letter was written by Gray on July 7th, in which he declined to resume service under the contract unless he had additional security for his salary.

It is to be observed that all this occurred after the action was begun. The contents of the letters of the defendant indicate that they were prepared either by the attorneys for the defendant or under their direction. The correspondence and the circumstances shown in the evidence justify the inference that the defendant was much more desirous of laying a foundation for a mitigation of damages in the suit than of taking the plaintiff back into its service. The motive is, of course, apparent. A reasonable person would easily perceive that the continuance of Gray in the service of the company after the occurrences leading up to the beginning of the action would most probably be disagreeable and undesirable to both parties, and would necessarily cause friction between them. Without further discussion, we think it sufficient to say that upon all the evidence the court was justified in drawing the conclusion that the offer was made in bad faith, and that the finding to that effect is supported by the evidence. It is therefore unnecessary to consider the additional questions whether or not the offer as made covered an agreement by the company to reimburse the plaintiff for his costs in the action, if he should resume employment, or whether it was sufficiently clear in that respect. Its apparent ambiguity on that point is one of the circumstances tending to show bad faith.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

29 Cal. App. 293

PERICH et al. v. MAURER et al. (Civ. 1423.)

(District Court of Appeal, Third District, California. Dec. 31, 1915.)

1. EJECTMENT ⟸86 — ENCROACHMENT—BURDEN OF PROOF.

In an action in ejectment and for damages for unlawful detention of the land claimed by plaintiffs, the burden of proof was on plaintiffs to show that defendants were encroaching on their land.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238–245; Dec. Dig. ⟸86.]

2. BOUNDARIES ⟸5—FENCE—"MONUMENT."

A fence claimed by defendants in ejectment for many years to mark the boundary between their lands and plaintiffs' is a "monument."

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 44–46; Dec. Dig. ⟸5.

For other definitions, see Words and Phrases, First and Second Series, Monument.]

3. BOUNDARIES ⟸48 — ESTABLISHMENT — FENCING—EVIDENCE.

Where adjoining landowners, either knowing the true boundary between them, or to determine an uncertain line, erected a fence, which they acquiesced in as marking the boundary for more than 40 years, making improvements accordingly, the line of such fence may be considered to be the true boundary, where there is no satisfactory showing to the contrary.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232–242; Dec. Dig. ⟸48.]

4. BOUNDARIES ⟸47 — ESTABLISHMENT — FENCING.

The building of a fence does not conclude adjoining landowners as to the boundary line, if it was built for temporary purposes without intent to make it the permanent boundary, or was the result of mistake or fraud.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 227–231; Dec. Dig. ⟸47.]

5. EJECTMENT ⟸95—TITLE—SUFFICIENCY OF EVIDENCE.

In an action in ejectment and to recover damages for an encroachment on plaintiffs' land, a holding that plaintiffs failed to establish any title to the land covered by the alleged encroachment, *held* justified.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280–295; Dec. Dig. ⟸95.]

6. EJECTMENT ⟸19—LOCATION OF BOUNDARY —SUFFICIENCY OF EVIDENCE.

In an action in ejectment and to recover damages for an encroachment, even if the evidence as to the fence between the parties was insufficient to locate the boundary line as contended for by defendants, the mere occupancy of the disputed strip of land by defendants was a species of title, prevailing over plaintiffs' entire lack of title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 65–73; Dec. Dig. ⟸19.]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Luka Perich and others against Sadie Maurer and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. A. Gett, of Sacramento, for appellants.
M. S. Wahrhaftig, of Sacramento, for respondents.

BURNETT, J. The action was in ejectment and for $500 damages for the unlawful detention of the land, and the judgment was in favor of defendants for costs. The real question in the case concerns the location of the boundary line between the land of plaintiffs and that of defendants. It was admitted that each of the parties deraigned title from John A. Sutter, the plaintiffs to the "east 35 feet of lot 2 in the lot between N and O streets and Fifth and Sixth streets in the city of Sacramento, and the defendants to the west one-half of lot No. 3" in said block. It is shown very clearly that there is and has been for many years, probably forty or more, a fence on the dividing line as claimed by respondents. Their dwelling house in the rear also extends to this line, and the entire holding of respondents is and has been for many years inclosed. It is the contention, however, of appellants that respondents have included in their inclosure a strip about twenty inches in width belonging to the former, and thus the controversy has arisen.

To establish their claim plaintiffs called D. R. Cate, a civil engineer, who testified:

That in 1911 he surveyed the lots in question; that it was an accurate survey from the "monuments of the city as they were found at the intersection"; that according to said survey the west fence of Mrs. Maurer was over on the land of Mr. Perich; "at N street it is 1.58 feet; 20.3 feet, back from N—that is, toward the alley—it is 1.26 feet. The porch that goes up into the house is 1.9 feet over. The main part of the building back of the porch is over 1.56 feet and the back end of the building is 1.21 feet. The barn which is 129.68 feet from N street is 1.81 feet. That is where the fence joins the barn."

The way he traveled in reaching the foregoing conclusion is indicated by his statement in answering questions of the court to the effect that he found there were 400.95 feet between "stones—between the centers of street intersections"; that, taking forty feet for the half of Fifth street and forty for the half of Sixth street, there would remain 320.95 feet to be divided into four lots or "practically eighty feet and a quarter for each lot." According to this calculation he located the boundary line between plaintiffs and defendants at varying distances, with a maximum, as we have seen, of over twenty inches further east than said fence and improvements would indicate.

For the defendants, one J. C. Boyd, a civil engineer and surveyor of long experience, testified:

"There were practically two surveys of the entire city as a whole; the first in laying out of the city originally by Sutter; subsequently, in 1878, a re-surveying by L. S. Bassett, then city engineer, who attempted to adjust the apparent difference in the property ownership to the line of the streets, for the purpose of street improvement largely, and for the purpose of rectifying errors that were shown to have been made by private surveys of private property, lots and so forth. It had been the custom theretofore to make surveys from the established monuments, from buildings, taking the nearest building as being a corner, approximately correct, and run out from that"; that the Sutter survey was made in 1848 or 1849 and the Bassett

survey in 1878; that these two surveys do not agree, that Bassett attempted to adjust differences through the city, that his policy "was to run a line for several blocks as long as possible, the longer the better, and adjust it with existing conditions"; that there is no way of determining whether this recent survey "conforms to the original survey, the Sutter survey"; that he considered that there was physical evidence that there was a line fence established by agreement between the coterminous owners and "the only monument that we could accept of the old Sutter survey would be the consideration of old buildings"; furthermore, that the Bassett survey "most assuredly is not the accepted survey at this time for the measurement of lots in the city of Sacramento" and "that considered in the light of the original survey, I do not think there is any part of lot 2—as originally surveyed—in this inclosure," declaring this was his professional opinion from a physical examination of the entire block including the said fence and "other collateral evidence."

The foregoing is substantially all of the expert testimony in the case. In addition, as we have stated, the evidence is ample of the occupancy and inclosure for many years in accordance with the claim of respondents, although the proof falls short of title by prescription. The court found specifically:

"That plaintiffs and defendant Sadie Maurer have deraigned their respective titles from the same grantor, to wit, J. A. Sutter; that said J. A. Sutter had surveyed and laid out the blocks and lots in the said city of Sacramento over sixty years ago, and that all the monuments of such survey have been obliterated; that since that time there has been no official survey adopted by the city of Sacramento except that one city surveyor, Bassett, in or about 1878, caused an arbitrary adjustment of the various subdivisions within the then city limits of the said city of Sacramento, so as to facilitate the uniform grading or paving of streets and sidewalks, and such survey of adjustment has been and now is conformed to by the said city of Sacramento, and for the purposes aforesaid; that plaintiffs' claim of 20 inches is based upon the arbitrary survey of the said city surveyor Bassett; that the dividing line, according to said arbitrary survey of Bassett, was not and is not the true line as surveyed and laid out by the common grantor, to wit J. A. Sutter.

"That defendant Sadie Maurer and her grantors have continuously, for a period of over forty years, owned and occupied the land and premises described in her answer to the plaintiffs' complaint herein, and paid taxes therefor; that during all of that time, and probably much longer than such period of time, a fence between her land and that of the plaintiffs was taken and considered by all as the dividing line; that the land of the defendant Sadie Maurer has for that length of time been inclosed, and so inclosed, was all of that time occupied as the land of said defendant and her grantors, described in her answer to plaintiffs' complaint herein; that plaintiffs bought the adjoining land also inclosed by fences, and as so inclosed."

The evidence is meager but, no doubt, it was difficult to secure evidence of the boundary line as located and fixed at the time of the Sutter survey.

[1] As to the showing made by plaintiffs, it is apparent that it was quite incomplete and unsatisfactory. They bore the burden of proof and it is at least doubtful whether there was sufficient evidence to support a finding in their favor. According to the Bassett survey, it is true, they have the legal title to the strip of land, or at least a portion of it, which they claim in their complaint. But the real boundary line was determined by the Sutter survey and the deeds were made in accordance with that survey. To that we must look, therefore, for the location of said line. The Bassett survey was made, admittedly, thirty years subsequent to the other, and we are left largely to conjecture as to the degree of correspondence, if any, between the two. The contention that the later survey is virtually a duplication of the earlier is based upon the assumption that the monuments found at the intersections of the streets by Bassett were recognized by Sutter and that the lots as established by the latter were all of the same size. As to these points the record is entirely silent, and we cannot forbear feeling that the case made out by plaintiffs is hopelessly weak.

[2, 3] We are not required, however, to hold that a judgment in favor of plaintiffs would be unsupported, as there is substantial evidence to uphold the contention of defendants. As to this, we observe the opinion of the expert Boyd that there is no part "of lot 2 as originally surveyed" within defendants' inclosure. There was no objection made that this was not a matter of expert testimony. Besides, the witness proceeded to state certain facts tending at least to support his conclusion. The most important of these, probably, was in reference to the fence which has been claimed for so many years as marking the boundary line. The fence itself is a monument, visible and obtrusive, which has existed for forty years or more, that under the peculiar circumstances of this case is quite persuasive in favor of the claim of defendants. It is a fair presumption that this fence was originally placed upon the true line as then recognized and understood, and it is proper to assume, in the absence of evidence to the contrary, that when the fence was built, either that the contiguous owners had knowledge and information of the lines of the Sutter survey and acted accordingly, or that the true line was uncertain and by agreement it was fixed and marked by said fence. It is not surprising that this fence seemed so important to Boyd and to the trial judge. Its existence for so many years, the recognition accorded it as the true boundary, the acquiescence of the respective owners in the location and the improvements made accordingly, were rightfully regarded as important if not decisive considerations in the determination of a line otherwise obscure and uncertain. It is true that no one testified directly that the boundary was actually located on the ground or that there was uncertainty in reference to it, but such may be fairly inferred from the various facts disclosed, and we may invoke the principle announced in Schwab v. Donovan, 165 Cal. 360, and cases therein cited. This must be especially true since there is no clear and sat-

isfactory showing here that the legal title is different from what is indicated by the fence.

[4] Of course, it is true, as said in Dierssen v. Nelson, 138 Cal. 398, 71 Pac. 456, that—

"the building of a fence does not always conclude the parties as to the boundary line; it may have been built for mere temporary purposes and with no intent to make it the permanent boundary, and it may have been the result of a clear mistake or fraud; but nothing of that kind appears in the case at bar."

Not only does nothing of that kind appear here, but the rational inferences are contrary, as we have seen.

[5, 6] Again, considering the imperfect showing of plaintiffs and the fact that the Bassett survey was repudiated by expert Boyd as a safe criterion by which to gauge the Sutter survey, we may conclude that the court was entirely justified in holding that plaintiffs had failed to establish any title to the property in controversy. Even further, it may be admitted that the evidence as to the fence was insufficient to locate the boundary line as contended for by respondents. The result of this view of the record would be, of course, a vindication of the judgment for defendants for costs. Moreover, without dispute, it was established that defendants and their predecessors are and have been for many years in possession of the property. This mere occupancy is a species of title, which would prevail, manifestly, over no title at all.

We think there is no doubt that considerations of equity as well as the exacting requirements of the law demand an affirmance of the judgment, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 298

McMUNN et al. v. LEHRKE. (Civ. 1409.)

(District Court of Appeal, Third District, California. Dec. 31, 1915.)

1. TRIAL ⇐6—NOTICE OF TRIAL—SERVICE—STATUTE.

Under Code Civ. Proc. §§ 1012, 1013, providing that notices may be served by mail where the person making the service and the one to whom it is to be made have offices in different places by deposit in the post office in a sealed envelope addressed to the person on whom it is to be served at his office or residence, the clerk's notice of trial by postal card to defendant was insufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 13–18; Dec. Dig. ⇐6.]

2. TRIAL ⇐21 — PRESENCE OF PARTY AND COUNSEL—STATUTE.

Code Civ. Proc. § 284, provides that the attorney in an action may be changed before or after judgment upon consent of both client and attorney filed with the clerk or entered upon the minutes, or by order of court on application of either client or attorney after notice to the other. Section 285 provides that, when an attorney is changed, written notice thereof and of the substitution of a new attorney must be given to the adverse party, but that until then he must recognize the former attorney, and section 286 provides that, when an attorney ceases to act as such in an action, the client, before any further proceedings against him, must be required by the adverse party by written notice to appoint another attorney. After setting an action for trial January 26th, when defendant's original attorney was his attorney of record, the court thereafter, on January 21st, reset the case for January 28th, in the absence of such attorney, and without notice of such order to the attorney, who did not appear on the 26th, and, in the absence of defendant and his attorney, and after plaintiff had presented an affidavit from the original attorney that he no longer represented defendant, tried the case and rendered judgment against defendant. *Held*, that the court was without authority to proceed with the trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 39; Dec. Dig. ⇐21.]

3. APPEAL AND ERROR ⇐969—REVIEW—DISCRETION OF TRIAL COURT—PROCEEDING TO TRIAL.

In such circumstances, if it was within the discretion of the trial court to proceed to trial in the absence of defendant or any attorney for him, it was an abuse of its discretion to do so, and defendant would be relieved from his default.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845–3848; Dec. Dig. ⇐969.]

4. ATTORNEY AND CLIENT ⇐75—CHANGE OF ATTORNEY.

A party to an action has the right to change his attorney in the manner provided by the statute.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110–119; Dec. Dig. ⇐75.]

5. ATTORNEY AND CLIENT ⇐88—REPRESENTATION BY ATTORNEY.

Where a party to an action appears by an attorney, he must be heard through him, and, while the attorney remains of record, the court cannot recognize any other as having control of the action.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 161–163; Dec. Dig. ⇐88.]

6. JUDGMENT ⇐136—DEFAULT JUDGMENT—RELIEF.

Code Civ. Proc. § 473, providing for relief from a judgment suffered through mistake, inadvertence, etc., is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 248; Dec. Dig. ⇐136.]

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by James McMunn and another against Albert W. Lehrke. Judgment for plaintiffs, motion for new trial denied, and defendant appeals. Judgment and order reversed.

W. H. Mahony, of San Francisco, for appellant. McNair & Stoker, of San Francisco, for respondents.

CHIPMAN, P. J. This is an action in which plaintiffs seek to recover payments made by plaintiffs upon two contracts in writing by which plaintiffs agreed to buy and defendant agreed to sell two certain five-

acre lots of land. Defendant filed a verified answer admitting the execution of the contracts referred to in the complaint and that payments had been made thereon as alleged, but denied that plaintiffs expended the sum of $30 or any other sum for improvements of said property; alleged that plaintiffs failed to make the payments stipulated to be paid, and "that more than two months elapsed after the nonpayment, * * * and that defendant thereupon elected to terminate the said contracts, and did thereupon terminate said contracts according to the terms of said agreement"; denied that, in May, 1914, or at any other time, defendant requested plaintiffs to relieve him from carrying out the said contracts in consideration of which defendant would either refund to plaintiffs the payments made by them or offer plaintiffs other land in lieu of the land described in said contracts; denied that plaintiffs accepted said or any proposition, or that plaintiffs released defendant from said or any obligation to perform the aforesaid contracts in consideration of the promise then made by defendant or at all; denied that plaintiffs ever demanded of defendant that he either repay said money or offer plaintiffs said or any land in lieu of the land described in said contracts.

The cause came on for trial January 28, 1915, and the court found:

That "all the allegations of the complaint herein are true and sustained by the evidence, and that none of the denials or allegations of the defendant's answer is true, except such thereof as admit allegations in plaintiffs' complaint."

Judgment went accordingly for plaintiffs.

It appears from the engrossed statement on motion for a new trial that:

"The cause was called for trial in the absence of the defendant, and in the absence of counsel representing the defendant on the 28th day of January, 1915, the plaintiffs appearing and being represented by counsel, Messrs. McNair & Stoker, whereupon the following proceedings were had and taken on the following oral and documentary evidence adduced, viz.: The Court: McMunn v. Lehrke. Mr. Stoker: Ready for plaintiffs, your honor. The Court: Proceed. There don't seem to be anybody else here. Mr. Stoker: I desire to read an affidavit, if the court please, and, after reading it, I will ask the clerk to file it. Affidavit of T. J. Butts, one of the attorneys of record in this action, and, as far as that is concerned, he still appears as attorney of record."

Then follows Mr. Butts' affidavit, which was sworn to on January 27, 1915, the day before the trial. The affiant stated:

That "he was one of the attorneys for the defendant above named, and as such prepared the answer which defendant verified, and which was filed in the above-entitled cause" (the answer was filed December 5, 1914); that on his own motion affiant had the cause set for trial for Tuesday, January 26, 1915; that "some time during the month of December, 1914," defendant was in affiant's office in the city of Santa Rosa, "at which time affiant advised defendant that said cause had been set for trial for Tuesday, January 26, 1915; that thereafter, and during the month of December, 1914, the said Albert Lehrke informed this affiant and R. L. Thompson, the associate of this affiant in said action, that he had placed all his matters, including said case, in the hands of an attorney at San Francisco, and that neither this affiant nor the said R. L. Thompson would represent him any further, and that neither this affiant nor the said Thompson has had anything further to do with any of the matters in which the said Lehrke was interested, and that said attorney from San Francisco has been representing him ever since said time."

At the request of Mr. Stoker Mr. Butts' affidavit was read into the record. Mr. Stoker stated that the cause had been regularly set for trial, on motion of defendant's attorney, "for last Tuesday" (January 26, 1915), and, he continued:

"I believe on the court's own motion it was carried over until to-day [January 28th], and the clerk advised me he wrote Mr. Lehrke advising him of that fact. At any rate, I understand Mr. Lehrke was not here either by counsel or in person last Tuesday. The Court: That is a fact, is it, Mr. Clerk? Clerk: Yes, your honor. I dropped him a card stating that the case was set for the 28th, and if he had an attorney to advise him of the matter. The Court: Proceed with the case. Mr. Stoker: Mr. McMunn, be sworn."

And the trial thereupon proceeded to judgment.

Among the grounds now urged for a reversal of the order it is claimed that the court was without jurisdiction to try the cause; that defendant did not appear at the trial through accident and surprise which ordinary prudence could not have guarded against; and that the court erred in proceeding with the trial in the absence of defendant, after it was made to appear that the defendant's attorneys had ceased to act as such. It becomes necessary to state the facts as they were before the court at the hearing of the motion.

In his affidavit filed with the motion for a new trial, defendant deposed:

That he received no notice and had no knowledge that the cause had been set for trial for January 28, 1915, or at any other time, and, had he known that the cause was set for trial, he would have appeared and presented his defense to the action; that after service of summons he employed Messrs. R. L. Thompson and T. J. Butts, attorneys at law at Santa Rosa, as his attorneys in said cause; that they appeared therein and filed a demurrer and answer; that affiant was not informed by T. J. Butts or any other person that the case had been set for trial for January 26, 1915; that since the 5th day of February, 1915, he was informed that on January 21, 1915, the court made a minute order on its own motion, and without notice to affiant, and in the absence of his attorneys, "that this cause be reset for trial for January 28, 1915"; that affiant did not at any time, either by mail or otherwise, have notice or knowledge of the order setting the case for trial for January 28th; that at all times since the commencement of the action he was a resident of Vineburg, in Sonoma county, at which place was an established United States post office, and was "affiant's regular and sole post office address in said county"; that he relied on his said attorneys "to represent him and to protect his interests in said litigation as long as they remained his attorneys of record, and so continued to rely upon said attorneys until on or about February 6, 1915, when for the first time affiant was in-

formed that a trial of said action had been had, and that a judgment had been rendered against said affiant therein; that he then learned that an affidavit made by T. J. Butts, one of said attorneys of said affiant, had been presented to the court upon said trial and read and offered in evidence, wherein it was made to appear that for a long time prior to the date of said trial the said Thompson & Butts had ceased to act for said affiant as his attorneys in said action; that it is not true, as set forth in said affidavit of said Butts, that during the month of December, 1914, the said Butts advised affiant that said cause had been set for January 26, 1915;" that affiant did not inform said Thompson & Butts or either of them that he had placed all his matters, including this action, in the hands of an attorney in San Francisco or elsewhere, and that neither said Thompson nor Butts would represent affiant thereafter; "but in this behalf affiant says the facts were: That prior to December 7, 1914, to wit, on or about the 24th day of November, 1914, affiant expressed to his said attorneys Thompson & Butts, his desire to employ his present attorney herein, but that no substitution or change of attorneys was then or there agreed to; that said attorneys Thompson & Butts then and there expressed their willingness to make the change of attorneys suggested, and stated that they would at a later date provide the necessary and formal substitution to be executed, and that they would in the meantime look after said cause and represent affiant therein until such substitution was made and given; that, affiant relying upon said promise, and not knowing that any immediate proceedings would be taken in said action requiring the attention of counsel, affiant did not apply to the court for an order changing the attorneys herein, and said substitution was for those reasons left in abeyance. And affiant further says: That said Thompson & Butts, did not give, in fact, make or give, their said substitution of attorneys for affiant in said action until the 4th day of February, 1915;" that subsequently, to wit, on the 7th day of December, 1914, the said T. J. Butts, acting as one of the attorneys for affiant in said action, moved the court for an order setting said cause for trial, "and on his said motion the court set the same for trial for January 26, 1915."

In opposition to the motion Mr. Geo. E. Stoker, one of plaintiffs' attorneys, made affidavit, in the course of which he introduced the affidavits and records filed at the hearing of the motion to vacate the judgment, which motion seems not to have been passed upon. Mr. Stoker stated no facts bearing upon the question of his own knowledge, except what took place at the trial already set forth. It appeared that defendant made a deposition at the hearing of the motion last above referred to in which the facts stated are substantially as in the affidavit above shown. He stated, however, that he received communications from Mr. Thompson during the month of December, 1914, but no reference was made in any of them that the cause had been set for trial or that either he or Mr. Butts had ceased to act as his attorneys. He deposed further:

"That before the filing herein of this affiant's answer he made a full, complete, and fair statement to his attorneys Messrs. T. J. Butts and R. L. Thompson of all the facts of the case in the foregoing entitled action, and was by his last-named attorneys informed, and he believes, that he has a good defense to said action upon the merits."

Attorney W. H. Mahony deposed:

That on or about November 24, 1914, he was consulted by defendant in relation to certain litigation then pending in the county of Sonoma, in which defendant was then represented by Messrs. Thompson & Butts, of Santa Rosa; that he informed defendant he would not accept employment before consulting his present attorneys, and that he could not legally act in said matters before "receiving from said present attorneys and filing a substitution of attorney authorizing him to do so"; that thereafter, on or about November 25, 1914, affiant went to Santa Rosa, called upon R. L. Thompson, one of said attorneys, "informed him of defendant's desire to employ him to act as attorney in the matters then being conducted by said Thompson & Butts, including the above-entitled action," and that he did not wish to interfere with their employment unless satisfactory to them; that said Thompson expressed his willingness to be relieved from further responsibility in said litigation, and that, though they had not been paid for their services "he knew that the defendant was responsible and would pay them without trouble"; that on said November 25, 1914, affiant received from said Thompson & Butts substitutions of attorney in two cases other than the present case in which they had been acting for defendant, and at that time the said Thompson promised to forward to affiant by mail substitution of attorney in the present case, and also in one entitled Lehrke v. Nelson; that on November 26, 1914, affiant informed defendant of the result of his interview with said Thompson and that affiant had decided to accept said employment and had accepted substitution in two cases; that affiant had been promised substitution in the present case, "and would assume control as soon as he received said substitution, but could not do so otherwise"; that affiant met said Thompson in the courtroom at Santa Rosa on December 15, 1914, and he again promised to forward to affiant by mail substitution of attorney in said last two mentioned cases, together with the papers in said action; that, said Thompson not having sent substitutions as promised, affiant wrote to him on January 4, 1915, requesting him to send them; that said Thompson replied, on January 6th, by letter (which is set out in the record), stating that since talking with affiant he had concluded he should be paid in the Nelson Case before making the substitution; that he had so written defendant, and that he simply wished to explain the delay "in forwarding papers"; that on January 7, 1915, Mr. Mahony wrote Mr. Thompson explaining that defendant was then in the mountains, where he expected to remain 10 or 12 days; that affiant forwarded Mr. Thompson's letter to defendant immediately; that, on January 13, 1915, affiant met Attorney Butts at Sacramento in the courtroom of the District Court of Appeal and informed him that he had not received from Mr. Thompson the substitution in the McMunn Case "and could not assume to act in said case as attorney for defendant until formally authorized to do so, whereupon said Butts replied that he would see that the substitution of attorney was forwarded to me by Mr. Thompson"; that affiant did not receive said substitution and heard nothing from Mr. Thompson until February 4, 1915, when affiant telephoned said Thompson "to inquire the status of the case at bar, and was told by said Thompson he did not know the condition of the case"; that affiant again requested substitution, and on February 5, 1915, he received a letter from said Thompson inclosing substitutes in the McMunn Case and Nelson Case "with office copies of the pleadings and copies of contract in the first-named case" (McMunn v. Lehrke); that on February 6, 1915, affiant went to Santa Rosa, and then for the first time discovered that a judgment had been entered against defendant, Lehrke, on January

28, 1915; and that affiant at no time prior to February 6, 1915, was informed that the case had been set for trial, or that a judgment had been entered therein.

Attorney Thompson testified that he had not been consulted by defendant relative to the facts, and "only knew in a general way that such a case was in the office"; that his associate, Mr. Butts, had charge of the case and prepared the answer; "that he did not remember that W. H. Mahony, the present attorney for defendant, ever mentioned the case of McMunn v. Lehrke in any of the conversations had between himself and said Mahony, and referred to in said Mahony's affidavit"; that he did remember Mahony's request for substitution in the Nelson Case, which was in witness' personal charge; that when he wrote to Mr. Mahony, January 6, 1915, "he did not have the case of McMunn v. Lehrke in mind," nor later, until receiving Mr. Mahony's letter of February 2, 1915, in which he asked for such substitution, and he thereupon prepared and sent the same to him.

[1, 2] Without attempting to analyze the various statements of facts thus appearing or separating uncontradicted facts from such as are in more or less conflict, it seems to us the learned trial court erred in denying the motion and upon a question not wholly the subject of judicial discretion. It is undisputed that Messrs. Thompson & Butts were defendant's attorneys of record when the case was set for trial for January 26, 1915; that they were his attorneys of record when the court, of its own motion, on January 21st, reset the case for January 28th, in their absence and in the absence of defendant, and there is no evidence that they were notified of the order of January 21st, or that they knew that the cause was to be tried on January 28th. The clerk stated, in response to the inquiry of the court whether the defendant had been advised of the trial, that he "had dropped him a card stating that the case was set for the 28th, and if he had an attorney to advise him of the matter." This was not legal service of notice such as the law requires, nor was service made upon defendant's attorneys, the persons upon whom it should have been made. The affidavit of Mr. Butts was introduced by Mr. Stoker as "affidavit of T. J. Butts, one of the attorneys of record in this action, and, as far as that is concerned, he still appears as attorney of record."

It is true that Mr. Butts knew the case was set for January 26th, and he deposed that some time in December he so told defendant, and it is urged that, had the attorneys for defendant appeared on the 26th, they would have learned of the order of January 21st resetting the case for January 28th, and defendant cannot now be heard to complain of their default. But we do not think that knowledge of the order of January 21st can be imputed to them because of their failure to appear on January 26th. The order setting the trial for that day was superseded, and was no longer in effect. Both defendant and his attorney Mr. Mahony testified that they had no notice or knowledge that the case was set for trial for January 28th, and it does not appear that either Mr. Thompson or Mr. Butts had notice.

Section 284 of the Code of Civil Procedure provides as follows:

"The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: 1. Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes; 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."

Section 285 provides that:

"When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney."

Section 286 provides that:

"When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person."

It is undisputed that early in December, 1914, defendant was endeavoring to dispense with the services of Messrs. Thompson & Butts and to engage Mr. Mahony. The latter made reasonable efforts to be substituted as defendant's attorney by applying to defendant's attorney of record, who refused to make the substitution, though claiming that they had ceased to be defendant's attorneys. Later, and before the trial, they promised to make the substitution, but failed to do so. Mr. Mahony took the position rightfully that he had no authority to act until substituted in their stead, and he so advised defendant. In the meantime, without notice to either Thompson & Butts, or Mahony, or defendant, the cause came on for trial, and was tried in the absence of defendant and his attorneys. The only service of notice of the trial attempted was by the clerk, as we have seen, who testified that he "dropped a card" to defendant "stating that the case was set for the 28th." But this was no evidence at all of notice to defendant. The statute points out the method by which service by mail is to be proven (sections 1012, 1013, Code Civ. Proc.), and it was not followed. If plaintiffs knew that Thompson & Butts had "ceased to act" as defendant's attorneys, it was plaintiffs' duty before any further proceedings were had against defendant to require defendant "by written notice to appoint another attorney or to appear in person." Section 286, Code Civ. Proc. If plaintiffs did not know that Thompson & Butts had "ceased to act," notice of the trial should have been served upon them. Section 285,

Code Civ. Proc. But the day before the trial plaintiffs for some unexplained reason obtained Mr. Butts' affidavit from which it appeared that neither he nor Mr. Thompson represented defendant, and plaintiffs' attorney stated to the court that they were still defendant's attorneys of record. The court therefore was advised, when the case was called, that the defendant had attorneys of record who, in the language of section 286, supra, had "ceased to act as such" and were not present, and that the defendant was without a representative. In such a case the statute provides that, before any further proceedings are had against a party thus situated, the adverse party must, by written notice, require such party to appoint another attorney or to appear in person.

[3] It seem to us that the court was without authority to proceed with the trial. We are further of the opinion that, if it was within the discretion of the court so to proceed, it was, under all the circumstances, an abuse of discretion to do so, and that defendant should be relieved from the consequence of his default.

[4, 5] A party to an action has the right to change his attorney; "yet such change must be effected in the manner provided by the statute" (Gill v. S. P. Co., 154 Pac. 478); "and, where a party to an action or proceeding appears in court by an attorney, he must be heard through him" (Id.). "As long as he has an attorney of record in an action, the court cannot recognize any other as having management or control of the action, and the party can act only through his attorney." Boca & Loyalton R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718. In the case of Toy v. Haskell, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70, the plaintiff, without the knowledge or consent of his attorneys of record, signed and delivered to defendant's attorneys a written stipulation authorizing a dismissal of the case, which was accordingly done. The lower court denied a motion to set aside the judgment. On appeal to the Supreme Court the order was reversed, the court saying:

"A party must be heard in court through his attorney, when he has one, and the court has no power or authority of law to recognize any one in the conduct or disposition of the case except the attorneys of record."

In Nicol v. San Francisco, 130 Cal. 288, 62 Pac. 513, plaintiff's attorney died, and plaintiff appointed an attorney who appeared at the hearing of the motion to dismiss the action. He challenged the jurisdiction of the court because of failure to serve the notice required by section 286 of the Code of Civil Procedure. The court said:

"If the plaintiff had failed to appear at the hearing upon the 15th day of April, either personally or by attorney, then the lack of service of such a notice would probably have been good cause to justify the invoking of the aforesaid provisions of the statute."

But because of his appearance by attorney and his having litigated the matter upon its merits, the court said:

"Any question of lack of jurisdiction upon the part of the court to proceed with the hearing is eliminated from the case."

[6] Speaking of the remedial provision of the statute found in section 473 of the Code of Civil Procedure, the court said, in Melde v. Reynolds, 129 Cal. 308, 61 Pac. 932:

"It is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure. The discretion of the court ought always to be exercised * * * in such a manner as will subserve rather than impede or defeat the ends of justice."

The judgment and order are reversed.

We concur: BURNETT, J.; HART, J.

29 Cal. App. 270

PEOPLE v. LIM FOON. (Cr. 323.)

(District Court of Appeal, Third District, California. Dec. 28, 1915.)

1. CRIMINAL LAW ⇐560—EVIDENCE—SUFFICIENCY—CIRCUMSTANTIAL EVIDENCE.

In view of Code Civ. Proc. § 1828, recognizing the distinction between primary and secondary, direct and indirect evidence, section 1831, defining "direct evidence," and section 1832, defining "indirect evidence," the degree of proof necessary to a conviction is precisely the same whether the proof relied on is direct or circumstantial, so that whatever the character of the evidence, and whether the direct testimony of an eyewitness to the fact in dispute, or evidence of circumstances from which the existence of such fact may be inferred, if relevant and competent, a conviction will be justified if the guilt of the accused is shown beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1266; Dec. Dig. ⇐560.]

2. CRIMINAL LAW ⇐784 — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.

In a trial for homicide, an instruction that there is nothing in the nature of circumstantial evidence rendering it less reliable than other classes of evidence, a man may as well swear falsely to an absolute knowledge of the facts as to a number of facts if true, the facts on which the guilt or innocence depends must follow, and clearly explaining that either direct or circumstantial evidence must establish guilt beyond a reasonable doubt, while ungrammatical and lacking in clearness, was not misleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883–1888, 1922, 1960; Dec. Dig. ⇐784.]

3. CRIMINAL LAW ⇐789 — INSTRUCTIONS — REASONABLE DOUBT—IDENTITY.

In a trial for murder, a requested instruction that if the one who fired the fatal shot was a man taller and heavier than the defendant, notwithstanding testimony that it was defendant, that would raise such a conflict as to the identity of the person as to raise a reasonable doubt and require an acquittal, was properly refused, as it merely stated the obvious proposition that, if the jury should believe that some other person than defendant shot and killed deceased, defendant should be acquitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1851, 1880, 1904–1922, 1960, 1967; Dec. Dig. ⇐789.]

4. Criminal Law ⇐763, 764—Instructions—Reasonable Doubt—Province of Jury.

Such instruction, if intended to state that a conflict as to defendant's guilt arose in the evidence by reason of the positive statements of certain witnesses that a man not fitting his description did the shooting, and of the expressions of other witnesses claiming to have seen the trouble that defendant was one of the men who shot deceased, creating reasonable doubt of guilt, was improper, as invading the province of the jury, who alone have the power to determine a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1748, 1752, 1768, 1770; Dec. Dig. ⇐763, 764.]

5. Criminal Law ⇐829 — Requested Instruction—Given Instruction.

In a trial for murder, defendant's requested instruction on the question of alibi, fully covered by a part of the general charge, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⇐829.]

6. Criminal Law ⇐829 — Requested Instruction — Given Instruction — Reasonable Doubt.

In a trial for murder, a requested instruction that, if a single juror had a reasonable doubt of defendant's guilt arising out of any part of the evidence, they could not convict, was properly refused, where the jury in the general charge were told that, if they entertained a reasonable doubt of defendant's guilt upon a single fact necessary to constitute the crime, it was their duty to give the defendant the benefit of such doubt and acquit; since the court must assume that the jury must have understood that, if on the evidence any one juror entertained a reasonable doubt, it would be his duty not to agree to a verdict of guilty, and to adhere to such doubt while he remained in that state of mind, and as the court could not assume that a juror entertaining a reasonable doubt of guilt will yield his views merely because the majority of the jurors, or all but himself, agree upon the defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⇐829.]

7. Criminal Law ⇐829 — Requested Instruction — Given Instruction — Dying Declaration.

In a trial for murder, a requested instruction that dying declarations should be received with caution, and that, unless it appeared that the declaration in evidence that defendant had fired the fatal shot was made under a clear opinion of impending death, it could not be considered in evidence, and that it could not be given as much weight as if testified to in health and subject to cross-examination, was properly refused, where the court admonished the jury to receive the declaration with caution because it had not been made under oath with an opportunity for cross-examination, and that declarant might be influenced against defendant, and that declarant's physical condition might affect its reliability.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⇐829.]

8. Criminal Law ⇐814 — Requested Instruction—Evidence to Support—Dying Declaration.

In such trial, a requested instruction that, if the jury found that defendant in making such declaration was actuated by vengeance upon some person whom he believed to be a member of a society which was an enemy to the society to which deceased belonged, the jury should disregard such declaration, was properly refused, where there was no evidence that in making such declaration deceased was actuated by vengeance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. ⇐814.]

9. Homicide ⇐213—Evidence—Dying Declaration—Statute.

Under Code Civ. Proc. § 1870, subd. 4, providing that the declaration of a dying person made under a sense of impending death, respecting the cause of his death, shall be admissible in criminal actions, the declarant's belief or nonbelief that, if he were to falsely accuse another, he would subject his soul to punishment, need not be shown.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 445–447; Dec. Dig. ⇐213.]

10. Homicide ⇐219—Evidence—Dying Declaration—Credibility.

If it should appear that the declarant was wholly obtuse to religious convictions, and entertained a complete disbelief in a future spiritual existence, or any theory of rewards and punishments, the credibility of his declaration would be greatly impaired, and should be viewed with caution; but it could not be presumed merely because declarant, a Chinaman, was an adherent of a non-Christian religion, that he did not as religiously believe in future rewards and punishments as those believing in the Christian religion.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 460; Dec. Dig. ⇐219.]

11. Witnesses ⇐282½ — Cross-Examination—Scope—Repetition.

In a trial for murder, where a witness for the people testified that he was near the scene of the shooting and that defendant fled northward, and was asked on cross-examination as to the direction in which defendant fled and how many feet he was away from defendant, the court's stopping of further cross-examination on that point, because it had been covered, was within its sound discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 928, 990–992; Dec. Dig. ⇐282½.]

12. Witnesses ⇐282½ — Cross-Examination—Objection.

In such case, the statement of the witness that defendant ran from the place of the shooting in a "northerly" course, though somewhat confusing upon that point, sufficiently brought it out to make it available to the defendant to impeach such witness' testimony and to justify a limitation of further questioning to bring out the ultimate fact that defendant ran in a northerly direction.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 928, 990–992; Dec. Dig. ⇐282½.]

13. Criminal Law ⇐942 — New Trial — Newly Discovered Evidence Impeaching Adverse Witnesses.

A motion for new trial, after conviction of murder in the first degree, on the ground of newly discovered evidence, in which defendant, in support of his alibi, attempted to show that at the time of the shooting he was in a certain store, in which he was corroborated by a number of other witnesses who were rebutted by witnesses for the state, would not be granted, where the offered evidence merely went to impeach the witnesses for the state who had rebutted defendant's evidence tending to establish an alibi.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. ⇐942.]

14. CRIMINAL LAW ⊂939 — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—MOTION.

A motion for a new trial upon the ground of newly discovered evidence is regarded by the courts with much suspicion and disfavor; as the temptations are so strong to make a favorable showing after a defeat in a bitter controversy, and the circumstance that the testimony had just been discovered when it is too late to introduce it is so suspicious, that courts require the strongest showing of diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318–2323; Dec. Dig. ⊂939.]

15. CRIMINAL LAW ⊂938, 1156 — APPEAL — DISCRETION OF TRIAL COURT—MOTION FOR NEW TRIAL.

The granting of a motion for new trial on the ground of newly discovered evidence is a matter addressed to the sound discretion of the trial court, and its denial of a new trial on that ground will not be reversed unless it clearly appears that it abused its discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306–2315, 2317, 3067–3071; Dec. Dig. ⊂938, 1156.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Lim Foon was convicted of murder in the first degree, his motion for a new trial was denied, and he appeals. Judgment and order affirmed.

Stephen N. Blewett and George F. McNoble, both of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted in the superior court of San Joaquin county of the crime of murder of the first degree, the jury fixing the penalty at imprisonment for life. Section 190, Pen. Code. This appeal is prosecuted by the defendant from the judgment and the order denying him a new trial.

The homicide occurred in the Chinese quarters of the city of Stockton, on the 7th day of March, 1915, and the party killed was an aged Chinese by the name of Yip Suey. There is testimony showing that the shooting resulting in the killing of Yip Suey took place a short time after the noon hour of the day mentioned; that it was witnessed by several white men and a number of Chinese; that two Chinamen, the defendant and another, the latter not having been captured, simultaneously shot into the body of the deceased, one of the Chinamen so shooting being approximately on the right and the other likewise on the left side of their victim; that, after the shooting, both the Chinese engaged in the shooting ran from the scene thereof, the defendant going in a southerly direction and throwing the pistol with which he did the shooting on the sidewalk or street as he ran, and the other going rapidly in the opposite direction; that the defendant was pursued and ran into a building, into which he was followed by some citizens and was finally apprehended near a chicken house in the rear of the building into which he fled and which was occupied by Chinese; that, when arrested, he was freely perspiring and bore the appearance of being nervous; that, shortly thereafter, the assistant district attorney brought the defendant into the presence of Yip Suey and asked the latter if he knew the Chinaman so brought before him, and Yip Suey, who had previously stated that he expected to die from his wounds, declared, pointing at said Chinaman, "Yes, him man shoot me"; that Yip Suey shortly thereafter expired from the effects of his wounds; that an autoptical examination disclosed that into his body six shots had been fired; and that at least two of the wounds so produced were necessarily mortal. The defendant at the trial claimed that he had nothing to do with the shooting, was not present at the scene of the homicide when it occurred and therefore sought to establish an alibi.

It is not claimed on these appeals that the verdict is not sufficiently supported by the evidence, but it is contended that alleged errors in the rulings upon the evidence and in the action of the court in giving and in refusing to give certain instructions so seriously militated against the substantial rights of the accused at the trial as to compel a reversal of the judgment and the order. It is further insisted that the court should have granted a new trial on the ground of newly discovered evidence, and that its refusal so to consider and determine the effect of the showing made in that particular constituted an abuse of its discretion, and therefore prejudicial error.

The assignments involving attacks upon the action of the court with respect to certain instructions are numerous, and some of them merit, and will receive, special notice.

[1, 2] 1. The first point under this head is directed against an instruction in which the trial court described to the jury the two classes of evidence—direct and circumstantial—which are permissible in courts of justice for the proof of a disputed fact, and upon either of which, in a criminal case, a verdict of conviction may be predicated, if it measures up to the requirement of the rule in that class of cases that guilt must be established to a moral certainty and beyond a reasonable doubt. The particular part of said instruction to which the strictures of the defendant are confined is as follows:

"There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence; a man may as well swear falsely to an absolute knowledge of the facts as to a number of facts, if true, the fact on which the guilt or innocence depends must follow."

In the same instruction, the court explained to the jury with clearness that in any case, whether the proof relied upon to establish guilt was direct or merely circumstantial, a conviction could not be justified

unless such proof was such as to establish the fact of guilt beyond a reasonable doubt.

Instructions explaining to juries in criminal cases the distinction between direct and circumstantial evidence have often been given in substantially the same language as the one challenged here and have as often been approved by reviewing courts. People v. Morrow, 60 Cal. 142, 144; People v. Wilder, 134 Cal. 182, 184, 66 Pac. 228; People v. Simmons, 7 Cal. App. 559, 565, 566, 95 Pac. 48. And such an instruction may with propriety be given in all appropriate cases, for there is a distinction between those two classes of evidence—an inherent distinction which is expressly recognized and explained by our laws (sections 1828, 1831, and 1832, Code Civ. Proc.)—which should be explained to juries with the further explanation that the degree of proof essential to a conviction is in no sense or measure influenced by such distinction. The common notion with respect to the proofs in criminal cases is that a stronger case should be made before a conviction is justified where, for a conviction, sole reliance is placed upon evidence of purely a circumstantial character. This is, of course, an erroneous notion; the true rule being that the degree of proof necessary to a conviction is precisely the same whether the proof relied upon for a conviction be direct or circumstantial. In other words, whatever may be the character of the evidence, whether it be the direct testimony of an eyewitness to the fact in dispute or evidence of circumstances from which the existence of the fact in dispute may be inferred, it being relevant and competent, a conviction will be justified and sustained if the guilt of the accused is shown to a moral certainty and beyond a reasonable doubt, and, as stated, it is with eminent propriety that the jury should be enlightened upon these important matters.

While the language above quoted from the instruction in question here, as it appears in the record, is lacking in that clearness of expression which should always characterize instructions to juries, and, indeed, is not strictly grammatical, because of the omission to have inserted in the part quoted above the words, "from which," immediately following the phrase, "as to a number of facts," still, taken as a whole, the instruction appears to be sufficiently clear in the expression of its true meaning as not to have had the effect of misleading the jury with respect to the proposition which it was the purpose and intention to explain by it.

[3] 2. The following instruction was proposed by the defendant, but disallowed by the court:

"* * * If you believe from the evidence in this case that the person who fired the shots which caused the death of Yip Suey was a man taller and heavier than this defendant, notwithstanding that certain witness or witnesses may testify that the person who fired such shots was said defendant, nevertheless there would exist such a conflict as to the identity of the person who fired such shots as to raise a reasonable doubt as to whether or not it was the defendant, then it is your duty to acquit this defendant."

The instruction was properly refused. Paraphrased, and thus reduced to its actual meaning, it merely states to the jury the very obvious proposition that, if they should believe from the evidence that some other person than the defendant shot and killed Yip Suey, the accused would be entitled to an acquittal, and, of course, in that case he would be, and his acquittal obviously the result of a total failure to establish guilt beyond a reasonable doubt or at all and necessarily the complete repudiation of contrary proof, and not upon the proposition that a reasonable doubt existed by reason of a conflict between the evidence convincing them that some other person did the shooting and the testimony involving an expression of the opinion of certain witnesses that the defendant was the guilty party.

[4] Perhaps, however, the real purpose of the instruction was to state that a conflict as to the defendant's guilt arose in the evidence by reason of the positive statements of certain witnesses that a man not fitting his description did the shooting and testimony showing the expression of the belief by other witnesses who claimed to have seen the trouble that the defendant was one of the men who shot the deceased, and that the conflict so arising in the proofs was sufficient to create a reasonable doubt of the defendant's guilt. But, assuming that to have been the proposition so sought to be stated, the instruction would still be vulnerable and wholly improper, since clearly it would involve a trespass upon the province of the jury, with whom alone rests the right or the power to determine for themselves whether there exists under the evidence reasonable doubt of the defendant's guilt.

[5] 3. The instruction requested by the defendant but rejected by the court, upon the question of the alibi interposed by the defendant, was fully covered by an instruction which constituted a part of the court's general charge. Instructions upon particular propositions are not required to be repeated, and for this reason the court was justified in disallowing the instruction in question.

[6] 4. The defendant proposed an instruction which would have told the jury that if, after considering all the evidence, "a single juror has a reasonable doubt of the defendant's guilt, arising out of any part of the evidence, then they cannot convict him." The court rejected said instruction, and it is here claimed that it was prejudicial error to do so. The court properly disallowed the instruction upon the ground, as assigned by it, that the proposition therein stated was covered by the charge. The charge was, of course, addressed to all the jurors, and therein it was declared that, if the jury entertained a reasonable doubt of the defendant's guilt or "upon a single fact or element neces-

sary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and acquit him." We must assume that from that language the jury must have understood that if, after a consideration of the evidence, any one of them entertained a reasonable doubt of the defendant's guilt or upon any element or fact the proof of which was essential to a conviction, it would be his duty not to agree to a verdict of guilty, and to adhere to his conviction so long as he remained in that state of mind. We are not authorized to assume that a juror who entertains a reasonable doubt of the guilt of a person charged with a criminal offense will yield his views merely because a majority of the jurors, or all but himself, have agreed upon the guilt of the accused. Such an assumption would involve an imputation against the intelligence of the average person competent under the law to serve in that important capacity which is not warranted, and such would necessarily be the assumption if we were required to hold that the jurors in this case did not understand from the court's general charge that a concurrence of all was requisite to reach a verdict, and that none was required or, indeed, justified, in concurring in a verdict of guilty if he entertained a reasonable doubt of the defendant's guilt under the evidence.

[7, 8] 5. The defendant requested the court to submit to the jury an instruction in which it was declared that dying declarations should be received with caution, and that, unless it appeared that the declaration made by the deceased just prior to his death accusing the defendant of having fired the fatal shots, and which declaration was admitted in evidence, was made "under a clear opinion of impending death, you cannot consider such declaration as evidence in this case; and the court cautions you * * * not to give as much weight to such evidence as if the same statement had been testified to in health and subject to cross-examination." The instruction further stated that, if the jury believed that the deceased "had no fear of God" and "had no conception of life after death wherein he would receive punishment for failure to tell the truth," then his alleged dying declaration should be disregarded "for the reason that there was no compelling cause to tell the truth in the hour of his impending death." The court refused to adopt the instruction on the ground that there was "no evidence upon which to base part of the instruction—proper portion covered by instruction elsewhere given."

Another of the instructions proposed by the defendant bearing upon the dying declaration stated that, if the jury found that Yip Suey was actuated, in making said declaration, by the desire to wreak vengeance upon some person whom he might believe was a member of a society or a relative of a member of such society which was an enemy of a society to which said Yip Suey belonged, * * *" it would then be their duty wholly to disregard and place no reliance upon such declaration. The court disallowed said instruction on the ground that there was no evidence to which it was pertinent.

The court committed no error by thus disposing of the proposed instructions. An instruction was embodied in the court's charge which admonished the jury to receive with caution the evidence of the dying declaration, "for the reason that the declarant had not been administered an oath, and an opportunity for cross-examination has not been afforded the defendant, and that the declarant might be influenced against the defendant," and for the further reason that the physical condition of the deceased, when making the statement, might have been such as to render questionable the reliability of his declaration.

The instruction given, as will be observed, fully covered the portion of the rejected instruction cautioning the jury, for reasons therein stated, to scrutinize the dying declaration with more than the usual care with which ordinary testimony is received and considered. There was no testimony justifying the implication contained in the rejected instruction that the deceased, in accusing the defendant of having fired the shots into his body, was actuated by "the desire to wreak vengeance upon some person whom he might believe was a member of a society or a relative of a member of such society which was an enemy of the society or tong to which said Yip Suey belonged."

[9] Nor was there any testimony from which it may be determined what the declarant's belief was as to a "hereafter," or whether be believed or did not believe that he would, were he to falsely accuse another, subject his soul to punishment after his immortal self had been separated from the flesh. And our law does not require that such fact should be shown to render the declarant's statement admissible.

If it is made to appear, as it was made to appear here, that the declaration was made by a dying person under a sense of impending death, and that such declaration related to the cause of his death, then it is sufficient. Section 1870, subd. 4, Code Civ. Proc.

[10] Undoubtedly, if it were made to appear that the declarant was wholly obtuse to religious convictions, and that he entertained complete disbelief in a future spiritual existence or had no regard whatsoever for the theory of rewards and punishments in the hereafter, his statement in extremis would not be supported by those considerations which may naturally be supposed to exercise an overruling influence upon the minds of men in such circumstances, and in such case, even if, nevertheless, the competency of the declaration as evidence would not be destroyed, the credibility of it would be greatly impaired, and when given under such cir-

cumstances it should never be submitted to a jury unaccompanied by an explicit admonition by the court that it should be viewed with great caution. In this case, however, no less than in any other, it is not to be presumed, merely because the declarant might have been an adherent of a heathenish religion—a fact which may reasonably be implied from the race to which he belonged—that he did not as religiously believe in "future rewards and punishments" as those who believe in the Christian religion, and that a statement made by him in the face of impending death would not be attended by the same degree of solemnity or given under the same conception of consequences as that under which a statement under like circumstances would be made by one charged with religious convictions of a more rational and civilized order. In any event, as stated, the court sufficiently enlightened the jury with respect to their duty in considering the dying declaration admitted in evidence, and for the reasons assigned by the court the instructions proposed by the defendant upon that subject were properly rejected.

The refusal to allow some other instructions proposed by the defendant is criticized; but said instructions involved, substantially, a repetition of the statement of principles contained in the rejected instructions which we have above noticed, and it is therefore unnecessary to give them special attention herein. In concluding on this branch of the case, we may observe that the court's charge to the jury, as a whole, covered every pertinent point or issue developed in the case correctly and in clear language, and that in this regard, as in all others, the court's conduct of the trial was notably characterized by fairness and impartiality.

[11, 12] 6. The witness Corbett, testifying for the people, said that he was near the scene of the shooting when it occurred, and that the defendant, in fleeing therefrom after the firing had ceased, ran north on Hunter street and entered a house north of the house in which the defendant was found. On cross-examination, after subjecting the witness to extended questioning as to the direction in which the defendant fled from the scene of the shooting, he was asked:

"Well, about how many feet were you from him [defendant] when he was running towards you, when you got over here?"

The court thereupon interrupted, addressing the attorney:

"Mr. Blewett, you have gone over that now several times."

Mr. Blewett retorted:

"Well, this is very important."

"The Court: I know, but you can't go over it and over it—repeat every question. You had him say he was above five feet from the south line. Go on to a different examination. The court will not permit you to take the time to go over and over it. I want to give you a full opportunity for cross-examination, but not by going over and over."

It is now claimed that the action of the court in thus limiting the defendant's right to fully cross-examine the witness upon the lines then being pursued constituted prejudicial error, particularly in view of the fact that the testimony of said witness was of singularly vital importance; he having testified that he witnessed the tragedy and identified the defendant as one of the assailants. It is argued that, if permitted to proceed with his cross-examination upon the lines upon which he was questioning the witness when interrupted by the court and further cross-examination upon those lines curtailed, the attorney for the accused would have probably succeeded in making the witness definitely and unqualifiedly say that the defendant, upon the cessation of the shooting, ran in a northerly direction from the scene thereof, and that thus the verity of his statement that he witnessed the shooting would have been greatly impaired, if, indeed, his testimony in that regard not altogether impeached, inasmuch as the defendant was found, shortly after the shooting, in the rear of a building south of the point where the shooting took place.

As has been shown, the question asked by the attorney when the court made the order or ruling complained of was:

"Well, about how many feet were you from him when he was running towards you, when you got over here?"

Precisely the same question had several times been previously propounded to the witness by the defendant's attorney and as many times answered. At page 226 of the transcript, on cross-examination, it will be found that Corbett stated that the defendant, in his flight, had passed "close" by where the witness was standing; at page 228, it will be seen that the witness, on cross-examination, testified that the defendant passed him, or where he was standing, at a distance of about five feet; at page 229, it will be observed that the same question was put to the witness, and that he replied that the accused passed him at about a distance of five feet from where he (witness) was standing. At page 231 of the transcript will be found the question which is responsible for the present discussion.

Even if it might justly be said that the allowance of further questioning of the witness as to the matter to which the question was addressed would have ultimately led, as counsel contend would have been the inevitable result thereof, to a positive statement of the witness that the defendant ran from the place where the shooting occurred in a northerly course, and thus the force of the witness' testimony that he saw the shooting destroyed an answer to the objection that the witness, as seen, did testify that the defendant ran in a northerly direction from the point at which the shooting was done, and, although his testimony thereafter appears to be somewhat confusing or hazy upon that

point, the fact was nevertheless sufficiently brought out to be available to the defense for any purpose to which it might be advantageously put in argument to the jury. But it is manifest that the court's order curtailing further cross-examination did not, nor was it intended to, have the effect of putting an end to the questioning of the witness further as to the direction in which the defendant ran from the scene of the homicide, but that the sole purpose of the order was merely to foreclose further inquiry as to the question of how near the defendant went to the point where the witness stood as he (the defendant) in his flight passed the former. And, very clearly, the witness had been sufficiently questioned as to that fact, and the court as clearly remained within the bounds of a sound judicial discretion in stopping further cross-examination upon that point. As was said in Phenegar v. Paolini, 149 Pac. 1008, 1012:

"There must be a limit somewhere to the examination of a witness upon a particular subject, and where, as seems to have been true here, it is evident to the trial court, after a full and exhaustive examination of the witness upon the subject concerning which particular information is desired or desirable, that nothing more can be accomplished by continuing the inquiry than has already been accomplished, then it is clearly within the discretion, and indeed the duty, of the court to put an end to the further prosecution of the examination."

See, also, Reed v. Clark, 47 Cal. 194, 201; People v. Mooney, 132 Cal. 13, 17, 63 Pac. 1070; People v. Harlan, 133 Cal. 16, 22, 65 Pac. 9; People v. Rader, 136 Cal. 253, 254, 68 Pac. 707.

[13] 7. One of the grounds upon which the defendant pressed his motion for a new trial was that of newly discovered evidence, and in support of the motion upon that ground a number of affidavits were filed and presented to the trial court.

The defendant, in support of his alibi, attempted to show that, at the time of the shooting, he was in the store of the Quong On Chung Company, at 138 Washington street, and he testified that he was at said store, and therein was corroborated by a number of other witnesses, among whom was one Lem Yeong. In rebuttal, the people called to the stand two Chinese, Hong Lun and Lee Loy, who claimed to have been in the store of the Quong On Chung Company at the time of the shooting, and who testified that neither the defendant nor his witness Lem Yeong was in said store at said time. Four of the affidavits filed by the defendant in support of his motion for a new trial on the ground mentioned were made by as many different Chinese, who therein deposed that, when the shooting occurred, Hong Lun was not a farmer, as he had testified, but was a gambler, and that when the shooting occurred he was in a gambling house at 131–133 East Washington street, which is located at some distance from the store above named. Two of the affidavits so filed were by two Chinese, who therein declared that they were in a rooming house above the store of the Quong On Chung Company, that they heard the shooting, and that at that time Lee Loy was with them in a room in said rooming house. Two other Chinese made affidavits, which were in among those filed, in which they deposed that they saw Lee Loy, immediately after the shooting, come out of the rooming house above mentioned. Mr. Blewett, attorney for the defendant, made and filed an affidavit in which, after showing the relevancy and alleging the importance of the testimony of the several Chinese affiants, he declared that he had no knowledge of the existence of the evidence to which the affidavits related at the time of the trial, and that he "could not by the use of reasonable diligence have discovered and produced the same upon the former trial."

[14] It is plainly manifest that the effect of the evidence claimed to be "newly discovered" and referred to in the affidavits would merely be to impeach the statements of Hong Lun and Lee Loy that the defendant was not in the Quong On Chung Company store when Yip Suey was shot.

"A motion for a new trial upon the ground of newly discovered evidence has always been regarded by the courts with a great deal of suspicion and disfavor. It has been said that 'the temptations are so strong to make a favorable showing after a defeat in an angry and bitter controversy, and the circumstance that the testimony had just been discovered when it is too late to introduce it is so suspicious, that courts require the very strictest showing of diligence.'" People v. Freeman, 92 Cal. 359, 366, 367, 28 Pac. 261, 264; People v. Sutton, 73 Cal. 243, 15 Pac. 86.

[15] Hence, it has always been held that whether a motion for a new trial should or should not be granted upon the ground of newly discovered evidence is a proposition which is addressed to the sound discretion of the trial court, and that the denial of a new trial on that ground will not be reversed unless it clearly appears that the court abused its discretion by its action in that regard. People v. Loui Tung, 90 Cal. 377, 27 Pac. 295; People v. Tallmadge, 114 Cal. 427, 430, 46 Pac. 282. And, furthermore, where the only office of newly discovered evidence is to impeach adverse witnesses, it is insufficient as a basis for granting a new trial. People v. Loui Tung, 90 Cal. 377, 27 Pac. 295; People v. Goldenson, 76 Cal. 328, 352, 19 Pac. 161; Stoakes v. Monroe, 36 Cal. 388; People v. Anthony, 56 Cal. 399. As before stated, and as is plainly apparent from the affidavits themselves, the only purpose which the evidence therein referred to could accomplish, if anything at all, would be the impeachment of two witnesses who testified for the prosecution and whose testimony was itself wholly in impeachment of the testimony of the defendant and his witnesses upon the question of the alibi sought to be shown by the accused.

We conclude that there was no error or

abuse of discretion in the action of the court refusing to grant the defendant a new trial upon the ground of newly discovered evidence.

No substantial error appearing in the record, the judgment and the order appealed from must be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

29 Cal. App. 703

O'BRIEN et al. v. REARDON et al.

(Civ. 1747.)

(District Court of Appeal, First District, California. Feb. 17, 1916. Rehearing Denied by Supreme Court April 14, 1916.)

1. JUDGMENT ⟸584 — CONCLUSIVENESS — IN PROBATE COURT.

The denial of a party's application to the probate court for administration of an estate already administered and distributed bars his subsequent action to set aside the decree of the probate court, distributing the estate on the first administration.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1067; Dec. Dig. ⟸584.]

2. HUSBAND AND WIFE ⟸264—COMMUNITY PROPERTY—EVIDENCE.

Evidence that property was accumulated through considerable contributions of cash and labor by the husband, although at one time it stood in wife's name as her separate property, and that the taxes on it were paid by her husband and he always regarded it as community property, *held* sufficient to prove it community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. ⟸264.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by P. J. O'Brien and another against Annie Reardon and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. C. Black, of San Jose, for appellants. A. A. Caldwell, of San Jose, for respondents.

LENNON, P. J. The plaintiffs, P. J. O'Brien and Harold Costello (a minor, acting through his guardian ad litem) bring this suit for the purpose of having vacated and set aside a decree of the probate court of the county of Santa Clara, distributing to Annie Reardon, in the matter of the estate of Annie Nelson, deceased, the real property described in the complaint. Annie Reardon, a daughter of said deceased, and C. O. Nelson, the surviving husband, are made defendants; and it is charged that they "entered into a conspiracy by fraud and falsehood to capture the said property, and with the intent by fraud and falsehood to defraud the plaintiffs out of their lawful interest as heirs at law in the estate of Annie Nelson, deceased"; that to accomplish their ends they "alleged, asserted, and gave out that the whole of the property of Annie Nelson, deceased, was community property," knowing such assertion to be untrue; that the defendant Nelson, claiming it to be community property while knowing that it was the separate property of his deceased wife, made a conveyance to his co-defendant of his title and interest therein as surviving husband; that the latter, as administratrix of the estate, caused it to be inventoried and returned to the probate court as community property, and petitioned the court for its distribution to herself as the grantee of the surviving husband of the deceased; that Annie Reardon by false testimony deceived the court, and obtained from it the decree of distribution in question. The defendants answered, denying the allegations of fraud, asserting that the property in question was in fact the community property of the spouses; that the decree of distribution which the plaintiffs attacked, not having been appealed from, was res adjudicata, and had been so held by the Supreme Court of this state in a proceeding brought by the plaintiff O'Brien, in which practically the same allegations as to its invalidity had been made as in the present suit. The matter came on for trial, and the plaintiffs introduced their testimony, at the conclusion of which the defendants moved the court for a nonsuit upon various grounds, viz., that the plaintiffs had failed to prove that they had any title or interest to the property described in the complaint; that they had failed to prove any fraud in the procurement of the decree of distribution sought to be vacated; that the evidence introduced by the plaintiffs failed to show that the said property was the separate estate of Annie Nelson, deceased; and finally upon the ground that the questions involved were also res adjudicata by virtue of a second proceeding in the probate court of the county of Santa Clara brought by said P. J. O'Brien, praying for letters of administration upon the said estate to be issued to him. Defendants' motion for nonsuit was granted in general terms, and judgment entered thereon. Defendants appeal from the judgment, and from orders of the trial court denying: (1) A motion to correct their notice of intention to move for a new trial; and (2) their motion for a new trial.

So far as previous litigation in the matter of this estate is concerned, the record shows: That Annie Nelson, wife of the defendant C. O. Nelson, died in the county of Santa Clara in February, 1910. Thereafter the defendant Annie Reardon, a daughter of the deceased, applied for and was granted letters of administration upon her estate. An inventory of the property of the estate was filed, which included the real estate involved in this action, but which was stated to be the community property of the deceased and her surviving husband. The latter executed to the administratrix a conveyance of his title and interest in said real property, and in the decree of distribution subsequently entered it was distributed to the administratrix as such grantee. No appeal was taken from said decree, and it is now in full force and effect. Subsequently, and in December of the same year, the plaintiff herein, P. J. O'Brien, applied to the same probate court for letters of administration upon the estate of Annie Nelson, deceased, alleging that the real property already distributed to Annie Reardon in the proceeding above mentioned was in fact the separate property of the deceased and not community property, and that the court had been imposed upon by the fraudulent representations of said Reardon. The defendants herein filed a contest to said petition; and, after a trial of the questions involved, the probate court denied the petition, and found and decreed that the said real property was the community property of the deceased and her surviving husband, and that the decree of distribution theretofore made was legal, valid, and binding upon the plaintiffs herein as heirs at law of the deceased. Upon appeal by O'Brien the Supreme Court affirmed this second decree, and incidentally held that the decree previously entered, not having been appealed from, was valid and binding upon plaintiff O'Brien and other heirs at law. O'Brien v. Nelson, 164 Cal. 573, 129 Pac. 985.

Upon the trial of this cause the facts above narrated appeared in evidence; and testimony was also introduced upon the question of whether the real estate in suit was the separate property of the deceased or community property.

[1] As to the plaintiff O'Brien, it is immediately apparent that the motion for a nonsuit was properly granted upon the ground that the questions upon which his right to recover depend are res adjudicata by virtue

of the prior proceeding brought by him and finally decided against him in the Supreme Court. It also seems clear that, if in fact the real property involved in this proceeding was the community property of Annie Nelson and C. O. Nelson, and that the testimony introduced in the plaintiffs' case so showed, then the allegations of fraud with which the complaint is so plentifully besprinkled fall of their own weight, and that neither of the plaintiffs made out any case.

[2] From the evidence so introduced it was shown that the deceased in the year 1880 (her name at that time being Annie O'Brien) was a widow, with three young children, earning her living by taking in washing. She became acquainted with the defendant Nelson, whom she subsequently married. In 1882, with the help of $100 borrowed from Nelson, she opened a small workingmen's boarding house, with a saloon attached, at Second street and Broadway in Oakland. In this venture she met with but indifferent success, for just prior to her marriage the following year she borrowed from Nelson a further sum of $200, which was used in the furnishing of the boarding house, of which, although consisting of only eight rooms, two were still completely unfurnished. Upon their marriage it was agreed between Nelson and his wife that the loan of $300 should not be repaid, but that whatever they possessed should be lumped together and considered as the family or community property. Shortly after his marriage Nelson obtained employment at $75 per month, his duties consisting of lighting the street lamps in the evening and extinguishing them in the early morning. During part of the day he tended bar in the saloon and helped around the house. His wages were regularly turned over to his wife (who, in the language of the testimony, "carried the purse"), and were by her placed with the money received from the boarding house and saloon, all expenses both of the family and the business being paid from such common fund. In 1884 a fire occurred in the saloon and boarding house, which destroyed part of the furniture. From an insurance company $500 was collected on account of this loss. At this time the Nelsons removed from Oakland to East San Jose, and purchased part of the real estate involved in this suit, the price of which was $1,600. Five hundred dollars was paid down, and a note secured by mortgage given for the balance. From this time on Mrs. Nelson, whose health was not as robust as formerly, did no more work other than attending to her household duties. On the other hand, Mr. Nelson was continuously employed. Part of the property so purchased was subsequently sold; there is evidence of the mortgage being paid off, and of a subsequent mortgage being taken on the property, which in turn was satisfied with money earned by Nelson. At the time of the purchase of the property the deed was taken in the name of Mrs. Nelson, and the habendum clause therein stated that the land was bought with the separate funds of the grantee and was to be held as her separate property, but this was done in the absence of her husband and unknown to him, and he never consented thereto. However, upon a subsequent exchange of part of this property for other land, the deed, although taken in the name of Mrs. Nelson, contained no clause designating it as her separate property; and it may also be mentioned that these deeds were taken at a time when the presumption of law prevailed that real property taken in the name of either spouse was community property. The remainder of the real property involved in this proceeding, consisting of lots in the county of Santa Cruz, was acquired by the spouses during coverture by purchase. All taxes on all the real estate were paid by money earned by Nelson, and the land was always assessed in his name. He never heard his wife claim that the property was other than community in character, and he always so regarded it.

With this evidence in the record upon the submission of the plaintiffs' case we think the trial court was entirely warranted in reaching the conclusion that the real property claimed by the plaintiffs to be the separate property of Annie Nelson, deceased, was in fact the community property of the deceased and her husband, that consequently the plaintiffs had failed to make out any case, and that their motion for nonsuit was properly granted.

If, as we hold, the nonsuit was correctly granted, it follows that the court did not err in denying the plaintiffs' motion for a new trial, based as it was upon the insufficiency of the evidence to sustain the decision, and that, even if we assume that the plaintiffs' motion to amend their notice of intention to move for a new trial should have been granted, they suffered no prejudice by its denial.

The judgment and orders are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

172 Cal. 123

BELL v. WILSON. (L. A. 3561.)

(Supreme Court of California. Feb. 16, 1916. Rehearing Denied March 16, 1916.)

1. HOMESTEAD ⊂59 — PROPERTY SUBJECT — CONTIGUOUS TRACTS.

One residing on an 80-acre pre-emption of government land may include in his homestead contiguous land held by other title, there being no limitation as to the amount of land or number of contiguous tracts which may be lawfully impressed with the homestead characteristic, the excess over $5,000 alone being subject to the demands of creditors.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 87; Dec. Dig. ⊂59.]

2. HOMESTEAD ⊂59 — PROPERTY SUBJECT — NATURE OF TITLE.

A homestead right does not depend on the character of the claimant's title, a mere naked possession being sufficient to support it.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 87; Dec. Dig. ⊂59.]

3. HOMESTEAD ⊂81 — PROPERTY SUBJECT — NATURE OF TITLE.

A debtor may claim a homestead on public lands of the United States of which he has possession, and maintain his homestead rights against all the world, but the owner of the superior title.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 114–118; Dec. Dig. ⊂81.]

4. HOMESTEAD ⊂154—ABANDONMENT—STATUTORY PROVISION.

Under the express provision of Civ. Code, § 1243, a homestead can be abandoned only by a declaration of abandonment or a grant of the homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 307; Dec. Dig. ⊂154.]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Mary Jane Bell, administratrix with will annexed of the estate of Solomon Bell, deceased, against C. N. Wilson. From a judgment for defendant, plaintiff appeals. Affirmed.

Will D. Gould, of Los Angeles, for appellant. Leon F. Moss, of Los Angeles, for respondent.

HENSHAW, J. This is an action by a judgment creditor who seeks to have held void a homestead declared by the judgment debtor upon certain real estate. It is alleged that plaintiff has a judgment exceeding $9,000 against defendant, which defendant refuses to pay; that there is a homestead upon the property declared by defendant; that the homestead has not been canceled of record or abandoned, and that the lands affected by the homestead "would now be subject to the statutory lien of said judgment and would now be subject to levy of execution and sale for the satisfaction of the judgment were not the same now covered by said declaration of homestead." It is further alleged that the lands affected by the homestead declaration exceed in value $10,000 and are sufficient to satisfy plaintiff's judgment. Plaintiff does not elect to proceed under section 1245 of the Civil Code and subject this asserted excess value of the homestead over $5,000 to the payment of the judgment, but rests her whole action upon the legal contention that the homestead itself is void.

[1] In all essentials of form and substance the declaration of homestead is unquestionably good. Its illegality and consequent voidness plaintiff and appellant asserts consists in this: The homestead covered a single tract of land, consisting, however, by government subdivisions, of 80 acres upon which defendant had filed a pre-emption declaratory statement. South of this was another 80 acres and two fractional lots, upon which the defendant had a timber culture entry. Such was the condition of his titles at the time of the declaration of the homestead. The timber culture entry was afterwards canceled by a relinquishment, and defendant thereafter filed a homestead entry on the lands embraced in the former timber culture entry. The homestead entry in turn was canceled by a relinquishment and a state lien selection embracing the same land was filed on the same day. Appellant's contention is that as respondent had entered upon and pre-empted 80 acres of land, his right to declare a homestead was limited to that 80 acres, as upon that 80 acres only could he have resided within the contemplation of the law, and that his effort to embrace within his homestead claim 201 acres was, as to the excess over the 80 acres, void; that defendant could not have a dual residence which would entitle him to complete his pre-emption purchase and at the same time entitle him to homestead the adjoining land; that the homestead declaration declared the value of all the land to be $2,500, but made no separate declaration as to the value of the pre-emption claim, which alone could legally be affected by the homestead declaration, and that therefore the homestead declaration as to all of the land was invalid and void for this failure to specify value.

In support of this position appellant cites a number of decisions of the land department, sound in their legal declaration, to the effect that a claimant cannot pre-empt land under the United States laws while residing on other land, and that, consequently, as declared by this court in Tromans v. Mahlman, 111 Cal. 647, 44 Pac. 327, the declaration of homestead cannot be extended over land not resided on. Hesnard v. Plunkett, 6 S. D. 79, 60 N. W. 159, is also relied upon in support of appellant's contention.

But appellant quite misconceives the meaning of our homestead laws, which, as correctly construed, fail to sustain his position and fail equally to give any pertinency in this discussion to the decisions of the land office and of the Supreme Court of South Dakota

in the case above cited. But before touching upon these matters, it should be pointed out that the evidence establishes that at the time of the declaration of homestead defendant had been married and was residing upon the 80 acres acquired by pre-emption, with two minor children. The land was not fenced. Defendant had filed an application for a certificate of purchase on the other portion of the land outside of the pre-emption 80 acres. He had a bee ranch and bought these other waste lands for the purpose of bee culture. He occupied these lands for that purpose, and with a pick had dug and planted 20 acres of eucalyptus and other trees upon the land. Furthermore, there is no evidence tending to show that defendant had not been in the exclusive possession and control of all the lands in controversy with his improvements thereon continuously from the time of the homestead declaration; and indeed appellant, as has been indicated, does not attack the homestead upon any evidentiary showing other than that which we have outlined. In other words, he contends that it is a legal impossibility for the defendant to have been able to occupy for purposes of homestead under the laws of the state of California any land other than the pre-emption 80 acres. This, as we have intimated, is the fundamental error into which he falls. There is no limitation in this state as to the amount of land or the number of tracts and parcels of land (provided they are contiguous) which may be lawfully impressed with the homestead characteristics. The limitation is upon the value of the land, and not upon the quantity or acreage. If the value of the land is proved to exceed $5,000, the homestead protection and exemption goes only to that amount, and the excess over is subject to the demands of the creditors. Brown v. Starr, 79 Cal. 611, 21 Pac. 973, 12 Am. St. Rep. 180.

[2-4] Again, as was long ago decided in this state, the homestead in no wise depends upon the character of the title which the homestead claimant has. A mere naked possession, without other title, may be impressed with the homestead characteristic. Spencer v. Geissman, 37 Cal. 96, 99 Am. Dec. 248. Whatever the character of the claim or title which the declarant has at the time of making the declaration, the homestead right will attach to such claim or title, and every improvement in the title to and including its perfection will be impressed with the homestead characteristic. Alexander v. Jackson, 92 Cal. 519, 28 Pac. 593, 27 Am. St. Rep. 158; Brown v. Starr, supra; King v. Gotz, 70 Cal. 241, 11 Pac. 656; Gaylord v. Place, 98 Cal. 478, 33 Pac. 484. Imperfections in or even the absence of a title is a false quantity which must be excluded from consideration. Brooks v. Hyde, 37 Cal. 373. Consequently the character of the title to the land impressed with the homestead not being a matter which in the slightest concerns the creditor, a debtor can claim a homestead on public lands of the United States of which he has possession and maintain his homestead rights against all the world but the owner of the superior title. Watterson v. Bonner Company, 19 Mont. 554, 48 Pac. 1108, 61 Am. St. Rep. 527. And finally upon this matter it is to be pointed out that while in the early case of Gregg v. Bostwick, 33 Cal. 220, 91 Am. Dec. 637, it was held that a homestead could be abandoned by nonuse—a construction which still obtains in some of the states—under the statute now in force and in force at the time of the declaration of this homestead, it can be abandoned only in the manner prescribed by statute, which is declared to be "by a declaration of abandonment, or a grant thereof, executed and acknowledged." Civ. Code, § 1243. Moreover, plaintiff has pleaded nonabandonment.

With these, our laws, before us, it must be quite apparent that there is nothing obnoxious to those laws in the declaration of homestead here under consideration. In other words, disregarding, as we must and do, the matter of title, or conceding that a title superior to the homestead claim was vested in the government of the United States to the lands lying outside of the pre-emption 80 acres, whatever title or possession the defendant did have in that outlying land was susceptible of being impressed with the homestead characteristic and was in fact impressed with it by his declaration and use. And this indeed has been directly decided in the similar case of Payne v. Cummings, 146 Cal. 426, 80 Pac. 620, 106 Am. St. Rep. 47, where the declaration of homestead covered 523 acres, including a pre-emption claim, a desert land claim, and water rights in which the claimant had a part interest.

The South Dakota case, to which reference has been made, may now be briefly considered. The facts in that case were that under the territorial laws of Dakota one might impress a homestead upon land not exceeding 160 acres. Of course the United States land laws provided for homesteads of an entirely different character, but limited the maximum acreage of those homesteads also to 160 acres. Plaintiff had pre-empted and secured a patent to 160 acres. Upon this 160 acres he declared a homestead under the territorial laws. He then undertook to secure to himself a homestead under the United States laws to an adjoining 160 acres of government land. To do this he sold 19 acres of his 160 acres homesteaded under the territorial law and moved his residence onto a corresponding 19 acres of the 160 acres, title to which he proposed to acquire under the United States homestead law. When the legality of the two homesteads was challenged he insisted that he was complying with the federal laws by living upon this 19 acres of the 160

acres, and, upon the other hand, that he was entitled to attach this 19 acres to the 141 acres of his territorial homestead, and thus retain his homestead exemption to 160 acres under the territorial law. For reasons so plain and obvious that they do not even require setting forth, the Supreme Court of South Dakota held that such a fraud would not be permitted. There is not even a resemblance in the situation presented in that case to that which confronts us here.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

172 Cal. 132

FLICKINGER v. WRENN INV. CO. et al.

(L. A. 3616.)

(Supreme Court of California. Feb. 16, 1916. Rehearing Denied March 16, 1916.)

1. CORPORATIONS ⇐120 — SALE OF STOCK — OPTIONS.

A buyer of corporate stock under a contract stipulating that the seller at the option of the buyer at the expiration of one year will repurchase the stock, provided the buyer gives 10 days' notice before the expiration of the year of his intention to exercise the option, does not exercise his option so as to put the seller in default by merely serving on the seller the 10 days' notice, unaccompanied by any tender of the stock and demand for the repurchase thereof by the seller.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 495, 504; Dec. Dig. ⇐120.]

2. APPEAL AND ERROR ⇐544 — QUESTIONS REVIEWABLE—BILL OF EXCEPTIONS.

Under Code Civ. Proc. §§ 661, 662, 952, providing that the judgment roll and the affidavits or bill of exceptions may be used on a hearing of a motion for new trial and shall constitute the record to be used on appeal, an appeal from an order granting a new trial after a nonsuit after the reopening of the case to permit plaintiff to introduce evidence to excuse his failure to perform a contract alleged in the complaint to have been performed by him, will be heard as against the objection that appellant has prepared no bill of exceptions to support his contentions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412–2415, 2417–2420, 2422–2426, 2428, 2478, 2479; Dec. Dig. ⇐544.]

3. CONTRACTS ⇐346—PLEADING ⇐237—ISSUES, PROOF, AND VARIANCE — AMENDMENT OF PLEADINGS.

A complaint alleging performance by plaintiff of a contract is not sustained by evidence of a waiver by defendant of performance, but where the evidence shows a waiver the court in the interest of justice may allow an amendment to the complaint to conform to the evidence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718–1751; Dec. Dig. ⇐346; Pleading, Cent. Dig. §§ 603–619; Dec. Dig. ⇐237.]

4. EVIDENCE ⇐258—DECLARATIONS OF THIRD PERSONS—AGENCY.

Declarations made by a third person are not admissible to bind a party where there is a failure to show agency and authority of the third person to speak for the party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. ⇐258.]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by J. C. Flickinger against the Wrenn Investment Company and others. From an order granting a new trial after nonsuit, defendants appeal. Reversed.

Geo. E. Whitaker and T. N. Harvey, both of Bakersfield, for appellants. W. W. Kaye and Alfred Siemon, both of Bakersfield, for respondent.

HENSHAW, J. The defendants Wrenn Investment Company, a corporation, and O. C. Heck, were interested as stockholders in the Owners' Garage & Supply Company. To increase the working capital of this company and to secure the services of plaintiff they induced him to purchase 25 shares of the stock of the Owners' Garage & Supply Company at par and to take employment in that company as manager for the period of one year agreeing in writing that they (the defendants) would "at the option of the party of the second part (plaintiff), at the expiration of one year from the date hereof purchase from the said second party the said 25 shares of the capital stock of the said corporation for said sum of $2,500 * * * provided that said second party may give 10 days' notice before the expiration of said year of his intention to exercise said option."

In his complaint plaintiff set up these facts and pleaded further that:

"At the expiration of one year from the date of the said contract the said plaintiff exercised his option to sell and delivered the said 25 shares of the capital stock of the said Garage & Supply Company to the defendants for the sum of $2,500, and in accordance therewith gave to the defendants and to each of them 10 days' notice before the expiration of the said year of the intention of the plaintiff to exercise said option and thereupon tendered to the said defendants the said shares of stock and the said certificate No. 54."

The defendants met this complaint with certain admissions and denials, the essential admissions going to the execution of the contract and their failure to purchase the stock from plaintiff, their denials joining issue upon the allegations of the exercise of his option by plaintiff.

Upon the trial there was introduced in evidence plaintiff's written notification delivered to the defendants 10 days or more before the expiration of the year. The writing was a notification by plaintiff:

"That I intend to exercise the option given to me under agreement dated the 1st day of March, 1910, for the sale by me to you of 25 shares of the capital stock of the Owners' Garage & Supply Company for the sum of $2,500. Upon payment of the said sum to me on the 1st day of March, 1911, the said stock will be delivered to you."

It further appeared that plaintiff did nothing more in the matter until he brought his action months afterwards. Only upon the trial did he tender to defendants the certificate of stock.

[1] In this condition of the evidence defendants moved for a nonsuit upon the unassailable ground that plaintiff had not shown an exercise of his option so as to put defendants in default, but had shown merely a service upon defendants of the preliminary 10 days' notice without which he could not at the expiration of the year take the second necessary step of tender and demand; that this tender and demand he had never made, and the evidence showed that he had never made it.

The trial court expressing its conviction that the motion for a nonsuit must be granted permitted plaintiff to reopen his case and introduce evidence to excuse him for this failure. After this evidence was introduced the court granted the motion for a nonsuit. The plaintiff then moved for a new trial, which the court granted. It is from this last order that this appeal is taken.

[2] By respondent a preliminary objection to the hearing of this appeal is made upon the ground that the appellants have prepared no bill of exceptions to support their contentions upon which alone they may be considered. The contention is groundless. Code Civ. Proc. §§ 952, 661, 662; Loucks v. Edmondson, 18 Cal. 203; Quivey v. Gambert, 32 Cal. 304; Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Frost v. Los Angeles Ry. Co., 165 Cal. 365, 132 Pac. 442.

[3] It is apparent that the court's order granting a new trial must have been based upon its conviction that the proffered evidence to receive which the case had been reopened was legally sufficient to show a waiver of the necessity of performance on the part of plaintiff because of the repudiation of their contract by defendants. This, of course, presents an entirely different cause of action from that relied on in the complaint which squarely rests upon full performance by plaintiff of the terms of the contract including the notice of intent to exercise the option and the exercise of the option itself. Conceivably, however, if the evidence were sufficient to show this waiver the court in the interest of justice might have permitted an amendment to conform to the proofs, and so have obviated the legal difficulty that a judgment cannot be sustained, unless the proof establishes the cause of action alleged in the complaint, even though a different cause of action be fully proven. Nichols v. Randall, 136 Cal. 426, 69 Pac. 26; Rogers v. Kimball, 121 Cal. 247, 53 Pac. 648; Schirmer v. Drexler, 134 Cal. 134, 66 Pac. 180; Kredo v. Phelps, 145 Cal. 526, 78 Pac. 1044. We pass on therefore to a consideration of the evidence introduced.

[4] The Wrenn Investment Company was a corporation. W. W. Kaye, one of the attorneys for plaintiff, was permitted to testify that he went to see defendant Wrenn, who he understood was carrying on negotiations looking to the sale of the Owners' Garage & Supply Company, and told him that Flickinger would not consent to a sale "unless something was done on the part of himself or the Wrenn Investment Company and Mr. Heck in regard to taking up this contract, which is the subject of action." Mr. Wrenn replied " that he or they would not entertain any proposition at all in regard to carrying out that contract. He said that before he would pay one cent or offer one cent to Mr. Flickinger on that stock he would take the whole concern out in the street and burn it." Mr. Kaye did not know what if any position Mr. Wrenn occupied in the Wrenn Investment Company; did not know whether or not he had any authority to represent the company or to represent the defendant Heck; all that he knew was that he purported to speak for the Wrenn Investment Company, but he knew nothing about his authorization or lack of authorization so to do. Another witness, E. P. Hoisington, in the employ of the defendants Wrenn and Heck, testified that he overheard Mr. Wrenn and Mr. Heck in conversation state that "they did not intend to pay Mr. Flickinger the amount that became due on this contract." Both of these conversations took place in the summer of 1910, and, according to the testimony of plaintiff, he was informed of them in July, 1910. Hoisington was not nor is it contended that he was, authorized to receive any communication on behalf of plaintiff nor authorized by the defendants to represent them or to communicate to anybody anything which he had overheard. All of this was some 9 or 10 months before the arrival of the time for the exercise of the option. Flickinger was at the time a director of the Wrenn Investment Company. After receiving this information he did not make the matter of it a subject of inquiry before the board of directors, of which he was a member. He said nothing and did nothing in the matter. Indeed, so far from regarding the contract as repudiated, when under familiar principles his right of action would immediately have arisen, he permitted the full time to run and thereafter, instituting his action, formally pleaded due performance upon his part. Touching the conversation testified to as having been had between Mr. Wrenn and Mr. Kaye, there is an utter failure of evidence to show the agency and authority of Wrenn to speak either for the corporation or for defendant Heck, and without such authority shown whatever may have been the declarations they were inadmissible in evidence to bind either of the defendants. Garfield v. Knight's Ferry W. Co., 14 Cal. 35; Grigsby v. Clear Lake Water Co., 40 Cal. 396; Smith v. Liverpool W. Ins. Co., 107 Cal. 432, 40 Pac. 540; Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162; 1 Clarke & Skyles, Agency, p. 1027; Reinhard, Agency, § 353; 31 Cyc. 1654.

It is unnecessary to pursue the consideration further or to discuss the additional proposition ably presented by appellant to the effect that even if defendants had repudiated their contract, nevertheless plaintiff by his course of procedure shown by his complaint continued to treat the contract as in existence, and, so doing, performance upon his part became incumbent, and he failed to perform. Hammon on Contracts, p. 896; 3 Page on Contracts, § 1438; 3 Elliott on Contracts, § 2033; New Brunswick, etc., R. Co. v. Wheeler (C. C.) 12 Fed. 377; Smith v. Georgia, etc., Co., 113 Ga. 975, 39 S. E. 410; Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255; Roeblings Sons v. Lock Stitch, etc., Co., 130 Ill. 660, 22 N. E. 518; Zuck v. McClure, 98 Pa. 545.

Without consideration of this last proposition sufficient has been said and shown to establish the error into which the trial court fell in treating the proffered evidence as in any legal and sufficient way tending to establish plaintiff's case.

The order granting the new trial is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

172 Cal. 120

CORNISH et al. v. DICKEY. (L. A. 3595.)
(Supreme Court of California. Feb. 16, 1916.)

INJUNCTION ⊂=56 — DISCLOSURE OR USE OF TRADE SECRETS—LISTS OF CUSTOMERS.

Where the defendant, a driver of plaintiffs' bakery wagon, furnished his own horse and harness and solicited patronage in his district, but was furnished by the plaintiffs with a wagon bearing their name and with lists of customers secured by advertising, and the defendant came each morning to the bakery for supplies and returned unsold goods each evening, receiving as compensation 25 per cent. of his sales, he was not the independent owner of a bakery route, and such a transaction did not constitute a sale, but he was an employé of the plaintiff, and his abuse of confidential relations in taking employment with a rival concern and using the list of names furnished by the plaintiffs to solicit their patrons and supply them with the products of his new employer was improper and would be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110; Dec. Dig. ⊂=56.]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Thomas J. Cornish and another against W. S. Dickey. From a judgment for defendant, the plaintiffs appeal. Reversed.

Kaye & Siemon, of Bakersfield, for appellants. R. H. Wilson, of Bakersfield, for respondent.

HENSHAW, J. This is an action for injunction. Plaintiffs conduct a bakery business. For the increase of their trade and for the convenience of their customers they districted the city of Bakersfield, in which their business was conducted, into routes, and the business of each route was carried on in the following manner. Plaintiffs furnished the driver of the route with a delivery wagon bearing conspicuously the name "Cornish's Bakery." The driver supplied his own horse and harness. He called at the bakery each morning, and placed in his wagon the daily supplies for the customers. At the end of the day he returned to the bakery the unsold goods, and received for his compensation 25 per cent. of the sales. The driver solicited patronage in his district. The bakery advertised in the public prints that it maintained a free delivery, and that its bakery wagon would call daily, and when the patrons by letter or by telephone indicated their desire that the wagon should so call, a notification to this effect with the name and address of the new patron, was given to the driver. In this way the business was fostered and increased. The defendant in this case was the driver of one of these Cornish's Bakery wagons operating in a prescribed district or "route." With the consent of the bakery he purchased the rights of his predecessor for $250, this including the horse and harness. He had been conducting his business, as it was understood that it should be conducted, with the bakery products of the Cornish's Bakery only. Suddenly, and without notification to the plaintiffs he ceased driving the Cornish's Bakery wagon and delivering the Cornish's Bakery goods and took employment in a rival bakery operating one of its wagons over the same route and soliciting and supplying his former patrons and the patrons of the Cornish's Bakery with the products of its rival. To restrain this conduct on his part the action was brought.

The position of the defendant, which was taken by the court and expressed in its findings, is that he was the independent owner of this bakery route, entitled to serve whom he pleased, as he pleased, and with what products he pleased; that he was not an agent or employé of Cornish's Bakery and stood in no confidential relations to the plaintiffs which rendered it at all improper for him to change his employment, and in so doing to supply his customers from the rival bakery, and that thus there was no abuse of the confidential relations existing between employer and employé. This position, however, does not find support in the evidence. It was necessary for the defendant to establish that his relations with the plaintiffs were such as to justify him in acting as he did. Conceivably this could be done by showing that he was an independent operator; that he purchased his supplies daily from the bakery; was at liberty to purchase supplies from any other bakery; and that he then peddled the goods at his own pleasure and price along his chosen way. But there is no showing to this effect. He did not purchase the goods. Each day he took out a

given quantity, returning, without cost to himself, the unsold portion and receiving a commission of 25 per cent. of the prices of the goods sold. Such a transaction in no wise constituted a sale, and therefore in no wise made defendant an independent purchaser. In re Columbus Buggy Co., 143 Fed. 861, 74 C. C. A. 611; Eldridge v. Benson, etc., 7 Cush. (Mass.) 485.

When consideration is paid to the undisputed facts that plaintiffs were actively engaged in increasing their own business; that they advertised to this end; that they made over the list of their customers to defendant, increasing the list as new patrons applied, that defendant was really employed as a sales agent on commission; and that it was to his interest, as well as to his principals' interest, to develop the business in every legitimate way; that his wagon was a Cornish's Bakery wagon; that he advertised and used only the products of the Cornish's Bakery—it makes the case too plain for the need of further discussion. The facts fit most aptly and appositely with those of Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 Pac. 1180, 44 L. R. A. (N. S.) 1159.

The judgment appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

(172 Cal. 129)

FOUNTAIN v. WILLARD-SLATER CO. et al. (L. A. 3638.)

(Supreme Court of California. Feb. 16, 1916.)

1. NEGLIGENCE ⟸55 — INJURY TO SERVANT OF SUBCONTRACTOR—LIABILITY OF GENERAL CONTRACTOR.

Where a building contractor furnished as required by the contract all the materials and appliances used by a subcontractor and his employés, and the contractor erected steps in the building for the workmen in general, an employé of a subcontractor was not a mere licensee when using the steps in the performance of his work; the steps being the most accessible and direct method of doing the work.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 68; Dec. Dig. ⟸55.]

2. NEGLIGENCE ⟸71—INJURY TO SERVANT OF SUBCONTRACTOR — LIABILITY OF GENERAL CONTRACTOR—CONTRIBUTORY NEGLIGENCE.

An employé of a subcontractor who used in carrying on his work steps erected by the general contractor pursuant to the contract with the owner binding him to furnish appliances was not negligent for failing to use a ladder which had been used in doing work in another part of the building; the steps being the most direct method of doing the work.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 98; Dec. Dig. ⟸71.]

3. NEGLIGENCE ⟸71—INJURY TO SERVANT OF SUBCONTRACTOR — LIABILITY OF GENERAL CONTRACTOR—CONTRIBUTORY NEGLIGENCE.

Where a stairway is tendered by a general contractor to an employé of a subcontractor as fit for the use he is making of it, the employé is not guilty of contributory negligence merely because he does not pick out some particular part of the stairway to use.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 98; Dec. Dig. ⟸71.]

Department 2. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by John W. Fountain against the Willard-Slater Company and another. From a judgment for plaintiff against defendant named, it appeals. Affirmed.

John Murray Marshall, Walter Gould Lincoln, and Perry F. Backus, all of Los Angeles (Roy V. Reppy, of Los Angeles, of counsel), for appellant. Paul M. Nash and Le Roy D. Barnett, both of Los Angeles, for respondent.

HENSHAW, J. Defendant Willard-Slater Company, under contract with the Los Angeles city school district, was erecting for it a school building in Los Angeles. It engaged defendant Venable to do the work of plastering this building. Plaintiff in turn was employed by Venable as a hodcarrier. In the building was a flight of stairs. The permanent stringers or supports of the steps were in place and across, and resting upon them, were temporary treads of Oregon pine, one inch thick by six inches wide, laid flatwise. The stairway was eleven feet five inches wide. The stringers were at each end and in the middle. There was thus between the stringers an unsupported space of over five feet upon each side of the middle stringer. The treads themselves were covered with the ordinary litter deposited in the process of the construction of such a building. Plaintiff was carrying a hod full of mortar up these steps when a tread broke, precipitating him to the floor below, and inflicting the injuries complained of. The tread which broke was not a clear board, but contained several knots, and the break was through these knots. Plaintiff sued his immediate employer, Venable, and the general contractor. Judgment was given against the general contractor alone, and that corporation appeals.

[1] Upon appeal it argues that plaintiff in using the steps was a mere licensee to whom it owed no especial duty; that the steps were not an appliance furnished to Venable and his employés, and that they used them at their peril. In answer to this there may be first pointed out the finding of the court that the defendant Willard-Slater Company furnished all the materials and appliances which were used by the defendant Venable and his employés, including the plaintiff. Defendant not only so furnished these materials and appliances, but it was a part of its express duty under its contract with the city so to furnish them, and it is not denied by the pleading that appellant did furnish all the materials and appliances which were to be used by all of the workmen. Moreover,

it is undisputed that the steps were made by defendant's own workmen. And finally Mr. Slater, of the defendant company, testified:

"The temporary steps were placed there for the workmen in general to be able to get from one part of the building to the other easily."

[2] It is argued that a ladder had been supplied, and that plaintiff could have climbed this ladder, and not used the steps. To this it may be answered that it was not incumbent upon him to do so, and it was not negligence for him not to do so. It appears that there had been a ladder which plaintiff, with other hodcarriers, had used when the plastering was being done in another part of the building. At the time of the accident the plastering was being done upon the first landing of the staircase. The ladder had been taken away, and the steps were the most accessible and direct mode and method of reaching the plasterers where they were then at work. Plaintiff was given no warning against using the stairway. Other hodcarriers and other workmen did use it, and the defect in the tread which broke was concealed by the rubbish. Thus plaintiff was not a mere licensee using instrumentalities not designed for his use and so using them at his peril. He was using an appliance which it was the duty of appellant to furnish, and which appellant did furnish, for the use of all the workmen about the building. Thus such cases as Fanjoy v. Seales, 29 Cal. 244, and Ryan v. Toop, 114 App. Div. 165, 99 N. Y. Supp. 590, differ radically in their facts from the case at bar, and render the legal considerations there set forth themselves inapplicable. In Fanjoy v. Seales, the plaintiffs, who were employed to paint a house, supported their scaffold by a cornice, which cornice broke. The owner had done nothing to induce them so to attach their scaffolding, and the declaration of this court was that the cornice was not designed for the purpose for which it was used. Its use was not suggested or invited by the owner, and he was not responsible for the injury which resulted from the breaking of the support. Similar facts and a similar declaration of law are found in Ryan v. Toop. There the subcontractor for the plastering of a building, which building was in process of construction, himself ordered his employé to plaster along a stairway, and the employé attempted to do so by standing on the iron treads of the stairs. These treads were not bolted. They were not intended to be walked on. They were designed to serve merely as a sheathing for stone treads not in place. One of these unbolted iron treads gave way, and the servant was injured. The holding of the court that the contractor was not liable for this misuse and uninvited use of the stairway was clearly correct, and as clearly inapplicable to the facts of this case.

[3] It is said that it would be difficult to find a clearer case of contributory negligence than that shown by the facts in this case, this clear contributory negligence consisting in the failure of the plaintiff to walk up the stairs along the line of the middle supporting stringer, the testimony showing that he attempted to ascend the stairs about halfway between the middle stringer and the end stringer. We state the point to show that it has not been overlooked, but we cannot agree that, where a staircase is tendered to an employé as fit for the use he is making of it, he is guilty of contributory negligence if he does not pick out some particular part or portion of the stairway to use in his ascent. The general duty of furnishing reasonably safe machinery and appliances is not subject to any such limitation.

None of the other questions presented by appellant call for special consideration.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

172 Cal. 147

In re CASPAR'S ESTATE.

BABIK v. AINLEY.

(L. A. 4284.)

(Supreme Court of California. Feb. 18, 1916. Rehearing Denied March 16, 1916.)

1. WILLS ⇐324—EVIDENCE—SUFFICIENCY TO TAKE TO JURY.

The rules with regard to the sufficiency of evidence to justify its submission to the jury are the same in a contested will case as in any civil action.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 225, 767–770; Dec. Dig. ⇐324.]

2. NEW TRIAL ⇐72—WEIGHT OF EVIDENCE.

Although the evidence upon the issues is substantial and conflicting, it is the duty of the trial judge to set aside a verdict at least once, if his conviction is that the verdict is contrary to the weight of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146–148; Dec. Dig. ⇐72.]

3. TRIAL ⇐178—RIGHT OF COURT TO DIRECT VERDICT.

The right of a court to direct a verdict is, touching the condition of the evidence, the same as the right to grant a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent Dig. §§ 401–403; Dec. Dig. ⇐178.]

4. TRIAL ⇐165—NONSUIT—POWER OF COURT.

A court may grant a nonsuit only when, disregarding conflicting evidence, and giving to the plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, there is not sufficient evidence to support a verdict for the plaintiff if such verdict were given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. ⇐165.]

5. NEW TRIAL ⇐72—GROUNDS—POWER OF COURT.

The court may grant a new trial even where there is substantial evidence to sustain the ver-

dict, if it believes that the evidence preponderates against the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146–148; Dec. Dig. ⟸72.]

6. New Trial ⟸70, 110—Grounds—Duty of Court.

The court is under compunction to order a new trial, and may do this of its own motion when the evidence is wholly insufficient to sustain the verdict.

[Ed. Note.—For other cases, see New Trial, Cent.Dig. §§ 142, 143, 231; Dec.Dig. ⟸70, 110.]

7. Wills ⟸324—Direction of Verdict — Review.

An order directing a verdict for proponents in a will contest *held* error, in that there was a substantial conflict of evidence on the issue of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 225, 767–770; Dec. Dig. ⟸324.]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Petition by Sahmin Babik to revoke the probate of the will of Shaopin Caspar. There was a verdict for the contestant which was set aside, and, on second trial, upon motion of the proponent, the court directed a verdict in favor of the proponent, and, from a judgment confirming the probate of the will and dismissing the petition to revoke that probate, the contestant appeals. Reversed.

Joseph L. Lewinsohn, Daniel M. Hunsaker, I. Henry Harris, Hunsaker & Britt, and Hunsaker & Harris, all of Los Angeles, for appellant. D. H. Laubersheimer and Trippet, Chapman & Biby, all of Los Angeles, for respondent.

HENSHAW, J. Shaopin Caspar died testate in the county of Los Angeles and his will was probated. Appellant, Sahmin Babik, as his cousin and one of his heirs at law, instituted this contest to revoke the probate of the will. Trial was had before a jury, and the issues were submitted to that jury for determination. They were all found in favor of the contestant. Subsequently the court set aside the verdict of the jury on the ground of insufficiency of the evidence to sustain it. A second trial was had before a second jury, and the evidence presented to that jury was (under stipulation) precisely the same evidence which had been considered by the former jury. Upon motion of the proponent, the court directed the second jury to find all of the issues in favor of the proponent, with the exception of the issue of relationship. The jury so found. Judgment thereupon was entered affirming the probate of the will, and the petition to revoke that probate was dismissed. This appeal is taken from the judgment so rendered, and it involves a consideration of the correctness of the court's ruling in directing a verdict. Necessarily it demands a presentation of the evidence relied upon by contestant, which presentation will in due course be made in as brief terms as possible.

[1, 2] Before doing so, however, it is necessary to consider the law governing the conduct of a court in a case such as is here presented. The rules of evidence and the weight to be accorded to the evidence are the same in a contested will case as in any other civil case, and those rules apply when the question goes to the sufficiency of the evidence to justify its submission to the jury. Estate of Arnold, 147 Cal. 583, 82 Pac. 252. Without elaboration of the authorities, and contenting ourselves with citing a few of them, the following propositions may be taken as determined beyond controversy: In this state, though the evidence pro and con upon the issues be substantial and conflicting, it is the duty of the trial judge to set aside a verdict at least once if his conviction is that that verdict is contrary to the weight of the evidence. Estate of Carriger, 104 Cal. 81, 37 Pac. 785; Estate of Motz, 136 Cal. 558, 69 Pac. 294; Estate of Everts, 163 Cal. 449, 125 Pac. 1058. We say at least once. We are not to be understood as saying that the court's powers and duties in this regard are exhausted by its first action. Our consideration here is not complicated by that question. With the statement that the number of times that a trial judge may so exercise his powers to set aside a verdict in a given case is in many states controlled by statute, as in this state it is not, it will suffice upon the general question to cite: Clark v. Barney Dumping Co. (C. C.) 109 Fed. 235; In re Geiser (D. C.) 129 Fed. 237; Daniels v. Leonard, 105 Ga. 841, 32 S. E. 122; Dethrage v. City of Rome, 125 Ga. 802, 54 S. E. 654; Howard Express Co. v. Wile, 64 Pa. 201; Van Doren v. Wright, 65 Minn. 80, 67 N. W. 688, 68 N. W. 22; Wilkie v. Roosevelt, 3 Johns. Cas. (N. Y.) 206, 2 Am. Dec. 149; Van Blarcom v. Kip, 26 N. J. Law, 351; Gibson v. Hill, 23 Tex. 77.

[3, 4] Next, it is beyond controversy that the right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit. It may grant a nonsuit only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. Of course, if in such a case no motion for nonsuit has been made and the issues have been turned over to the consideration of the jury, and that jury has rendered a verdict in favor of plaintiff, such verdict being unsupported by any substantial evidence, it becomes the imperative duty of the court to set it aside. Estate of Arnold, supra; Estate of Chevallier, 159 Cal. 161, 113 Pac. 130; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914. But when, and only when, the

evidence of the proponent is thus insufficient, the court may and should, as has been said, grant a nonsuit, and may and should on motion direct a verdict. Thus in Estate of Baldwin, 162 Cal. 472, 123 Pac. 267, it is declared that:

"A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence; but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one."

To the same effect are the cases last above cited, as well as Estate of Morey, 147 Cal. 495, 82 Pac. 57; Estate of Higgins, 156 Cal. 257, 104 Pac. 6; Estate of Chevallier, supra; Sill v. Ceschi, 167 Cal. 698, 140 Pac. 949.

[5, 6] The rule as to directed verdicts is not that a verdict may be directed whenever the evidence is such that upon motion the court would grant a new trial. The court may grant a new trial even when there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict. It is under compulsion to order a new trial, and may do this of its own motion when the evidence is wholly insufficient to sustain the verdict. This is the meaning of the language in Estate of Baldwin, supra, where it is said that a directed verdict is proper "whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence." For a detailed and satisfactory discussion of this proposition reference may be made to McDonald v. Metropolitan Street Ry. Co., 167 N. Y. 66, 60 N. E. 282.

To sum up, then, the situation is this: If contestant did present evidence of so substantial a character as that, notwithstanding the conflict raised by proponent's evidence, it would support a verdict in favor of contestant, it would have been error for the court to have granted a motion for a nonsuit, and it was error upon the part of the court to direct a verdict for proponent.

To the consideration of contestant's evidence we thus come, bearing in mind that every intendment is to be indulged in favoring any reasonable inference which can be drawn and thus might have been drawn by the jury from the direct and positive evidence itself.

Shaopin Caspar was an Armenian, born in Adrianople, Turkey, in 1861. There his early life was spent. Sahmin Babik was his cousin, two years younger. His family also resided in Adrianople, and the families of the two cousins were on intimate terms. Caspar and Babik were playmates. Caspar's parents died when young and he received little or no education. Babik, upon the other hand, was well educated and had held positions of distinction in the Bulgarian government. When 18 years of age, Caspar came to the United States and settled in Lawrence, Mass. There he lived for over 25 years. Before departing for the United States, he made a journey to the city where his cousin Babik was then residing to bid him good-bye. By industry, frugality, and business ability, Caspar in Massachusetts achieved comparative affluence. When he died in Los Angeles in 1913, at the age of 52 years, his estate was appraised at $30,000. For years he was a photographer in Lawrence and did a prosperous business, employing several assistants. In 1911 he moved from Lawrence, Mass., to Los Angeles, and died a year and a half thereafter. He never married, nor did he seem to have sought the society of women. He was a Mason and an Odd Fellow, and his social activities were confined within the orbits of these orders. He was prudent, frugal, and respected.

In 1904 Babik came to America. He wrote to Caspar from New York advising him that he was without a position and asked Caspar's advice. Caspar expressed great delight upon receiving this letter. He had seen no blood relative for 22 years or more. He wrote a cordial reply to his dear cousin, and Babik then went to Lawrence, where the meeting between the cousins was most cordial and affectionate. Babik was married, and Caspar gave him a position in his studio and provided him and his wife with a home. He appeared proud of his cousin, of his education, and of the high positions he had occupied, including a secretaryship to the King of Bulgaria, and frequently spoke of these matters to his friends. He made Babik acquainted with his brethren of the Masonic Order, introducing him as his cousin and securing his election to membership. In many ways he expressed more than mere affection and admiration for his cousin, declaring his intention to provide for him in his life and at his death as being one of his nearest relatives and the one to whom he was fondly devoted.

In 1905 Emily Ainley, proponent of the will and the sole beneficiary thereunder, arrived in Lawrence with her husband, Sam Ainley. Mrs. Ainley was an immoral and designing woman. Sam Ainley was a complacent husband, if not worse. The two conspired to get Caspar in their clutches and subject him to their domination. This was to be accomplished by the seduction of Caspar, and to the accomplishment of this end, with the connivance and procurement of her husband, Mrs. Ainley set herself. She was the janitress in charge of the hallways of the building in which Caspar's studio was situated. She was much younger than Caspar. She was frequently and unnecessarily in his room. She accomplished her purpose and became the mistress of the well-to-do bachelor. The relationship Caspar admitted, with epithets of contempt for the complacent husband, but at that time he regarded the woman as nothing more than his mistress. Mrs. Ainley did not

conceal the fact that her designs were meretricious and mercenary. She said that Caspar had a lot of money and she might as well have it as anybody else; that she proposed to get it even if she had to work hard to do it. The relationship between the two seemed to have been fairly well recognized in Lawrence, and a sister-in-law of Mrs. Ainley protested against it. In 1909 the Ainleys came to Pasadena, Cal., Caspar paying their fare. On reaching California both husband and wife importuned Caspar to join them. The woman wrote frequently, indeed almost daily. One letter would be couched in terms of fond endearment and longing; the next would contain threats that she would go back to Massachusetts "and show you what I can do to you" if he did not come out. Ainley likewise wrote, and an extract from one of his letters is as follows:

"Mr. Caspar, why do you stay away? You have got enough money. What do you want staying in Lawrence, ruining your health in that old shack. This is Pasadena, the heaven on earth. You want to come out and see it. My wife will take you around. Also my wife. I can't do anything with her, as she has lost her health since she came out here. Every night she won't sleep, she is crying and sobbing, and in the daytime she is always thinking of you. I think it will be well for you and will help Emily for you to come out here."

Caspar was distressed over these letters. He showed them to his friends. He declared that they were bothering him; that nearly every letter he got from them asked for money. He became nervous and timid over their threats; he was afraid they would drag him into court. He had never been in court and would give anything to avoid going. He consulted an attorney. He did not want his good name destroyed. He was advised to go to California and see the Ainleys and try and fix the matter up. In 1910 he did go to California and was gone three weeks. Upon his return he intimated, if he did not declare, that he had resumed his illicit intercourse with Mrs. Ainley, with the knowledge of her husband. After his return to Lawrence, Mrs. Ainley continued to write to him. In 1911 Babik was in France, and Caspar a second time joined the Ainleys in California and lived with them until his death. He built a bungalow for the Ainleys, installed them in it, and lived there with them. He became Mrs. Ainley's devoted slave, fetching and carrying, doing servile and menial duties, and was, according to the medical testimony, a masachist—her love-slave. Changes in his demeanor, deportment, and dress were noted. There is testimony of the blandishments and endearments which she practiced upon him. He was "just like her maid." The explanation of both the Ainleys of this conduct is that it was sexually harmless because Caspar had declared that he was impotent from childhood. Upon one occasion Mrs. Ainley declared that she detested Caspar, but that she proposed to get his money. "He has got more money than anybody has any idea of, and he is dead in love with me."

In 1912 Caspar seems to have become nervous, excitable, disheartened, melancholy, absent-minded, preoccupied, and negligent in attire, while before he had been neat. Notwithstanding his years, if it be true that "a man is as old as his arteries," he was rapidly approaching senile decay, for, though he died at the age of 52, the cause of his death was brain lesion following arterial sclerosis. During this time his cousin Babik wrote to him, asking him to lend money to aid him in a business venture. He repudiated Babik in terms of hostility and denied that Babik was related to him. In the latter part of January he was taken to a hospital. He had complained of constipation. While in the hospital the will in question was executed. In the hospital he was stricken with a cerebral hemorrhage. While suffering from this hemorrhage, but after the execution of the will, he was taken back to the Ainley home, and there, five days later, he died. The hospital charts during the days he was there showed a marked failure of physical powers and control. He could not retain his urine; he vomited; he was kept on a low diet—eggs and milk, which he could not retain. Mrs. Ainley was constantly at the hospital and in attendance on him. Frequently before her he expressed to the attending doctor, who had been called in by Mrs. Ainley and who was not the physician who had previously treated Caspar, his desire to make his will. This physician summoned D. H. Laubersheimer, an attorney at law, for that purpose, and in the hospital and under these circumstances and in the presence of Mrs. Ainley, Mr. Ainley, Mrs. Ainley's mother, Dr. Cook, and a friend of the Ainleys, George Shaw, and Mr. Laubersheimer, the will was drawn by Caspar, devising and bequeathing all of his estate "to my dear friend Emily Ainley to be hers forever," and appointing her sole executrix to serve without bonds. The testimony of these witnesses, all favorable to the proponent, is that they were all present at Caspar's request. The attorney upon asking the sick man if he desired to make a will was met with the response that he did not desire to make a will, but that he desired to adopt Mrs. Ainley. Whereupon the attorney asked either Dr. Cook or the whole assemblage, "Is this man competent?" Receiving a favorable answer and proceeding to interrogate Caspar, and learning from him the nature of the will which he proposed to make, he asked him, "Has any one influenced you to make this will?" The will was thus reduced to writing and presented to Caspar for his signature, with the surprising result that it was found that Caspar could not write his own name. He had suffered a brain lesion, the immediate effect of which was partial paralysis and aphasia. He was able to write in proper order "C-a" or "C-a-s"

of his name, but could not remember, and so could not write any more of it, or, if he could remember, he could not form the familiar letters. Notwithstanding his serious condition, the will was not only executed, but on that day he was removed from the hospital to the home of the Ainleys, where five days thereafter he died.

An appellate tribunal sitting to review asserted errors at law always regrets the necessity which here confronts us of presenting and analyzing matters of evidence. It regrets the necessity because the analysis of the evidence may be and frequently is misunderstood to be an expression of the court's views as to the weight of the evidence. We are here compelled to set forth contestant's evidence for the single and sole purpose of determining whether it has legal weight and substantiability in and of itself, and without regard to the conflicting evidence to support the issues tendered by contestant, and what has been said and what may be said is to be construed, therefore, solely from this point of view, and not at all as expressing the court's opinion touching the question whether with contestant or with respondent lies the preponderance upon a review of all the evidence in the case. We are not here concerned with the conflicting evidence introduced by proponent. We repeat, we are concerned simply with the determination of the question as to whether the direct evidence introduced by contestant, with the reasonable inferences permissible to a jury to draw therefrom, would have sustained the verdict of the jury in favor of the contestant. If it does, the court's action in directing a verdict against contestant is grave error.

[7] We think upon this proposition that the summary of the evidence above given, omitting as that summary does many other evidentiary matters and many reasonable inferences which appellant argues are deducible from that evidence, speaks for itself upon the proposition, without need of lengthy argument; the illicit relation between the deceased and the beneficiary (In re Flint, 100 Cal. 391, 34 Pac. 863; Smith v. Henline, 174 Ill. 184, 51 N. E. 227; McClure v. McClure, 86 Tenn. 173, 6 S. W. 44), the beneficiary's expressions of intent to secure the deceased's property, the methods which she adopted to this end, her control and his sex bondage, his repudiation of his blood relatives and disavowal of relationship, the changes in his demeanor, deportment, and character, his physical and mental breakdown at the time of the execution of the will, in and of themselves furnish sufficient and substantial evidence to support contestant's position that the will was the product of a mind upon which undue influence was exercised in the very matter of the testamentary act by the Ainleys. True it is that the opposing testimony is to the effect that the testator was of sound and disposing mind at the time of the execution of the will; that he was not acting under duress or undue influence; that Mrs. Ainley had come into his lonely life and had taken the place to him of a daughter, as evidenced by his expressed desire to adopt her; that he had ceased to care for his cousin, the contestant, because his cousin was incessantly seeking to borrow money from him; that his repudiation of the cousin was not so much a repudiation of the relationship as a declaration of his loss of interest in the man. But when all this has been said, and everything else which could be said upon the question, it does not for one moment militate against the proposition that there is a substantial conflict of evidence upon the matter.

Such being the situation, the court erred in directing its jury. It was the duty of the court under the circumstances to have submitted the cause a second time for the jury's determination, and then, a second time, should a motion for a new trial have been made, to act in accordance with the dictates of the law.

We are not here confronted, as has been said, with the conflict between the constitutional right of a litigant to the determination of a jury and the duty of a court to set aside the verdict of that jury where in its judgment the evidence preponderates against the verdict. The fact that the question is new in this state bears highest testimony to the judicial fairness of trial judges in the matter. We have heretofore cited some of the conflicting decisions upon the matter and mentioned that in some of the states the right of the trial judge to set aside successive verdicts of juries upon the same evidence is controlled by statute. This could happily be done by the Legislature in this state, and the matter thus removed from the need of judicial consideration, which, however, we repeat, is not pressed upon us here and now.

The judgment appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

172 Cal. 104

MEYER v. RECLAMATION DIST. NO. 17.
(Sac. 2193.)

(Supreme Court of California. Feb. 14, 1916. Rehearing Denied March 13, 1916.)

1. DRAINS ⇐82 — RECLAMATION DISTRICTS — SUITS AGAINST.

Under Pol. Code, § 3462, as amended by St. 1911, p. 644, providing for hearing of objections to assessments levied in behalf of reclamation districts, the same to be filed with the boards of supervisors, and for action by any person aggrieved by the decision of the board, but that no objection to the assessment shall be allowed, unless it shall have been made in writing to the board of supervisors, only objections going to the jurisdiction of the board to levy the assessment and those filed in writing

can be considered in the action provided therefor.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83–87; Dec. Dig. ⟸82.]

2. Appeal and Error ⟸1011—Review—Decisions.

A finding of fact by the trial court on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. ⟸1011.]

3. Drains ⟸76—Reclamation Districts—Assessments.

The report of commissioners of a reclamation district, which provided for drainage canals and pumping plant on which an assessment is based, is not bad because it did not specify the cost of a right of way for the same, as the right of way might be donated or the district have other funds with which to pay for the same.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. ⟸76.]

4. Drains ⟸76—Reclamation Districts—Assessments.

In such case, the failure of the reports to specify the width at the top of the canals or the slopes of the sides will not invalidate the assessment where the total number of cubic yards to be excavated was given, and from the data furnished an engineer might ascertain the width at the top of the canal and the slope.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. ⟸76.]

5. Drains ⟸76—Reclamation Districts—Assessments.

A statement in the report of commissioners of a reclamation district providing for a 12-inch pump to be run by electricity with necessary housing, etc., is sufficient under Pol. Code, § 3459, requiring statement of the work to be done to furnish basis for assessment.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. ⟸76.]

6 Drains ⟸82—Reclamation Districts—Assessments.

Where an assessment for a reclamation district was attacked by the action provided for by Pol. Code, § 3462, as amended by St. 1911, p. 644, the insufficiency of the report of the commissioners of the district relating to improvements cannot be questioned where plaintiffs were not injuriously affected.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83–87; Dec. Dig. ⟸82.]

7. Drains ⟸76—Reclamation Districts—Trustees—Duty of—Reports.

An assessment for a reclamation district based on the report of the commissioners of the district which provided for brush and rock revetments and specified the cost of the same, is not bad because the dimensions of such revetments which were to protect levees were not given, for as a reclamation district is a continuing agency and commissioners are a continuing board to protect the lands, it is proper to leave something to their discretion.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. ⟸76.]

8. Drains ⟸76—Reclamation Districts—Assessments—Statute.

Pol. Code, § 3455, as amended by St. 1911, p. 642, relating to an assessment for the payment of debts for previous work requires a description of the levees and other reclamation work constructed, while section 3459 merely requires a statement of the work done. The old levees built were visible, and maps and profiles showed their location and height. *Held*, that an assessment based on the report of the commissioners of a reclamation district for work already done is not bad because the character of the work done and the outstanding warrants were not specifically stated.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. ⟸76.]

9. Drains ⟸76—Reclamation Districts—Assessments.

That the board of supervisors did not take evidence before appointing commissioners to make an assessment for a reclamation district or make formal findings regarding objections to assessment, is immaterial to the validity of the assessment, as are the reasons actuating them and plaintiff's ignorance regarding form of proceedings; therefore averments as to such matters are properly stricken from a complaint attacking the assessment in the courts.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. ⟸76.]

Department 1. Appeal from Superior Court, San Joaquin County; G. W. Nicol, Judge.

Action by Cynthia A. Meyer against Reclamation District No. 17. From a judgment for defendant and order denying new trial, plaintiff appeals. Affirmed.

A. H. Ashley, of Stockton, for appellant. Nutter & Orr and Clary & Louttit, all of Stockton, for respondent.

SHAW, J. [1] This is an action authorized by section 3462 of the Political Code, as amended in 1911 (Stats. 1911, p. 644). The plaintiff seeks to modify or annul an assessment levied in behalf of the reclamation district by the board of supervisors of the county. That section provides that when the commissioners have completed their assessment the same shall be filed with the clerk of the board of supervisors, who shall thereupon appoint a time for the hearing of objections thereto, of which notice shall be given. At this hearing any person interested in any land assessed may file written objections to the assessment, stating the grounds of the objections. After hearing the objections, if the board approves the assessment, it shall make an order to that effect and indorse the same upon the assessment list, which shall then be filed with the county treasurer. The section provides that the decision of the supervisors "shall be final, and thereafter said assessment list shall be conclusive evidence that said assessment has been made and levied according to law, except in an action commenced as hereinafter provided." It further provides that any person aggrieved by the decision of the supervisors may commence an action in the superior court of the county to have the decision corrected, modified, or annulled, that such action must be commenced within 30 days after the assessment list has been filed in the office of the county treasurer, and that if not commenced within that period "no action or defense shall thereafter be maintained attacking the legality of the assessment in any respect." There is also a provision that no objection to the assessment shall be allowed in any action, unless it shall

have been made in writing to the board of supervisors as prescribed by the section. The present action was begun within the 30-day period prescribed; consequently, the objections presented in writing to the board of supervisors are open for consideration. None other are available, except such as go to the jurisdiction and render the proceedings void. Finnan v. Reclamation Dist., 26 Cal. App. 714, 148 Pac. 227, 152 Pac. 1197. The court made findings against the contentions of the plaintiff and rendered judgment in favor of the defendant. A motion for new trial was denied. The plaintiff appeals both from the judgment and from an order denying a new trial.

The entire sum assessed was $131,727.04, of which $97,058.74 was for the purpose of paying outstanding warrants of the district for reclamation work already done.

[2] The report and plans of the engineer, upon which the assessment was based, estimated as a part of the work to be done the construction and installation of a pumping plant designated as Pump No. 3, together with drainage canals leading thereto, the estimated cost of which was $8,040. One of the objections stated was that this pump and canals would be of no benefit to the lands of the plaintiff. Another was that the assessment to plaintiff's land was not in proportion to the benefits accruing from the works of reclamation. With respect to these objections it is sufficient to say that the evidence at the trial of this action was conflicting, and the decision of the court below is therefore conclusive on appeal.

[3] Another objection was that the cost of the right of way for the proposed canals and pump was not provided for in the report or plans. The district is not required to make such cost a part of the estimate of the expense of making the pumping plant and canals. It may be that the right of way will be given free of cost, or that the district has other funds with which to pay for the same. In any event the omission of this item of possible cost does not make the assessment invalid. Reclamation Dist. v. Hershey, 160 Cal. 692, 117 Pac. 904.

The other objections made to the supervisors were stated generally. They are, in effect, that the plans were not sufficiently full or in detail to advise the board of the necessity of making the assessment, or the landowners of the nature or extent of the work theretofore done or thereafter to be done; that the assessment for the portion of the money estimated for the outstanding warrants is invalid because the work previously done was unlawfully done by reason of defective plans therefor, and the plans reported for the present assessment do not remedy the objection, in that they do not show the character or extent of the previous work for which said warrants were issued.

The report of the engineer stated the character of the pumping plant and canals and the estimated cost thereof as follows:

Cost of 12-inch pump, electrical motors, transformers, housing, and installation complete	$2,680 00
31,400 cubic yards excavation for canal system for pump No. 3 as per plans herewith	3,300 00
Cost of operation, pump No. 3, for one year	560 00
Estimated cost of necessary bridges over canals	1,500 00

[4] The plans consisted of profiles and maps. The maps showed the lines and location of the canals to be constructed leading to the pumping plant, and the profiles showed the bottom width of the canals. They also showed the contour of the land and the height of the surface above the bottom of the ditch. The first objection is that the description of the canals does not show the width at the top nor the slopes of the sides, so that the yardage could be computed therefrom. The number of cubic yards to be excavated, taken in connection with the courses and length of the several canals, their depth and the width on the bottom, furnish all the data necessary to enable an engineer to ascertain the slope of the bank and the width of the top, if any person deemed these items important enough to justify the labor of the calculations. The amount of excavation is the important thing in estimating the cost, and that is stated specifically.

[5] It is also claimed that the pump is not adequately described. The statement shows that the pump was a 12-inch pump to be run by electricity with the necessary housing, transformers, and attachments. We think these specifications constitute a sufficient "statement of the work done or to be done," within the meaning of section 3459 of the Political Code, or a sufficient report of the "plan of the work" as required by section 3455, to form a legal basis for the assessment. The Code does not require that such statement shall have the certainty and completeness of detail that would be necessary in a contract for the construction of the works, but only "a plan showing in some detail and with some degree of certainty the extent and character of the proposed works." Reclamation Dist. v. Bonbini, 158 Cal. 203, 110 Pac. 577. It is difficult to draw a line of certainty and fullness of detail to which such statements must conform. But the above specifications are as complete and certain in all respects which may be said to be substantial, in view of the purposes for which such statement is to be made, as those held sufficient in the Bonbini Case and in the subsequent decisions in Reclamation Dist. v. Diepenbrock, 167 Cal. 577, 143 Pac. 763, and Reclamation Dist. v. Hershey, 169 Cal. 793, 148 Pac. 185.

[6] Furthermore, section 3462, as amended, authorizing this form of action, permits it to be maintained only by "any person aggrieved by the decision of the board." It is not alleged that these, or any other of the specifications attacked will, by their uncertainty or want of detail, cause any injury to the plaintiff or others, or in any manner injuriously

affect the proceeding, or in any degree hinder or prevent the carrying out of the proposed reclamation or add to the cost thereof. The objections are made on wholly technical grounds and upon the theory that their effect is to render the assessment void, regardless of their practical importance. The policy of the law should be to discourage such objections.

[7] The report further stated that:

"It is necessary that the following named sums be expended for the following named purposes, to wit:

* * * * * * * *

Rocking and brushing 1000 ft. east of the bank of the San Joaquin river, ¼ mile below the S. P. R. R. bridge $5,000 00

Rocking and brushing fill along east bank of the San Joaquin river, in the N. E. ¼ section 5, T. 1 S., R. 6 E., at power line crossing..... 500 00"

There was evidence that rocking and brushing, in engineering parlance, means a covering or revetment of brush held in place by rocks to protect the levee against the washing of waves and currents. The written objections to the supervisors did not specify any particular defects in this part of the report, but merely stated the general objection that the report and plans were not sufficiently full or in detail to advise the board or the landowners of the nature of the work to be done. The briefs discuss it only in a general way. The report and plans do not give the thickness of the layer of brush, the size of the rocks to be used, nor the width of the space to be covered. Apparently it was not the purpose to determine these things in advance. Obviously it might be inadvisable to do so. The conditions would vary from time to time, and they might change before the work was done, so as to make a change in such details necessary. It would be impossible to foresee all the conditions and fix the exact plan in advance. It would also be impracticable, in many cases, to prepare the details required by the minute variations in the surfaces of the levees. Such matters are often better left to the discretion of persons in charge of the work. The intention apparent on the face of the report was not to provide a complete plan for the work, but to raise a specific sum of money to expend in such work, leaving the details to the discretion of the trustees. We think it is within the power of the trustees to make an assessment in this manner for protective work of this kind. The functions of the trustees of a reclamation district are not confined merely to the construction of the works necessary to prevent the overflow and secure the drainage of the land therein. The district is a permanent agency organized to keep the lands protected. The trustees constitute a continuing board charged with the duty of carrying on the affairs of the district, operating its pumps and other machinery, when necessary, and keeping in repair the levees and ditches. In this respect they are a governing body similar, in respect of district affairs, to a city council with regard to municipal affairs. They must raise revenues sufficient to enable them to discharge these duties. Protective work of the character here involved is analogous to the repair and preservation of streets, sewers, and the like in a city. The funds necessary to carry on this part of the district government, though raised by a special assessment, are in the nature of taxes. It is never considered necessary in levying taxes for such matters to state in detail how the funds are to be expended. It is enough to state the specific purpose to which they are to be applied and the amount to be devoted to that purpose. We hold that it is a sufficient plan for an assessment, under this law, with respect to such protective work of this kind, for the report of the supervisors to state the character of work and the amount estimated to be necessary to accomplish it.

[8] The objection that the character and nature of the work previously done and for which the outstanding warrants were given is not shown is untenable. The Code, with respect to an assessment for the payment of debts for previous work, requires, at most, a mere "statement of the work done" (Pol. Code, § 3459), and a description of the "levees and other reclamation works already constructed" (Pol. Code, § 3455; Stats. 1911, p. 642). A description of such work that will identify it with certainty is enough. The old levees here to be paid for were existing things visible by any one who chose to look at them. The maps and profiles showed their location and height, and also the height to which it was proposed to raise them by the new work, the number of cubic yards required therefor, and the top width of the levees when so raised, together with the estimated cost of the work to be done. This is clearly sufficient.

In cases where work had been done under a previous assessment which had been adjudged invalid, section 3466½ provides that the landowners who did not pay such assessment may be charged by a subsequent assessment with their just proportion of the former assessment, according to the benefits to the lands from the works constructed. The petition for the assessment set forth the fact that a former assessment had been adjudged void, and that certain landowners had not paid the amounts charged to them thereon. The plaintiff was not one of the delinquents. The work previously done under that assessment is a part of that shown on the maps and profiles above mentioned and, for the reasons above stated, the description thereof is sufficient as a basis for the present assessment.

The remark in Reclamation Dist. v. Bonbini, supra, criticizing the plans there held to be insufficient, are not to be understood as holding that the assessment is void in ev-

ery case, unless the plans were so certain and specific that a perfect contract for the contemplated work could not be let thereon, or unless the estimates showed separately the cost of each material part into which the work might be subdivided. There must be enough of detail to show the particular purpose to which the money will be applied and some degree of certainty as to the extent and character of the work to be done. The examples held bad in that opinion go only to the extent that the cost of repairs and of new work on levees and of drainage ditches and pumps, respectively, must be stated separately. The case is not authority for the conclusion that the present assessment is invalid. We find no fatal defects in the proceeding here attacked.

[9] Objection is made to the ruling of the court striking out certain portions of the complaint. The portions stricken out consisted of allegations that the supervisors did not take evidence prior to appointing the commissioners to make the assessment; that certain evidence was given at the hearing upon the objections to the assessment before the board; that the board made no formal findings regarding the objections; that plaintiff did not know of the prior proceeding; the nature and effect of the evidence received by the board of supervisors at the time of the hearing upon her objections to the assessment; the reasons which actuated the board in making the assessment; and the claims and arguments made in her behalf at the hearing. The court properly decided that the matters stricken out were immaterial to the objections urged against the assessment.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 137

SWEETSER v. PACHECO. (S. F. 7646.)

(Supreme Court of California. Feb. 17, 1916.)

1. ELECTIONS ⟸194—BALLOTS—INDICATION OF CHOICE—STATUTE.

Under Pol. Code, § 1211, providing that no unauthorized mark shall invalidate a ballot unless it appears to have been made to identify it, ballots on each of which the voter had stamped a cross in the voting square at the right of a blank space left on the ballot for the insertion by the voter of some name not printed on the ballot, without writing any name in said space, were properly counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

2. ELECTIONS ⟸194—BALLOTS—INDICATION OF CHOICE—STATUTE.

A ballot on which the voter had written the name of a candidate for Lieutenant Governor in the blank space left for insertions, though the candidate's name was printed as running for Lieutenant Governor, there being no indication that the act was to identify the ballot, was properly counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

3. ELECTIONS ⟸194—BALLOTS—INDICATION OF CHOICE—STATUTE.

A ballot on which the voter wrote two names for justice of the peace and constable and stamped a cross immediately to the right of such names, but not in the voting squares, without indicating any intent to identify the ballot, was properly counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

4. ELECTIONS ⟸194—BALLOTS—INDICATION OF CHOICE—STATUTE.

A ballot on which the voter had stamped a cross as to both "Yes" and "No" on one of many propositions submitted to the voters, and then had attempted to rub out one of the crosses, there being nothing to indicate an intention to identify the ballot, was properly counted for a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

5. ELECTIONS ⟸194—BALLOTS—INDICATION OF CHOICE—STATUTE.

A ballot on which the voter had attempted with the voting stamp to cancel a cross placed by him in the voting square as to one of the propositions submitted by the ballot, there being no indication of intent to identify the ballot, was properly counted for a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

6. ELECTIONS ⟸194—BALLOTS—INDICATION OF CHOICE—STATUTE.

A ballot on which the voter had stamped his cross in three instances in the rectangular space to the right of the name of his candidate, but not in the voting square, the cross as to a particular candidate being in the voting square, there being nothing indicating an intention to identify the ballot, was properly counted for such candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

7. ELECTIONS ⟸194—BALLOTS—INDICATION OF CHOICE—STATUTE.

Ballots, the distinguishing marks of which were obviously accidental, were properly counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

8. ELECTIONS ⟸180—BALLOTS—INDICATION OF CHOICE—STATUTE.

A ballot, wherein a voter had simply written in a name for both justice of the peace and constable, was properly counted for a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151–155, 157; Dec. Dig. ⟸180.]

9. ELECTIONS ⟸180—BALLOTS—INDICATION OF CHOICE—STATUTE.

Under Pol. Code, §§ 1205, 1207, touching the marking of ballots, a ballot on which all the crosses, including the only one opposite a candidate's name, were stamped in a rectangular space to the right of the name, but none of the stamps were either wholly or partly within the voting square, was properly rejected as to such candidate, since the only way in which a voter can indicate his intention to vote for a particular candidate is by stamping a cross in, or at least partly in, the voting square.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151–155, 157; Dec. Dig. ⟸180.]

10. ELECTIONS ⟸186—BALLOTS—INDICATION OF CHOICE—STATUTE.

Under Pol. Code, § 1205, touching the marking of ballots, a ballot on which all the crosses, including that in the voting square opposite a candidate's name, were made with a lead pencil was properly rejected, since the statute requires

expression of the intention of a voter by stamping a cross.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

11. Elections ⟸194—Ballots—Indication of Choice—Statute.

Under Pol. Code, § 1211, providing that no unauthorized mark on a ballot invalidates it unless apparently made to identify the ballot, a ballot on which the cross as to various propositions was stamped on the word "Yes" or "No," instead of in the voting square, there being nothing to indicate an intention to identify, was valid as to a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

12. Elections ⟸194—Ballots—Indication of Choice—Statute.

A ballot on which a cross was stamped on the word "Yes" as to several propositions, and then stamped in the square, there being nothing to indicate an intention to identify the ballot, was valid as to a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

13. Elections ⟸194—Ballots—Indication of Choice—Statute.

A ballot, whereon a voter had attempted to vote on various propositions by writing "Yes" or "No" in the voting squares, instead of stamping a cross, and had marked a cross with pen and ink in the voting square on one of the propositions, there being no indication of intention to identify, was valid as to a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

14. Elections ⟸186—Ballots—Indication of Choice—Statute.

A ballot, whereon a voter had penciled "Matt" in the blank space for Chief Justice of the Supreme Court, drawn a line through it, and then written "Matt Sullivan" in the blank space for Chief Justice, short term, was valid as to another candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 159; Dec. Dig. ⟸186.]

15. Elections ⟸194—Ballots—Indication of Choice—Statute.

Ballots on which there were attempted erasures of all signs of the crosses first placed by the voter as to some candidate or proposition, there being nothing to indicate an intention to identify, were valid as to a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

16. Elections ⟸194—Ballots—Indication of Choice—Statute.

A ballot, containing an attempted erasure of a cross stamped opposite one candidate's name, the vote having been changed by erasure and another stamped to the other candidate, there being nothing to indicate an intention to identify, was valid as to another candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

17. Elections ⟸194—Ballots—Indication of Choice—Statute.

Pol. Code, § 1197, touching the form of ballot, and providing that on the top of its face a direction shall be printed that all marks except the cross are forbidden, and that all distinguishing marks or erasures are forbidden and make the ballot void, is a mere provision that certain cautions shall be given the voter, and does not invalidate ballots on which erasures have been made, not indicating an intention to identify.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

18. Elections ⟸194—Ballots—Indication of Choice—Statute.

A ballot, containing a light and apparently inadvertent impression of the voting stamp in the upper right-hand corner on the margin, was valid under Pol. Code, § 1211, providing that unauthorized marks do not invalidate unless apparently made to identify.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. ⟸194.]

19. Elections ⟸305—Contest—Review.

In an election contest, where the bill of exceptions shows that the proceedings on trial consisted solely of a recount of ballots to determine whether they were properly counted, also showing all objections made by either party to ballots, it must be taken as settled that ballots as to which no objection was made were properly counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. ⟸305.]

In Bank. Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Proceeding to contest an election by Fred W. Sweetser against G. Pacheco. From a judgment for defendant, plaintiff appeals. Judgment reversed, and cause remanded, with directions.

W. H. Early, of Petaluma, for appellant. Thomas P. Boyd, of San Rafael, for respondent.

ANGELLOTTI, C. J. The parties to this proceeding, an election contest, were rival candidates for the office of supervisor of the fifth supervisor district in Marin county at the election held November 3, 1914. Upon the canvass of the votes for said office by the board of supervisors it was declared that Mr. Pacheco had received 351 votes and Mr. Sweetser 350. Thereupon this proceeding was instituted by Sweetser in the superior court of Marin county. Upon a recount of the ballots in court, it was determined by the court that Pacheco had received 333 votes and Sweetser 330, and by the judgment the former was declared elected. This is an appeal by Sweetser from the judgment, the appeal having been ordered transferred to this court after decision by the District Court of Appeal of the First District.

The only questions presented by the appeal are as to rulings of the trial court in the counting of ballots. The bill of exceptions shows the proceedings in the trial court as to the ballots to which objection was made by either party, and the ruling of the court thereon, said ballots numbering 38. By stipulation these ballots were made a part of the bill of exceptions, and have been brought to this court for inspection and consideration.

[1] The trial court counted seven ballots on each of which the voter had stamped a cross in the voting square at the right of a blank space left on the ballot for the insertion by the voter of some name not printed on the ballot, without writing any name in said space. Its action in that regard was correct, as recently held by this court in

Turner v. Wilson, 154 Pac. 2 (decided December 21, 1915).

[2-8] We have examined all the other ballots counted by the trial court to which objection was made, and find no error. In Turner v. Wilson, supra, we discussed the effect of subdivision 4, § 1211, Political Code, added to the section by amendment in the year 1903, providing that:

"No mark upon a ballot which is unauthorized by this act shall be held to invalidate such ballot, unless it shall appear that such mark was placed thereon by the voter for the purpose of identifying such ballot."

In the case at bar there was no evidence of any kind before the court other than the ballots themselves. In view of this provision and what is said concerning it in Turner v. Wilson, supra, it is clear that the action of the trial court in counting each of these ballots must be approved. On ballot "Black 10," the voter had written the name of J. V. Snyder in the blank space for the office of Lieutenant Governor, although Snyder's name was printed on the ballot as one of the candidates for that office. Although this was an unauthorized act, there was nothing to indicate that it was done for the purpose of identifying the ballot. On ballot "Nicasio 3," the voter having written in the names of Frank Rogers and E. Cotta for justice of the peace and constable, respectively, had stamped a cross immediately to the right of each name, but not in the voting square. While such crosses were ineffectual for any purpose, there was nothing therein to indicate any intent to identify the ballot thereby. On ballot "Nicasio 8," the voter had stamped a cross as to both "Yes" and "No" on one of the many propositions submitted to the voters at that election, and then had attempted to rub out one of said crosses. On ballot "Nicasio 9" the voter had attempted with the voting stamp to cancel a cross placed by him in the voting square on one of the propositions. On ballot "Novato 2–5" the voter had stamped his cross in three instances, not including Pacheco, in the rectangular space to the right of the name of his candidate, but not in the voting square. The cross as to Pacheco was in the voting square. As to none of these ballots was there anything to indicate an intent to identify the ballot. As to ballots "Black 12," "Novato 1–1," and "Novato 2–16," the alleged distinguishing marks were obviously accidental. On ballot "Black 6" the voter had done simply what he had an absolute right to do, written in the name of Wm. Farley for both the office of justice of the peace and constable.

[9, 10] The trial court did not err in refusing to count as a vote for Sweetser either ballot "Novato 1–15" or ballot "Novato 2–8." On the former all the crosses, including the only cross opposite Sweetser's name, were stamped in the rectangular space at the right of the name, but none of the stamps was either wholly or partly within the voting square. Under the law as it now is and has been ever since the year 1903, the only way in which a voter can indicate his intent to vote for a particular candidate is by stamping a cross in, or at least partly in (see section 1211, Pol. Code), the voting square, the provisions of section 1205, Political Code, being mandatory in this regard. Any other method is legally ineffectual to express an intent to vote for a particular candidate, by reason of the express language of this section providing how, and how only, the intent shall be indicated. This is made manifest by what is said by this court as to the mandatory character of section 1205, Political Code, in regard to the method of indicating a vote, in Tebbe v. Smith, 108 Cal. 109, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68, Huston v. Anderson, 145 Cal. 333, 78 Pac. 626, and Tout v. Hawkins, 143 Cal. 104, 106, 76 Pac. 897. As that section now is, the voter who has omitted to stamp his cross in, or at least partly in, the voting square, opposite the printed name of a particular candidate, has not voted for that candidate. The case is simply one of no vote. As to ballot "Novato 2–8," all the crosses, including that in the voting square opposite Sweetser's name, were made with a lead pencil. What we have already said applies also to this ballot. In view of the provisions of section 1205, Political Code, the intent of the voter to vote for a particular candidate whose name is printed on the ballot can be expressed only by *stamping* a cross in, or at least partly in, the voting square. Lacking such stamped cross, the ballot cannot be counted for such candidate, even though the courts may feel that the voter in fact intended so to vote. The express language of the law forbids it.

[11-13] The trial court rejected ballot "Nicasio 1," a Sweetser vote, because the voter had stamped the cross as to various propositions on the word "Yes" or "No," instead of in the voting square; also ballot "Novato 2–19," a Sweetser vote, because the voter had stamped the cross on the word "Yes" as to several propositions, and then had stamped a cross in the square; also ballot "Black 8," a Pacheco vote, because the voter had attempted to vote on the various propositions by writing the word "Yes" or "No" in the voting squares instead of stamping a cross, and had also marked a cross with pen and ink in the voting square on one of the propositions; and also ballot "Novato 1–3," a Pacheco ballot, because the voter had stamped his cross on the word "Yes" or "No" as to various propositions, instead of in the voting square. The vote for supervisor was properly indicated on each of these ballots. It was error to reject any of these votes in so far as the contest for supervisor was concerned. There was nothing on any of these ballots to indicate any intent to identify the ballot, and however defective any of them was to indicate a vote on any other candi-

date or proposition, it showed a good vote for a candidate for supervisor. See Turner v. Wilson, supra.

[14] The trial court erred in rejecting ballot "San Antonio 6," a Pacheco vote. The only objection thereto was that the voter had written with a pencil the word "Matt" in the blank space for Chief Justice of the Supreme Court, drawn a pencil line through the word, and had then written the name "Matt Sullivan" in the blank space for Chief Justice Supreme Court, short term. Obviously there was nothing thereon to indicate any intent to identify the ballot.

[15-17] The trial court rejected 14 ballots, 9 Sweetser votes and 5 Pacheco votes, because of attempted erasures by the voter with more or less success, of all signs of the cross first placed by him thereon, as to some candidate or proposition, generally some proposition or propositions. On only 1 of these was the attempted erasure as to a candidate for supervisor, ballot "Novato 1-2," where the voter had first stamped his cross in the voting square opposite Pacheco's name, and then had almost entirely removed all indications of such cross and stamped his cross in the voting square opposite Sweetser's name. The vote as cast was clearly one for Sweetser, and the question in regard to this ballot is the same as that presented by the other 13 ballots on which erasures appeared. We are satisfied that in view of the provisions of subdivision 4, § 1211, Political Code, and the opinion in Turner v. Wilson, supra, it must be held that all of these ballots should have been counted in the contest for supervisor. It is too plain for discussion that there was nothing on any of these ballots to indicate any purpose to thereby identify the ballot. The attempted erasures were at most unauthorized "marks upon the ballot," such marks as it clearly was the object of subdivision 4, § 1211, Political Code, to cover. Unless there be some provision of law making a ballot void whenever an erasure or attempted erasure appears thereon, no sufficient ground for the rejection of the ballot exists except that of a distinguishing mark placed thereon by the voter, and this ground of objection is governed by subdivision 4, § 1211. In this connection reliance is placed by counsel for defendant on a provision in section 1197, Political Code, a section devoted to the matter of form of ballot. This section provides that on the top of the face of the ballot, "the following directions shall be printed." Then follow many directions, including this:

"All marks except the cross (x) are forbidden. All distinguishing marks or erasures are forbidden and make the ballot void. If you wrongfully stamp, tear or deface this ballot, return it to the inspector of elections and obtain another."

But, as was said by Mr. Justice Shaw in his concurring opinion in Turner v. Wilson, supra, this provision—

"is not an enactment of substantive law at all, but a mere provision that certain cautions shall be given to the voter himself."

This was definitely held by this court in Tebbe v. Smith, 108 Cal. 101, 109, 41 Pac. 454, 456 (29 L. R. A. 673, 49 Am. St. Rep. 68), as to another portion of the directions contained in said section 1197, viz.:

"To vote for a person, stamp a cross (x) in the square at the right of name."

At the time of that decision, section 1205, the section providing how the voter must indicate his choice, simply provided that he shall prepare his ballot "by marking a cross *after* the name of the person," etc., saying nothing about a voting square, and it was held that a cross "after the name" which was not in the voting square should be counted. As we have seen, the law in this particular respect has since been changed. It was said that "the mandatory provisions as to voters are found in sections 1205 and 1215 of the same Code," and that neglect to comply with the directions printed on the ballot to place the cross in the voting square did not make the ballot void. It was also said that, while—

"the statute contemplates, at least inferentially, the making of a square, and that the square is the proper place for the marking of a cross, * * * it has not made the doing of this a prerequisite to the casting of a legal ballot."

And so here, while section 1197 still provides for printing a direction on the ballot that "all distinguishing marks or erasures are forbidden and make the ballot void," there is absolutely no provision of substantive law anywhere in the Code to the effect that "a distinguishing mark or erasure" does make the ballot void. As was said by Justice Shaw in his concurring opinion to which we have referred:

"These instructions to voters have been carried down in the same form from the time when the statute provided that every distinguishing mark should invalidate the ballot, and it apparently has not been perceived that subdivision 4 aforesaid changes the rule in that respect."

The controlling rule of substantive law as to the invalidating of ballots by reason of unauthorized marks, including erasures, is that contained in subdivision 4, § 1211, Political Code. There is no difference between erasures and other unauthorized marks in this regard. As was said in Turner v. Wilson, supra, decisions relative to unauthorized marks on a ballot, rendered prior to the amendment of section 1211 in this regard, must be read in the light of the law as it then was. The real ground on which ballots containing erasures were rejected in People v. Campbell, 138 Cal. 11, 20, 70 Pac. 918, 922, was, as is apparent from the opinion, that the erasures "might serve as distinguishing marks." The court said:

"The objections of the appellant to counting for the relator ballots No. 36(a), 137(a), and 276(a), upon the ground that they contain certain erasures which might serve as distinguishing marks, should have been sustained and the

votes rejected" (citing Salcido v. Roberts, 136 Cal. 670, 69 Pac. 431).

In the case so cited, where the voter had attempted to "rub out" a written name, rendering it illegible, this court ruled that the ballot should have been rejected, because by the erasure the voter had left a conspicuous mark on the ballot "by which it might easily have been identified." At the time of these decisions, both prior to the enactment of subdivision 4 of section 1211, Political Code, the settled law of the state was that the ballot must be rejected if the voter placed thereon any mark by which it *might* be afterwards identified as the one voted by him. It was for the very purpose of changing this rule that subdivision 4 of section 1211 was enacted. Of course, in the light of that amendment it is impossible to hold, as was said in People v. Campbell, supra, that a voter "spoils" a ballot when he places thereon "any mark by which it *may* be identified." (The italics are ours.)

[18] The trial court rejected ballot "Novato 2–13," a Sweetser vote, on the objection that a cross near the upper right-hand corner of the ballot, on the margin to the right of the directions to voters, constituted a distinguishing mark invalidating the ballot. The cross is very light, and does not have the appearance of being the result of a deliberate impression of the voting stamp. There is absolutely nothing to indicate that it was not inadvertently made. We are satisfied that it cannot fairly be held that it appears from the ballot that this cross "was placed thereon by the voter for the purpose of identifying such ballot," and the statute says that such a mark cannot be held to invalidate the ballot, unless this appears. As already suggested, the only evidence on the subject is the ballot itself. We must hold that the learned trial judge erred in his conclusion that it appeared that this cross was placed on the ballot by the voter for the purpose of identifying the ballot, and in refusing to count the same as a vote for Sweetser.

What we have said disposes of all the ballots to which objection appears to have been made on either side. The erroneous rulings were in the rejection of 20 ballots, 8 of which were Pacheco votes and 12 Sweetser votes. The ballots as to which no objection appears to have been made must be assumed to have been correctly counted. The result is that Pacheco received 341 votes instead of 333, and that Sweetser received 342 votes instead of 330. The trial court found the vote of each by precincts, and also in the aggregate. The findings as to precincts should have been as follows:

Novato 1.....	Sweetser	98	Pacheco	84
Novato 2.....	"	126	"	97
Nicasio	"	63	"	50
San Antonio.....	"	21	"	73
Black	"	34	"	37

[19] The only grounds of contest alleged in the statement filed by the plaintiff were malconduct of the election officers in the various precincts, in that they miscounted the ballots cast, and illegal votes. The latter ground apparently was not urged on the trial, and the bill of exceptions shows that the proceedings on the trial consisted solely of a recount of the ballots cast, for the purpose of determining whether they were properly counted. The findings of the trial court show simply the conclusions based entirely on such recount. As already stated, the bill of exceptions shows all objections made by either party to ballots, respondent as well as appellant, as is proper in a proceeding of this character. See People v. Campbell, 138 Cal. 17, 70 Pac. 918. In such a proceeding, too, it is clear that, in view of the record, it must be taken as settled that ballots as to which no objection was made were properly counted. Therefore nothing remains for the trial court to do in the matter of this contest except to add to the totals already declared by it said 20 rejected ballots, that is, 12 for Sweetser and 8 for Pacheco, making their respective totals 342 and 341, to make its findings accordingly, and thereupon to enter judgment declaring Sweetser elected. No useful purpose can be accomplished by any further proceedings in the trial court, and the law contemplates as summary a disposition of proceedings of this character as is consistent with a proper ascertainment of the result of the election.

The judgment is reversed and the cause remanded, with directions to the trial court to count the 20 rejected ballots declared by the opinion herein to have been improperly rejected, for the parties for whom they were cast, viz., 12 for plaintiff Sweetser and 8 for defendant Pacheco; to add to the total vote heretofore declared by the findings as having been received by each party the votes thus gained; to make its findings of fact accordingly; and thereupon to enter judgment annulling the election of defendant, Pacheco, and declaring plaintiff, Sweetser, elected.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

(172 Cal. 112)

CARPENTER v. MARKHAM et al.

(L. A. 3631.)

(Supreme Court of California. Feb. 15, 1916.)

1. MECHANICS' LIENS ⟸226—BOND AGAINST LIENS—CONSTRUCTION.

A bond given by a builder, in consideration of the premature payment of the last installment of the contract price before lapse of time for filing liens, to hold the owner harmless from any liens, is immaterial relative to a claim for extras as to which it says nothing.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 409; Dec. Dig. ⟸226.]

2. EVIDENCE ⟸408—RECEIPT — CONTRADICTING.

A receipt is open to evidence contradicting or explaining its terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829–1842; Dec. Dig. ⟸408.]

3. EVIDENCE ⟸409—PAROL EVIDENCE—EXPLAINING RELEASE.

Even if an instrument executed by a building contractor, reciting receipt "in full as per contract for house," be a release instead of a mere receipt, the question of what is released thereby, whether the claim for contract price merely or also that for extras, is open to explanation and elucidation by parol evidence; Civ. Code, § 1647, providing that a contract may be explained by reference to the circumstances under which it was made and the matter to which it relates, and section 1648 providing that, however broad the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1843–1845; Dec. Dig. ⟸409.]

Department 2. Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by J. A. Carpenter against W. F. Markham and others. From an order denying a motion for new trial, plaintiff appeals. Reversed, with directions.

Edward Winterer, of Los Angeles, for appellant. Andrew M. Strong, of Los Angeles, for respondents.

HENSHAW, J. This is an appeal from an order denying plaintiff's motion for a new trial. Plaintiff, as contractor, entered into a contract with Carrie B. Shortman, since and now by marriage Carrie B. Markham, to construct for her a dwelling house. In recompense he was to receive the total sum of $6,440, payable in four separate installments of $1,610 each, the last payment to be due and payable, under the mechanics' lien law, 35 days after the completion of the work. In terms the contract between the parties provided that compensation for additions, changes and extras shall be agreed upon between the parties—

"at a fair and reasonable price * * * and the owner shall give the contractor written authorization for the work, setting forth the changes to be made, the price to be paid and the extra time allowed for its execution. * * * This authorization shall be signed by both parties to the contract and shall be binding upon both. No extras will be allowed without agreement for the same. Changes thus made shall in no wise alter, make void, or in any other way affect the standing of the original contract."

After the completion of the building and the payment by the owner of the last payment of $1,610, plaintiff contended that there was due him $540,21 for and on account of extra work. Defendant denying this, the present action followed. The court heard the evidence of plaintiff and of plaintiff's witnesses tending to show that all the items charged for in the extra work, material, and labor performed were actually supplied and performed, and that the reasonable value was the amount sued for. Evidence was also offered that when plaintiff made his demand upon defendant after payment by defendant of the $1,610 final payment, defendant did not question her liability to pay for these extras, but questioned only the amounts charged for them. The defendant W. F. Markham, now the husband of defendant Carrie B. Markham, and at the time her man of affairs, was the one through whom these negotiations were carried on and with whom these discussions were had. Indeed there is in evidence a letter from defendant W. F. Markham admitting some liability on account of these extras, and declaring that when the plaintiff had finished some other work upon which he was engaged for defendant, defendant had expressed his intent to "settle with him fair and square and was willing to pay him more than his due; that we would get together personally or by friendly arbitration if necessary." This evidence, legally sufficient to establish plaintiff's contention, was admitted under objection and subject to defendants' motion to strike it all out. Subsequently and upon defendants' motion to this end the court did strike out all of this evidence and gave judgment, so far as these controverted matters are concerned, for defendants.

The court based its ruling upon the following facts: Upon the completion of the building and before the expiration of the 35 days during which the last payment must be withheld, defendants agreed with plaintiff to make him this last payment of $1,610 if he would execute an indemnity bond protecting them against possible lien claimants. This indemnity bond declared that the principal and sureties were bound unto Carrie B. Shortman in the sum of $1,610, the conditions of the bond being that whereas Carpenter has carried the work to completion, and whereas the contract provides that the sum of $1,610 shall be due and payable 35 days after the final completion, and whereas Carrie B. Shortman is ready and willing to make the final payment provided the said Carpenter as such contractor shall hold her "harmless from any and all liens or incumbrances which may accrue and grow out of or be caused by the construction of that building, and the furnishing of any labor or

material used in the construction of the same," therefore the principal and sureties declared themselves bound in consideration of the payment of the $1,610 to Carpenter to indemnify and save harmless Carrie B. Shortman from any and all cost, damages, and counsel fees and all other expenses which she may sustain by reason of the matters set forth. Accompanying this indemnity there was given to defendants a receipt in the following language:

"Received from Miss C. B. Shortman in full as per contract for house on lot 18 and 19, Morning Gate tract, in Los Angeles, Cal.
"J. A. Carpenter."

Defendants' motion to strike out was based upon the contention that upon their faces these two instruments amounted to a release and discharge of defendants against all claims of plaintiff, and thus operated to estop him from proceeding to prove those claims. The motion was granted by the court, and plaintiff's case thus being without evidence to support it judgment, as has been said, passed for defendants.

[1-3] We may pass over certain well-founded objections which the appellant takes to the rulings of the court in this respect; the objections being that whether defendants' position be that there was an accord and satisfaction, or whether it be that these instruments raise an estoppel against plaintiff, in either case to be availed of the facts constituting the accord and satisfaction or the facts constituting the estoppel must have been pleaded. Davis v. Davis, 26 Cal. 39, 85 Am. Dec. 157; Etcheborne v. Auzerais, 45 Cal. 121; Landis v. Morrissey, 69 Cal. 86, 10 Pac. 258; Simmons v. Oullahan, 75 Cal. 508, 17 Pac. 543; Dellapiazza v. Foley, 112 Cal. 386, 44 Pac. 727; Newhall v. Hatch, 134 Cal. 273, 66 Pac. 266, 55 L. R. A. 673; Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151. To rest this determination simply upon the fatal error of defendants to plead their satisfaction and accord or their estoppel would still leave the fundamental proposition in the case undecided. That proposition, stated in the form of a question, is: Do these instruments constitute such an accord and satisfaction or raise such an estoppel?

It is better for all concerned that this basic question be now decided. Considering the indemnity bond, it is quite plain that it deals with the premature advancement of the final payment of $1,610, and it deals with nothing else. It is designed to protect the owners who have made this premature payment against any ill consequences that may flow therefrom if liens should be filed and lien claimants exercise their undoubted right to resort to this fund. Neither directly nor indirectly does it say or intimate anything else or further. Analyzing next the receipt, that instrument it is true declares over plaintiff's signature that he has received (payment) "in full as per contract for house." But it is only a receipt, and a receipt is always open to evidence contradicting or explaining its terms. Even if it be considered a release instead of a mere receipt, the question of what is released thereby is open to explanation and elucidation by parol evidence. Civ. Code, §§ 1647, 1648; Stufflebeem v. Arnold, 57 Cal. 11; Field v. Austin, 131 Cal. 383, 63 Pac. 692; Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 86 Pac. 509, 691; Davis v. Diamond Carriage Co., 146 Cal. 59, 79 Pac. 596; California P. Co. v. Merritt, 6 Cal. App. 507, 92 Pac. 509. It was precisely this evidence in elucidation and explanation of this receipt which the court after admitting it struck out, with evidence touching the nature and value of the extras.

In so doing the court erred and the order appealed from is therefore reversed, with directions to the trial court upon new trial to admit the excluded evidence, with such other legal evidence upon these matters as may be tendered by either party and determine the litigation accordingly.

We concur: MELVIN, J.; LORIGAN, J.

(172 Cal. 116)

BARRETT v. METROPOLITAN CONTRACTING CO. (L. A. 3622.)

(Supreme Court of California. Feb. 15, 1916. Rehearing Denied March 16, 1916.)

1. APPEAL AND ERROR ⟸999—REVIEW—EVIDENCE.

For purpose of appeal the jury are to be considered as having accepted the testimony supporting the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. ⟸999.]

2. ANIMALS ⟸70 — VICIOUS ANIMALS—LIABILITY—IMPUTED KNOWLEDGE — SERVANTS IN CHARGE.

Where defendant, though having a foreman who frequently made the rounds of its stables, permanently kept at each stable only stablemen, whose authority was simply to feed the animals, and at times to hook them up, such stablemen were placed sufficiently in charge of the animals as to make their knowledge of the vicious propensities of one of them, through complaints lodged with them by the drivers, imputable to defendant, as regards liability for injury inflicted by the animal.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 225, 228-237; Dec. Dig. ⟸70.]

3. APPEAL AND ERROR ⟸1170(3)—HARMLESS ERROR—RULING ON DEMURRER.

Though the complaint was open to demurrer, as not stating with sufficient certainty that plaintiff's ignorance of the vicious propensities of the horse which injured him extended up to the time of the accident, yet, his testimony having been certain to that effect, overruling the demurrer on that ground was harmless, within Code Civ. Proc. § 475, and Const. art. 6, § 4½.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4075, 4098, 4101, 4542; Dec. Dig. ⟸1170(3).]

Department 2. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by J. H. Barrett against the Metropolitan Contracting Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Vincent Hannon, of Los Angeles, for appellant. R. T. Lightfoot, of Los Angeles, for respondent.

HENSHAW, J. This is an action to recover damages for personal injuries sustained by plaintiff while driving a team furnished to him by defendant under the following circumstances: The city of Los Angeles had entered into a contract with defendant whereby the latter had agreed to furnish suitable horses and their harness and wagons to the city for the purpose of doing its street sprinkling work. The city was to supply the drivers. The teams and wagons were furnished subject to the approval of the inspector or his deputies. "Nothing could leave the yard that was not satisfactory to him." In the performance of this contract defendant maintained, in convenient parts of the city, stables where its horses were kept. Each morning a harnessed team was delivered to each of the city's drivers. Each team was attached to a sprinkling wagon, and, with the city's driver in charge went on its way. The defendant had a foreman or overseer of its stables and horses, who frequently made the rounds of the stables, but was not permanently at any one of them. Each stable was in charge of one or more stablemen—"stable-bucks" they are called. Touching the powers and duties of these stable-bucks the uncontradicted evidence is as follows:

"The authority of the stable-bucks was simply to feed the animals and at times to hook them up."

Upon the day of his injury plaintiff under the direction of a deputy city inspector, took his team, hitched to a sprinkling wagon, and proceeded about his usual duties. There was assigned to him a particular district. His duties were to fill his wagon at convenient water plugs, sprinkle the streets and reload his wagon from the most accessible plug, and so to continue throughout the day. His team upon this day consisted of a horse and a mule. He had not driven them before. At the time of the accident he had refilled and emptied his wagon some 15 or 18 times. He had noticed that the horse was high-spirited and restive, and seemed to be disturbed at the noise made by the rushing water at the fire plugs. The horse started much more quickly than did its companion, the mule, and when it started did not wait for the mule, but dragged forward the whole of the load. To mount to the driver's seat one was obliged to climb first upon the hub, then upon the tire, and then upon the step below the seat. When filling the wagon it was usual and was the habit of plaintiff to tie the lines securely to the seat. When the lines were released the restive horse seemed to regard this as its signal to start and "plunge forward." The plaintiff had filled his wagon at one of the fire plugs, had released the lines, the horse had started, when noticing that the check rein or a line of the mule's harness was out of place over a hame, he stopped his team and dismounted to arrange it. In doing so he left the brake on, dismounting upon the left-hand side with the lines in his hand. He fastened the lines not to the seat, but to the step just above the wheel. He arranged the harness, returned to mount to his seat, was standing on the tire with the loosened reins in his hand, when the horse started, jerked the tire from under his feet, and precipitated him to the ground with the lines in his hand. The wheel passed over his leg and inflicted the injury. He shouted, "Whoa," as he fell off the wheel, but the team did not stop until the wheel had passed over and crushed his foot.

[1] Such is the evidence of the accident. Defendant moved for a nonsuit upon several grounds: That the evidence failed to show that the horse was a dangerous animal, and that it failed to show that, if it were, in fact, a dangerous animal, defendant had any actual or imputed knowledge of its character. This motion was denied. The same propositions advanced upon the motion are in different form presented on this appeal. Evidence was admitted touching the dangerous character of the horse. This evidence consisted of statements made by other drivers of the horse to one or more of the stable-bucks to the effect that the horse was dangerous and would "kill somebody some day," and was restive and high-spirited, and not fitted for the work. The making of these statements to the stable-bucks was disputed by them, the testimony on behalf of the defendant being that no complaint was ever made about the horse; that it was purchased by the defendant upon the recommendation of the city inspector, after an examination of its qualifications by both of them. But, of course, for the purposes of this consideration, it is necessarily to be concluded that the jury accepted the statements of plaintiff's witnesses.

[2] The second proposition advanced by appellant is that, even if these statements were made, they were not made to any officer or agent of the company under such circumstances as to carry actual or imputed knowledge to the defendant itself, and herein is pointed out the limited duties of the stable-bucks in the matter of the horses.

The general question of the responsibility of the owner of a vicious animal for damages by that animal inflicted received some consideration in the case of Clowdis v. Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238. It is there said that knowledge by or notice to a servant charged

with no duty in the matter of the vicious propensities of an animal is not notice to the master. But, upon the other hand, the knowledge of a servant to whom is intrusted the care of the animal is knowledge of the master sufficient to render the latter liable. Bearing in mind that defendant kept in charge of its stables no responsible person and no person at all other than the stable-bucks, that the foreman simply visited these stables, it results that there was no representative of the defendant with whom the drivers could lodge their complaints or to whom they could give their information excepting the stable-bucks themselves. It would be unreasonable to say that these drivers must go in pursuit of some representative of the defendant in higher authority for this purpose. Thus it comes about that under the situation created by the defendant the stable-bucks were placed sufficiently in charge of the animals to warrant the lodging of complaints with them as representatives of their employer, and knowledge of the complaints thus lodged is imputable to that employer.

[3] Appellant by demurrer urged the insufficiency of the complaint, in that it charged that:

"Plaintiff had no knowledge as to the viciousness of the said horse at any time prior to attempting to use the same."

And again:

"That defendant failed to warn the plaintiff before he undertook to use or drive the same."

It is argued that this pleading is pregnant with the admission that, while not knowing the vicious character of the horse prior to attempting to use him, he did learn of this character after using him and before the injury occurred, and that the allegation that defendant failed to warn the plaintiff before he undertook to use the horse is an admission that defendant did inform the plaintiff at the time he undertook to use the horse. It is unquestionably true, as declared in Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695, that it is of the essence of the plaintiff's case that he is ignorant of the viciousness of the animal until the injury has occurred. Undoubtedly, in the respects pointed out, the complaint could have been framed with greater art, and the demurrer to it might well have been sustained to compel the plaintiff to plead more specifically. But the evidence of the plaintiff is that he knew nothing of the horse's vicious propensities until the actual occurrence of the injury. Defendant therefore was not deceived nor misled at the trial by these imperfections in the pleading, and under the familiar and oft-cited sections of the Code and Constitution (Code Civ. Proc. § 475; Const. art. 6, § 4½) the error will here be disregarded.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

27 Cal. App. 667

SCHMIDT v. BEKINS VAN & STORAGE CO. OF SAN FRANCISCO.

(Civ. 1440.)

(District Court of Appeal, First District, California. June 16, 1915. Rehearing Denied by Supreme Court Aug. 12, 1915.)

1. CHATTEL MORTGAGES ⇐138 (1)—LIEN AND PRIORITY — WAREHOUSEMAN'S LIEN FOR STORAGE.

A warehouseman, with notice of the mortgage, has no lien on the mortgaged goods stored with him by the mortgagor after default and without the consent of the mortgagee whose right to their possession became absolute upon default.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 236; Dec. Dig. ⇐138 (1).]

2. CHATTEL MORTGAGES ⇐138 (1)—LIEN AND PRIORITY — WAREHOUSEMAN'S LIEN FOR STORAGE.

A warehouseman's lien for the storage of goods has priority over the lien of a mortgagee who has consented to their storage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 236; Dec. Dig. ⇐138 (1).]

3. CHATTEL MORTGAGES ⇐157 (2)—LIEN AND PRIORITY — WAREHOUSEMAN'S LIEN FOR STORAGE.

In an action by the mortgagee of personal property for its conversion by defendant warehouseman, in which defendant set up its lien for storage as superior to the mortgage lien, evidence *held* to show the mortgagee's consent to the storage of the goods.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. ⇐157 (2).]

4. CONTRACTS ⇐93 (3)—ASSENT—READING.

Plaintiff mortgagee, in signing a memorandum agreeing to subordinate his mortgage lien to any storage lien of the defendant warehouseman, was required to exercise the care and diligence of a prudent business man, and, if not able to read the memorandum, to obtain some reliable person to read it to him before signing, and, not having done so, to be bound by its terms.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 417; Dec. Dig. ⇐93 (3).]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by George Schmidt against the Bekins Van & Storage Company of San Francisco. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. H. Chapman, of San Francisco, for appellant. Russell P. Tyler and A. C. Caminetti, Jr., both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendant from a judgment in favor of the plaintiff in an action for the conversion of certain personal property. The facts, so far as they are material to this appeal, are as follows:

In January, 1911, Marie Knauer borrowed of the plaintiff a certain sum of money, and as security for the indebtedness executed to him a mortgage upon certain personal property. The mortgage was duly recorded in the city and county of San Francisco. In the mortgage it was provided, among other things, that the property should not be re-

moved from the premises at 691 Folsom street in San Francisco, where it was located, without the written consent of the mortgagee (plaintiff); and in the event of its removal without such consent the whole principal sum found remaining unpaid should become immediately due and payable irrespective of the time for payment specified in the note. It was further provided by the terms of the mortgage that the mortgagee should be entitled to the possession of the property in the event that the principal or interest was not paid in accordance with the terms of the promissory note. On the 8th day of May, 1911, at the instance of the mortgagor the defendant hauled one-half of the mortgaged property to its warehouse on Mission street, and the other half to a flat on Bush street, and a few days later this last-mentioned one-half was removed from Bush street and also placed in defendant's warehouse, and was there received and stored by the defendant. The whole of the property remained in storage with the defendant from the said 8th and 19th days of May, 1911, respectively, and was still in storage with the defendant at the time this case was tried. The plaintiff herein foreclosed his mortgage prior to the commencement of this action, and, being unable to obtain possession of the property, brought this action for the conversion thereof by the defendant. Defendant set up in its answer herein as one of a number of defenses its lien for storage as paramount and superior to plaintiff's mortgage lien.

[1] In view of the conclusion we have reached in this case it will be unnecessary for us to pass upon but one of the questions discussed in the briefs. That question is: Did the plaintiff consent to the storage of the goods? If he did, it is not disputed, nor could it well be, that the lien of the defendant is superior to his; or, to state the rule conversely and more nearly as it is usually stated in the books, a warehouseman, with notice of the mortgage, has no lien on mortgaged goods stored with him by the mortgagor thereof after default and without the assent of the mortgagee, whose right to the possession of the goods became absolute upon default. Cobbey on Chattel Mortgages, § 464.

In 40 Cyc. 458, the rule is stated thus: A warehouseman is not entitled to retain mortgaged property to enforce his lien for charges when it was stored in violation of the provisions of the mortgage, without the mortgagee's consent, and no promise can be implied from the mortgagee's silence. See, also, Wright v. Sherman, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792.

[2-4] Looking at the whole record we think it requires us to hold that the plaintiff consented to the storage of the goods, and that therefore the defendant's lien takes precedence over the lien of the plaintiff. It appears from the testimony of the plaintiff that on the 8th day of May, 1911, he called on the mortgagor to collect a payment due on the note referred to, and at this time saw some of the goods loaded on a wagon belonging to the defendant. He demanded of the mortgagor the amount due him, which apparently was not paid, and while he told her that she ought not to remove the furniture, he merely, so far as the defendant was concerned, asked and learned of the driver of the wagon where the goods were going. The mortgagor was quitting the premises at 691 Folsom street; and as the goods had to be removed to some place he was content to let the defendant take them; and a little over two months later, and after he had learned from the mortgagor that the remainder of the goods subject to the mortgage had been removed to the defendant's warehouse, he called there, and after some discussion concerning the matter signed the following writing:

"Bekins Van and Storage Company:

"In the matter of goods stored by Mrs. L. E. Knaued, 691 Folsom street, on May 8th, this is to advise you that I hold a chattel mortgage on these goods, and that they were stored on the date given with my consent.

"George M. Schmidt.

"1203 11th Avenue, E. Oakland."

True, according to his testimony, he told the representative of the defendant who presented the paper to him for signature that he did not want to sign it as he had left his eyeglasses at home, and that all he thought he was signing was a paper which declared that he held a chattel mortgage on the property, the purpose of which was to enable the defendant, if the mortgagor demanded the property, to refuse her demand and retain possession of it for the plaintiff. While perhaps the fair implication from the testimony is that the plaintiff could not see to read without glasses, still he does not expressly say so, nor does he claim that he requested any one to read the paper to him. This explanation of why he signed the document is too flimsy and unsatisfactory to be given any substantial weight. It is slight evidence, which is insufficient to support a judgment. Code Civ. Proc. § 1835. If a document, being the basis of a substantial right, as this is, may be swept aside by such a meager and unsatisfactory explanation as the one here given, then the security of business transactions will be greatly impaired. This paper may in effect be considered as a memorandum of an agreement, under the terms of which the plaintiff agreed to subordinate his lien to any lien the defendant might acquire for the storage of the property; and so regarding the document the law would require the plaintiff to exercise the care and diligence of a prudent business man; and, as such, not being able to read the document, it was his duty to procure some reliable person to read it to him before he signed it, and, not having done so, he is bound by its terms. Hawkins v. Hawkins, 50 Cal. 558; McNinch v. N. W. T. Co., 23 Okl. 386, 100 Pac. 524, 138 Am. St. Rep. 803; Bostwick v. Mut. Life Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; Chicago, etc., Ry. Co. v. Belli-

with, 83 Fed. 437, 28 C. C. A. 358; Muller v. Kelly (C. C.) 116 Fed. 545.

The plaintiff was present when the property was removed from its location on Folsom street, and consented tacitly at least to its removal. It also appears that he permitted the goods to remain with the defendant for over a year thereafter, during all of which time it must have been apparent to him that he could not collect the note from the maker and must look to the goods for its satisfaction. It would seem that while these circumstances perhaps could not be held sufficient of themselves under the authorities to show that the mortgagee intended to subordinate his lien to the lien of the warehouseman, they certainly do tend to support the theory that he knew what he was doing when he signed the document in which he said that the goods were stored with his consent.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

29 Cal. App. 363

PEOPLE v. WAGNER. (Cr. 607.)

(District Court of Appeal, First District, California. Jan. 12, 1916.)

1. CRIMINAL LAW ⇐517(4)—CONFESSIONS—PROOF OF THE CORPUS DELICTI.

In a trial for murder, proof of the corpus delicti of the convincing character required to support a conviction of murder was not a prerequisite to the admission of the defendant's extrajudicial statement that he had accidentally killed the deceased, but prima facie proof was sufficient for that purpose; and it was not essential to the proof and purpose to show that the crime charged was committed by the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1147; Dec. Dig. ⇐517(4).]

2. CRIMINAL LAW ⇐517(4), 680(2) — EVIDENCE—CONFESSIONS—CORPUS DELICTI.

In such trial evidence *held* sufficient prima facie to establish the corpus delicti as a foundation for the state's admission of the extrajudicial statement of defendant that he had accidentally caused the death of the deceased, and it was of no consequence that the proof was not made until after the reception in evidence of the defendant's extrajudicial statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1147, 1610; Dec. Dig. ⇐517(4), 680(2).]

3. CRIMINAL LAW ⇐1168(2) — APPEAL — HARMLESS ERROR — BURDEN OF SHOWING PREJUDICE—EVIDENCE.

Where a fact, essential to the proof of corpus delicti as the foundation for the admission of the defendant's extrajudicial statement, ultimately appeared in evidence, the irregularity in the order of the proof will be held harmless, in the absence of a showing of prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3129–3136; Dec. Dig. ⇐1168(2).]

4. CRIMINAL LAW ⇐388 — EVIDENCE — RESULTS OF EXPERIMENTS — DISCRETION OF TRIAL COURT.

The admission of evidence of the result of experiments is largely within the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 854; Dec. Dig. ⇐388.]

5. CRIMINAL LAW ⇐388 — EVIDENCE — RESULTS OF EXPERIMENTS—CONDITIONS.

In a trial for murder, the court's action in allowing the prosecution, over sufficient objections, to show the result of experiments made by the district attorney and others with shots fired from the gun which killed the deceased, at cardboard and blocks of wood intended to represent the deceased, and supposedly placed in the position in which he stood at the time he was killed, to show the pattern that would be formed by shooting a shell of the same kind that defendant said was used, was error, where there was no showing that the experiments were made under circumstances and conditions substantially the same as those existing when the killing occurred.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 854; Dec. Dig. ⇐388.]

6. CRIMINAL LAW ⇐388 — EVIDENCE — RESULTS OF EXPERIMENTS.

In a trial for murder, evidence of the result of experiments in shooting at blocks of wood supposed to represent the deceased might be material and effective, when considered by the jury with other evidence in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 854; Dec. Dig. ⇐388.]

7. CRIMINAL LAW ⇐830—INSTRUCTION BAD IN PART—REFUSAL.

The trial court may rightfully refuse a requested instruction, which, although correct in part, involves an erroneous statement of the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. ⇐830.]

8. CRIMINAL LAW ⇐747 — INSTRUCTIONS — PROVINCE OF JURY.

In a trial for murder, a requested instruction that, if the evidence of the experiments made by the prosecution and defendant under similar circumstances showed different results, the result of each experiment should be totally disregarded by the jury was properly refused, since such a situation would amount to no more than a conflict of evidence, to be left to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1714, 1727; Dec. Dig. ⇐747.]

9. CRIMINAL LAW ⇐763, 764(12)—INSTRUCTIONS—WEIGHT OF ORAL EVIDENCE.

In a trial for murder, the refusal of a requested instruction that evidence of oral admissions should be considered by the jury with caution was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1748, 1752, 1768, 1770; Dec. Dig. ⇐763, 764(12).]

10. CRIMINAL LAW ⇐829(1)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

In a trial for murder, the refusal of requested instructions was not error, where they were substantially and correctly covered by the charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⇐829(1).]

11. CRIMINAL LAW ⇐782(1)—INSTRUCTIONS —RESULT OF EXPERIMENTS.

In a trial for murder, the refusal to give defendant's requested instruction that the evidence of the result of the experiments made by the prosecution should be disregarded, unless the jury found that its experiments were made under conditions and circumstances substantially the same as those which existed at the time of the killing, was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1847; Dec. Dig. ⇐782(1).]

12. CRIMINAL LAW ⟸736(1)—TRIAL—QUESTION FOR JURY — CONDITIONS OF EXPERIMENT.

The question whether the conditions and circumstances attending the making of experiments were substantially similar to those attending the killing was, in the first instance, a question of fact, to be determined by the trial court before ruling upon the admissibility of the experiments, but ultimately a question for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1701, 1705; Dec. Dig. ⟸736(1).]

13. CRIMINAL LAW ⟸781(3)—INSTRUCTIONS —CONFESSIONS—CORPUS DELICTI.

In a trial for murder, where defendant's extrajudicial statement that he had accidentally shot and killed the deceased was offered by the state, the refusal of defendant's requested instruction that before the jury could convict they must be convinced beyond reasonable doubt that a criminal homicide had been committed, and must be so convinced by evidence additional to the defendant's statements or admissions, itself sufficient to show that the death of deceased was produced by the criminal act of some person, and that the production of a dead body alone did not establish the criminal homicide, was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1866; Dec. Dig. ⟸781(3).]

14. HOMICIDE ⟸228(1)—EVIDENCE—"CORPUS DELICTI."

The phrase "corpus delicti" means the body of the offense, the essence of the crime; and proof of the corpus delicti involves the proof of the distinct factors, of the commission of a criminal act and the defendant's participation in the perpetration thereof.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 471; Dec. Dig. ⟸228(1).

For other definitions, see Words and Phrases, First and Second Series, Corpus Delicti.]

15. CRIMINAL LAW ⟸781(3)—INSTRUCTIONS —CORPUS DELICTI.

Where there is evidence, apart from the extrajudicial confessions or admissions of the defendant, sufficient to fully establish the corpus delicti, the refusal to charge thereon will not constitute reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1866; Dec. Dig. ⟸781(3).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Roy Wagner was convicted of manslaughter, his motion for a new trial was denied, and he appeals. Reversed and remanded for a new trial.

Everts & Ewing, of Fresno, for appellant. U. S. Webb, Atty. Gen., and Frank L. Guerena, Dep. Atty. Gen., for the People.

LENNON, P. J. The defendant in this case, upon an information charging him with the crime of murder, was convicted of manslaughter and sentenced to serve a term of eight years in the state's prison at San Quentin. The appeal is from the judgment and from an order denying the defendant a new trial.

The facts of the case upon which the people relied for a conviction, briefly stated, are these: At and prior to the time of the alleged commission of the offense the defendant Roy Wagner, a boy of 19 years of age, was residing with his father, the deceased, Otto F. Wagner, at the home of the latter near the city of Fresno. At the time of the commission of the offense and for three months prior thereto the defendant was the only person who resided with the deceased. Between the hours of 7 and 8 a. m. on March 15, 1915, the neighbors of the deceased heard a shot, apparently fired in the vicinity of the house of the deceased, and about 40 minutes thereafter saw the defendant leave the house of the deceased and proceed at a rapid gait towards the nearby home of a Mr. J. H. Fisher. When the defendant arrived there he exclaimed to Fisher, his family, and a hired man named Dickinson, all of whom were seated at the breakfast table: "Come over. I have shot my father, and I think I have killed him." Thereupon Dickinson returned with the defendant to the home of the deceased, and upon arriving there found the dead body of the deceased lying on its back on the floor of the kitchen. Dickinson felt the face of the deceased, and the defendant thereupon exclaimed, "He is dead!" Fisher followed some 10 minutes later, and upon arriving at the home of the deceased met the defendant at the kitchen door, who then exclaimed "Isn't it awful!" In explanation of how the killing occurred the defendant stated to both Fisher and Dickinson that while seated in a chair he had been cleaning a loaded gun, and that after cleaning the gun he reloaded it, and when attempting to lower the hammer, it slipped from his thumb and discharged the contents of a shell into the body of the deceased. The defendant then voluntarily proceeded to show how the killing occurred by illustrating how he sat in the chair, and how he held the gun before and at the moment of its discharge. The defendant further stated that his father, the deceased, had repeatedly cautioned him to be extremely careful in the handling of that particular gun because the hammer thereof was defectively constructed. The autopsy upon the body of the deceased showed that the contents of the shell struck him on the right side of the head above and around the ear, producing a fracture of the skull at the base of the brain. The body of the deceased was found lying in an angular position in front of the kitchen table, which was placed before and extended across the window. The feet of the deceased extended under this table. The deceased, so the defendant said, was standing in front of this table at the time the gun was discharged, and the upper sash of the window had two shot holes in it. When Dickinson and Fisher arrived at the home of the deceased the gun which did the killing was standing in a corner of the kitchen behind the kitchen table and adjacent to the window. The prosecution offered and were permitted to show, over the objection of the defendant, the result of certain

experiments made by the district attorney and peace officers in shooting into a wooden figure of about the size of the deceased, for the purpose of rebutting the statements of the defendant that the killing was the result of an accident. The defendant did not take the stand in his own behalf, and the case was submitted to the jury upon the evidence substantialy outlined above.

[1] Proof of the corpus delicti of the conclusive and convincing character required to support a conviction of the crime charged was not a prerequisite to the reception in evidence of the extrajudicial statements of the defendant that he had killed the deceased. Prima facie proof of the corpus delicti was sufficient for that purpose; and it was not essential to the proof and purpose to show that the crime charged was committed by the defendant. People v. Vertress, 169 Cal. 404, 146 Pac. 890; People v. Rowland, 12 Cal. App. 6, 106 Pac. 428; People v. Spencer, 16 Cal. App. 756, 117 Pac. 1039.

[2] We are of the opinion that the evidence relating to the finding of the body of the deceased, its position when found, the location, nature, and result of the gunshot wound which caused the death of the deceased, the position in which the shotgun which did the killing was standing when the body of the deceased was found by Fisher and Dickinson, the remoteness of the gun from the place where the body of the deceased had apparently fallen and remained after the shooting, coupled with the fact that the defendant was seen leaving the house of the deceased and proceeding in the direction of the Fisher place some 40 minutes after the sound of a shot was heard by neighbors, apparently fired from a gun in the vicinity of the house of the deceased, was not only sufficient to repel the inference that the death of the deceased was self-inflicted, or the result of a stray shot entering through the kitchen window from the gun of a passing hunter, but was sufficient prima facie to establish the corpus delicti as a foundation for the admission in evidence of the extrajudicial statements of the defendant that he had caused the death of the deceased.

[3] It is of no consequence in the present case that proof was not made until after the reception in evidence of the defendant's extrajudicial statements, of the fact as to the time when the defendant was seen leaving the home of the deceased after a shot was heard in that vicinity. If this fact was essential to the proof of the corpus delicti as the foundation for the admission in evidence of the defendant's extrajudicial statements, it ultimately appeared in evidence; and, in the absence of a showing that the defendant was prejudiced thereby, the irregularity in the order of proof must be held to be harmless. People v. Barnnovich, 16 Cal. App. 427, 117 Pac. 572.

[4, 5] The trial court erred to the substantial prejudice of the defendant in its ruling permitting the prosecution to show, over detailed and sufficient objections, the result of certain experiments made by the district attorney and others with shots fired from the gun which killed the deceased at and into cardboards and blocks of wood, which were intended to represent the deceased, and supposedly placed in the postion in which he stood at the time of the killing. The purpose of these experiments, as declared by the district attorney, was "to show the pattern that would be formed by shooting a shell of the same kind that the defendant said was used that morning and using it in the same gun." The evidence showing the result of the experiments tended to show that if the gun had been discharged on the morning of the killing in the manner and under the same circumstances described by the defendant, the pattern and location of the shot which struck the head of the deceased, and that which scattered and lodged in the window casing of the kitchen, where the killing occurred, would have been different from the pattern and location of the shot actually found upon the head of the deceased and in the window casement. While the admission of evidence showing the results of experiments is largely within the discretion of the trial court, nevertheless the admission of such evidence is regulated and must be controlled by the well-settled rule that it must be first shown that the experiments relied upon were made under conditions and circumstances which were essentially the same as those which existed when the alleged occurrence took place. People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; People v. Hill, 123 Cal. 571, 56 Pac. 443; People v. Solani, 6 Cal. App. 103, 91 Pac. 654; State v. Justus, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470; Commonwealth v. Piper, 120 Mass. 185. The rule in this behalf is well stated in the case of Hisler v. State, 52 Fla. 30, 42 South. 692. In that case the defendant was charged with murder, and his defense was that the shooting which resulted in the death of the deceased was accidental. The prosecution sought to discredit the testimony of the defendant as to the conditions under which the shooting was done by introducing in evidence the result of an experiment made by shooting at a target, and which tended to show the area over which the shot from a gun would scatter at a given distance. The case was reversed partly because of the admission of such evidence without first having laid the full foundation therefor, and in the course of its opinion the court said:

"Evidence of an experiment whereby to test the truth of testimony that a certain thing occurred is not admissible, where the conditions attending the alleged occurrence and the experiment are not shown to be similar. The similarity of circumstances and conditions go to the admissibility of the evidence, and must be determined by the court. If, in the discretion of the trial court, such proffered evidence is rejected, the appellate court will not review the rul-

ing, unless an abuse of discretion appears. But where such evidence is admitted over proper objections, and the rule as to similarity of circumstances and conditions attending the occurrence and the experiment does not appear to have been complied with in admitting the evidence, the appellate court will review the ruling, and if error be found therein, and it does not appear from the whole record that no harm could have resulted to the defendant from the admission of such evidence, the error may cause a reversal of the judgment. Evidence of this kind should be received with caution, and only be admitted when it is obvious to the court, from the nature of the experiments, that the jury will be enlightened, rather than confused. In many instances, a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful."

In the present case no showing was made that the experiments were made under circumstances and conditions which were all the same, or substantially the same, as those which existed when the killing occurred. Thus it was not shown, or attempted to be shown, that the block of wood which was supposed to represent the head and body of the deceased stood in the same position and at the same angle as the deceased stood when he was shot. This the prosecution was unable to do because the defendant, in his explanation and illustration of the circumstances attending the shooting, made no reference to the position of the deceased when he was shot further than to say that he was standing in front of the kitchen table washing the dishes; and, for aught that appears in the record, the deceased at the time he was shot may have been standing erect at either end of the table, or may have been standing slightly stooped forward with his head turned slightly towards or entirely away from the defendant. Obviously these added and possible circumstances would have materially altered the result of the experiments relied upon; and the fact that the prosecution was unable to reproduce substantially all of the circumstances and conditions attending the killing should have prompted a rigorous enforcement rather than a relaxation of the rule under discussion. Doubtless the result of the experiments, erroneously admitted in evidence, tended in no small degree to involve in doubt, if not entirely discredit, the defendant's explanation and illustration of the killing which he made to Fisher and Dickinson.

[6, 7] The trial court rightfully refused to give the instruction requested by the defendant which declared that the evidence of the result of experiments should not be—

"considered material and effective nor conclusive, but as a mere circumstance to be considered in connection with other evidence in the case."

Clearly this instruction was erroneous in the particular that it declared that evidence of the result of experiments was neither material nor effective; and the fact that it in part stated the law correctly to the extent that such evidence was to be considered by the jury with the other evidence in the case neither warranted nor required the giving of the instruction in whole or in part; for it is the rule that the trial court may rightfully refuse a requested instruction which, although correct in part, involves an erroneous statement of the law. People v. Davis, 135 Cal. 163, 67 Pac. 59.

The instruction in question finds no support in the case of People v. Levine, 85 Cal. 39, 43, 22 Pac. 969, 24 Pac. 631. The opinion in that case does not declare that as a matter of law the results of experiments must be considered as neither material nor effective. Whatever was said by the court in that case concerning "material and effective evidence" was said by way of argument; and the only point decided upon the experimental phase of the case was that evidence of the result of experiments is not conclusive, but must be considered in connection with the other evidence in the case.

[8] The trial court also rightfully refused the requested instruction which was to the effect that if the evidence of the respective experiments made by the prosecution and defendant, made under similar circumstances, showed different results, then the result of each experiment should be totally disregarded by the jury. Such a situation in the evidence would amount to no more than a conflict of evidence, which, like the ordinary conflict of evidence, should be left to the jury for decision.

[9] The refusal of the trial court to give a requested instruction, to the effect that evidence of oral admissions should be viewed and considered by the jury with caution, was not error. As was stated in the very recent case of People v. Raber, 168 Cal. 316, 143 Pac. 317:

"Such instruction, if not in violation of the constitutional injunction against charging juries on matters of fact, is one that may properly be refused as a 'mere commonplace.' In short, a judgment will not be reversed either for the giving or the refusing of this instruction."

[10] Complaint is made of the refusal of the trial court to give several other requested instructions, but by comparison we have ascertained that in every instance the subject-matter of each of the requested instructions now under discussion was covered substantially and correctly in the charge of the court.

[11, 12] The trial court, however, erred in refusing to give certain other instructions requested by the defendant, to the effect that the evidence of the result of the experiments made by the prosecution should be disregarded unless the jury found that those experiments were made under conditions and circumstances which were the same, or substantially the same, as those which existed at the time of the killing. As a matter of course, the question of whether or not the conditions and circumstances attending the

making of the experiments in question were substantially similar to those attending the killing was, in the first instance, a question of fact, to be determined by the trial judge before ruling upon the admissibility of the evidence of the result of the experiments, but the trial court's determination of that question was not conclusive upon the jury. Undoubtedly such evidence was proffered and permitted upon the theory that it would assist the jury in arriving at a correct conclusion concerning the conduct and relative positions of the deceased and defendant at the time of the killing, and therefore the question as to whether or not the experiments relied upon were made under the same, or substantially the same, conditions and circumstances as those which existed at the time of the killing, was a question of fact, which ultimately was for the jury to weigh and determine. While the instruction immediately under consideration may not have been entirely free from ambiguity, nevertheless in its essential features and as a whole it was sufficiently correct and certain to warrant and require its giving, in the absence of anything upon the same subject in the charge of the court.

[13-15] We are satisfied that under the particular and peculiar circumstances of the present case the trial court erred, to the substantial prejudice of the defendant, in refusing to charge the jury at the request of the defendant as follows:

"You are instructed in this case that before you can convict the defendant, you must be convinced from the evidence beyond a reasonable doubt and to a moral certainty that a criminal homicide was in fact committed; and you must be so convinced by evidence other than or in addition to the statements or admissions of the defendant, and this evidence must be sufficient to establish that the death of the deceased was produced by the criminal act of some person and was not the result of accident. The production of the dead body does not alone establish the criminal homicide; and proof of the dead body alone found, with the statements of the defendant, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide before the statement of the defendant would be admissible for any purpose; and hence, if you believe in this case that the only evidence which shows that a crime was committed is the production of the dead body of the deceased, coupled with the admissions or statements of this defendant, then it is your duty to acquit this defendant."

While the foregoing proposed instruction may not have been perfect in its statement of the rule and principle of law that it was evidently intended to embody, nevertheless, in the absence of anything upon the same subject in the charge of the court, we think it was a sufficiently clear and correct statement of the familiar, well-settled, and uniformly adhered-to rule of law, which imperatively declares and directs that a defendant charged with crime must not be convicted upon his extrajudicial confessions or admissions, unless such confessions or admissions be corroborated by proof aliunde of the corpus delicti. The proposed instruction was not faulty in any of the particulars pointed out in the case of People v. Frey, 165 Cal. 140, 131 Pac. 127, where it was held that a requested instruction upon the same subject was rightfully refused, not only because the phraseology employed was calculated to mislead the jury, but also and principally for the reason that it did not contain a definition of the phrase "corpus delicti." Succinctly stated, the phrase "corpus delicti" means the body of the offense, the essence of the crime, and proof of the corpus delicti involves two distinct but nevertheless interdependent factors, viz., the commission of a criminal act, and the defendant's guilty participation in the perpetration thereof. While the proposed instruction in the present case did not in terms refer to the corpus delicti, nevertheless it did embody all of the essentials of a definition of that phrase, and stated substantially the requirements of the rule involved therein. This being so, no good reason appears why the court should not have given the proposed instruction, or have covered the subject-matter thereof in its charge to the jury. We are not unmindful of the rule that where, in any given case, there is evidence, apart from the extrajudicial confessions or admissions of the defendant, sufficient to fully establish the corpus delicti, the refusal to charge the jury upon that subject will not constitute reversible error. People v. Tomalty, 14 Cal. App. 224, 111 Pac. 513. Although the evidence of the corpus delicti presented in the present case was, as previously pointed out, sufficient to warrant the reception in evidence of the extrajudicial statements of the defendant, and upon the whole may have been, standing alone, barely sufficient to have sustained the conviction of the defendant, nevertheless it was not, in our opinion, of a character so conclusive and convincing as to warrant us in saying that the failure of the trial court to give the requested instruction, or state in its charge to the jury the rule of law under discussion, did not operate to the substantial prejudice of the defendant. We cannot conceive that the jury, in arriving at the conclusion, implied from the verdict, that the corpus delicti had been established, did not resort to the evidence erroneously admitted, showing the result of experiments, which tended to discredit the defendant's statements that the killing was the result of an accident, and consequently it cannot be said that the extrajudicial statements of the defendant formed no part of the evidence upon which the jury determined that the corpus delicti had been established. It is evident, therefore, that the proposed instruction was not only of peculiar pertinency to the paramount issue in the case, but was clearly essential to a proper consideration of the evidence by the jury, and, that being so, there is no escape from the conclusion that the refusal of the trial court to give such instruction, or to cover the subject-matter in

its own charge, was an error which, because it deprived the defendant of a substantial right and undoubtedly contributed to the verdict, was sufficient in itself to compel a reversal of the judgment and the granting of a new trial.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: RICHARDS, J.; KERRIGAN, J.

(29 Cal. App. 326)

BLOXHAM v. TEHAMA COUNTY TELEPHONE CO. (Civ. 1417.)

(District Court of Appeal, Third District, California. Jan. 7, 1916.)

1. MASTER AND SERVANT ⟸278(2) — ACTION FOR DEATH — SUFFICIENCY OF EVIDENCE — NEGLIGENCE.

Evidence, in plaintiff's action for damages for the death of her minor son through the negligence of his employer, *held* to justify a finding of defendant's culpable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 956; Dec. Dig. ⟸278(2).]

2. MASTER AND SERVANT ⟸281(12)—ACTION FOR DEATH — SUFFICIENCY OF EVIDENCE — CONTRIBUTORY NEGLIGENCE.

In such action, *held* that the evidence would have justified a finding that decedent's contributory negligence did not proximately cause his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 995; Dec. Dig. ⟸281(12).]

3. CONSTITUTIONAL LAW ⟸208(7) — CLASS LEGISLATION — REGULATION OF ELECTRIC POLES AND WIRES.

Act April 8, 1911 (St. 1911, p. 796), providing by section 1 that in any action for damages for death of an employé from personal injury on the ground of want of ordinary care on the part of the employer, it shall be conclusively presumed that the employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to his injury, and Act April 22, 1911 (St. 1911, p. 1037), regulating the use and maintenance of electric poles, wires, etc., and declaring that no person or corporation shall run or maintain above ground, within 4 feet of any wire carrying less than 600 volts, any wire carrying more than 600 volts, or maintain, 4 feet from any wire carrying more than 600 volts, any wire carrying less than 600 volts, and making any violation thereof a misdemeanor, are not unconstitutional as class legislation, since they apply to a single class of individuals or objects, and apply uniformly to all of the class.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 654, 655; Dec. Dig. ⟸208(7).]

4. MASTER AND SERVANT ⟸119—SAFE PLACE TO WORK — TELEPHONE CONSTRUCTION — STATUTE.

Act April 22, 1911 (St. 1911, p. 1037), regulating the placing, erection, and maintenance of electric poles, wires, etc., and forbidding the erection or maintenance above ground, within the distance of four feet from any wire carrying less than 600 volts, of any wire carrying more than 600 volts, etc., and by section 4, making a violation thereof a misdemeanor, was not intended for the protection of the general public or for the patrons of telephone companies, but was intended to operate in favor of an employé engaged in the construction of a telephone line, to whose death the violation of such statute contributed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 210; Dec. Dig. ⟸119.]

5. MASTER AND SERVANT ⟸119—ACTION FOR DEATH—NEGLIGENCE.

Under Act April 22, 1911 (St. 1911, p. 1037), regulating the erection and maintenance of electric poles, wires, etc., and requiring wires carrying more than 600 volts to have more than a 4-foot clearance from wires carrying less than 600 volts, etc., defendant telephone company was bound to know of the existence of another line and to adapt its line to the situation, and could not shift the responsibility, for an accident contributed to by a violation of the statute, upon the other company for letting its line sag so as to be within the forbidden limit of clearance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 210; Dec. Dig. ⟸119.]

6. TRIAL ⟸260(1) — REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

The refusal of requested instructions was not error, where the instructions given were full, and correctly presented every essential and issue of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⟸260(1).]

7. APPEAL AND ERROR ⟸232(1)——MATTERS REVIEWABLE—POINT NOT RAISED BELOW—PARTIES.

In an action for the death of plaintiff's minor son through the negligence of defendant telephone company, where defendant demurred on the ground of a misjoinder of parties plaintiff because plaintiff's former husband, the father of the deceased, was not made a party, and where its answer alleged that plaintiff was a married woman at the time of the accident, with a husband able and willing to support her, the court, on appeal, could not consider whether the action should have been brought by plaintiff's husband.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1426; Dec. Dig. ⟸232(1).]

8. APPEAL AND ERROR ⟸867(3, 4)—MOTION FOR NEW TRIAL — SUFFICIENCY OF PLEADINGS.

The sufficiency of the pleadings to support the judgment, or the sufficiency of the findings of fact to sustain the conclusions of law, cannot be considered on appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3479, 3481; Dec. Dig. ⟸867(3, 4).]

9. APPEAL AND ERROR ⟸867(1)—MOTION FOR NEW TRIAL—SCOPE OF REVIEW.

The appellate court is limited, in its review of the action of the lower court on appeal from the order denying a new trial, to the grounds on which the new trial was asked.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476, 3482; Dec. Dig. ⟸867(1).]

10. NEW TRIAL ⟸5 — MOTION FOR NEW TRIAL—DENIAL.

Where a motion for a new trial on the ground that the verdict is against the law will afford no relief, and other and effective means of relief by motion to vacate the judgment, etc., are provided in Code Civ. Proc. §§ 663, 663½, the motion will be overruled.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 8, 13; Dec. Dig. ⟸5.]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Annie Bloxham against the Tehama County Telephone Company. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

H. P. Andrews, of Red Bluff, for appellant. J. T. Matlock, Jr., of Red Bluff, and Frank Freeman, of Willows, for respondent.

CHIPMAN, P. J. Plaintiff seeks to recover damages for the death of Oscar Cole, her minor son, who, it is alleged in her complaint, lost his life through defendant's negligence while in its employment. The cause was tried by the court with a jury, and plaintiff had a verdict for $2,157.25, on which judgment was accordingly entered. Defendant moved for a new trial, which was denied, and it appeals from the order.

It is alleged in the complaint that at the time of his death the said Oscar Cole was of the age of 18 years; that his father was John N. Cole, who deserted plaintiff, his then wife, more than 10 years ago and that she obtained an absolute divorce from him. It elsewhere appears that plaintiff subsequently married one Zell Bloxham, who was living with her as her husband when the accident occurred, but that they were separated when the action was commenced and tried. The circumstances attending the accident are thus alleged:

"That on or about the 20th day of November, 1911, and at the time of the death of the said Oscar Cole, he was an employé and in the employ of the Tehama County Telephone Company, in the capacity of a general telephone lineman, and at the time of his said alleged death, the said Oscar Cole was engaged in fastening a bracket of the defendant company upon one of its poles for the purpose of stringing and making fast to said bracket a wire of the said company, and that while so engaged in fastening said bracket to said pole, without any fault on his part, he came in contact with one of the electric power wires of the Sacramento Valley Power Company, a corporation, thereby causing his death, and that at the time that the said Oscar Cole was fastening the said bracket to the said pole of the said company, the distance from where said bracket was being attached by the said Oscar Cole, to the electric power wire of the Sacramento Valley Power Company, was less than four feet, and that said wire of the Sacramento Valley Power Company, at said time, was carrying more than 600 volts of electricity, and that the said wire that was to be placed on said bracket was a wire that would carry less than 600 volts of electricity."

It is further alleged that deceased "was uneducated and inexperienced in electricity and in building and construction work and duties of a general telephone lineman," and that defendant's agents "who were in charge of said work of construction in fastening brackets and attaching the wires thereon were uneducated and inexperienced" in the work being done, and were careless and negligent in permitting said Cole to erect its line within a distance of four feet from the electric power line of said power company, and in permitting incompetent men to take charge of its construction work; that by reason of said alleged carelessness and negligence of defendant the said Cole met his death.

Defendant demurred generally to the complaint and specifically on the ground of uncertainty and "misjoinder of parties, in that John N. Cole, father of said Oscar Cole, is not joined as a party plaintiff in said action." The demurrer was overruled, and defendant answered: Denied the alleged dependency of plaintiff upon said Oscar Cole; alleged that plaintiff was a married woman whose husband "was at the time of the accident and is now charged with the support of said plaintiff"; denied that Oscar Cole was, prior to his death, contributing to the support of plaintiff; denied that he was not at fault at the time of his death; denied that he was inexperienced in the work he was doing, and denied also the alleged incompetency of defendant's said agents; denied that defendant, by its alleged negligence or otherwise, contributed to the death of deceased; alleged that he fully understood the work of lineman and understood the dangers attached to such employment; that full and complete instructions were given him as to said work and as to the dangers incident thereto, and especially that he must not place brackets or construct lines within four feet of the electric power line of said Sacramento Valley Power Company; that his death was caused by his own gross carelessness which contributed proximately thereto.

It was admitted at the trial that Oscar Cole was killed on November 20, 1911, while in the employ of defendant, and while ascending one of the poles of defendant preparatory to fastening a bracket thereon, by coming in contact with one of the electric power wires of the Sacramento Valley Power Company, at the town of Corning, Tehama county, and that at the time of his death he was of the age of 18 years; that defendant is the owner, and managing, constructing, and operating the telephone system involved in the action; that Oscar Cole was the son of John N. Cole and Annie Bloxham, formerly Annie Cole, plaintiff in the action, and that John N. Cole deserted his family, then consisting of Claudia Cole, Oscar Cole, and Elmer Cole, more than 10 years ago, and plaintiff obtained an absolute divorce from said John N. Cole on the ground of willful desertion, "and for that reason the plaintiff brings this action in the place and stead of the said John N. Cole"; that the power wire of the Sacramento Valley Power Company with which the deceased, Oscar Cole, came in contact at the time of his death was carrying more than 600 volts of electricity, and that the telephone line at that time being constructed by defendant, upon which said Oscar Cole was working, was a wire that would carry less than 600 volts of electricity; that one Wesley Holt, spoken of as Red Lewis, was defendant's foreman of the crew and "as such foreman controlled and directed the

services of said Cole at the time of the accident."

Plaintiff testified that she was married to Zell Bloxham 11 years ago; that he was a blacksmith earning about $15 per week, and supported her "with what he made and what Oscar made," and that the latter "contributed from $20 to $30 per month"; that her husband "is not now living with" plaintiff, and they are separated; that deceased did all kinds of work—drove team, worked in hayfields and orchards; "that Oscar never had any experience in the duties of a telephone lineman or electricity to amount to anything; that he had not worked at that more than two months; that he received $2.50 per day; that he never attended a school where he was taught electricity."

Witness McGovern qualified as an expert in construction work on telephone and electric power lines, having, as he testified, worked at that business since 1898—"practically doing nothing else." He testified: That he had known deceased "for a year around town." That he worked for witness one or two days. He was asked if he knew whether or not deceased had any experience in electrical construction work, and answered: "I know he had not. I know that he had no experience." That he worked for witness "just a few months before his death," and that he afterwards worked for defendant. He was not present when the accident occurred. He visited the scene a year later, and the situation and circumstances attending the death of deceased were explained to him substantially as shown by the evidence of witnesses then present. He was asked if a person was sent up on the pole to fasten brackets on it where they are now, how near to the power wire would it be safe for him to place himself. Over defendant's objection he testified:

That if the man wasn't capable he "should judge about 4 feet. Q. You say a man would have to be away 4 feet? A. No, sir; if the man was a practical man, he could go up and put on the brackets if the wire was within 6 inches, if he knew how to handle himself. * * * If he had a four-foot clearance, it wouldn't be dangerous. * * * Q. Well, suppose there was about an 18 or 19 inch clearance, what would you say then? A. If he wasn't a practical man, it would be a dangerous place for him to work. Q. What would you say about sending a man like Oscar Cole up there? A. I wouldn't send him up there, because I don't think he was competent to do it. Because he had no experience."

Witness George Duncan was one of the men working with deceased. He testified that they had been on the job about 1 week or 10 days, running a line from Red Bluff to Orland, and had reached Corning where the accident occurred. He was an eyewitness to the accident, and described it as follows:

"We were working on the second street south from the Maywood Hotel, either the second or third on the lower end of the town toward the railroad track. He went up to put some brackets for the telephone line, and he went up there and put his leg over the messenger wire which was grounded, and put his belt around the pole and leaned back to snap the belt to the pole, and when he leaned back, he leaned right against the power wire which was behind him. I think it was Sacramento Valley Power Company's power wire. Think he was about 25 feet from the ground. He went up the pole to put some brackets on, which he was to put above the messenger wire. Wesley Holt told him to go up there. I had just finished nailing on some brackets on the pole I was on. The pole I was on was across the street from the one Cole was on, west and north of him. When I had nailed my brackets on I stayed there under the pole in position to sight him with his bracket under the power line. I was directed to do this by Holt. He ordered me to sight him in to clear this power wire. It was the one on which Cole was killed. I had orders to sight there nearly on the level or get the brackets in line to clear this power wire between the poles that the lines wouldn't come in contact with each other. I don't think the power wire was more than 18 inches from the pole where he was to nail the brackets. I didn't measure it; I just guessed at the distance. When I was sighted I told Cole there wasn't clearance enough. He said there was. I don't remember having any instructions as to the distance the telephone wire was to clear the power wire. I didn't hear any instructions given Cole on that point, but I heard Holt instruct Cole to be careful about the power. That is as much as I can remember at the present time. Before that I hadn't had but very little experience in power, scarcely any. I had considerable experience in telephone work. I had been working at telephones off and on since 1906, but had not had scarcely any experience with power wires. I don't know how much experience the other men working with me had. When Cole struck the power line he fell limp out over the wire. I hollered to the other boys as soon as I saw it; they started to run down there, and then they went back the other way to the substation and shut the power off. I don't believe it was 18 inches from the messenger wire to the power wire."

The witness was asked how a man who understood his business should proceed in what deceased was doing:

"A. Well, he should have stopped and buckled on before he got up to this messenger. He should have buckled on the safety belt around the pole and put himself in position to work. Touching the wire (the power wire) caused Cole's death."

On cross-examination he testified:

"Q. Mr. Duncan, Mr. Holt had directed you to see that there was sufficient clearance before nailing on the brackets, had he not? A. Well, he didn't specify just that manner. He asked me to sight through there and sight under the power. To sight young Cole under the power was the orders he gave me. This was for the purpose of giving sufficient clearance. Our instructions were to go up there and put the brackets on, and my instruction was to sight him in for this clearance. I did sight for clearance and told Cole that there wasn't sufficient clearance."

On re-examination he testified:

"I was instructed to clear this power and this messenger. That was as much as I know of it. I wasn't specified any particular distance that I was sighting for placing a bracket on which a telephone wire would be placed. It couldn't have been placed anywhere on that pole, and had perfect clearance from the power wire."

On recross he testified:

"I was there after the death of Cole until the body was removed, and it had been taken to the morgue. Later in the day there was considerable more clearance between the messenger wire and the power company wire. Later, on that day, it was about 20 minutes after the ac-

cident, the slack was straightened out of the Sacramento Power wire. It was done by a Sacramento Valley wireman. He drew up the slack immediately after the accident, and after he drew it up there was plenty of space for a man to work, but wasn't 4 feet, but there was considerable difference in space * * * There were no brackets nailed on the pole on which Cole was killed that day."

The witness testified that about 10 days later he saw the pole, "and the brackets and wires were strung on it"; that the messenger wire, "just guessing at it, it was somewhere in the neighborhood of 4 feet, but whether over or under" he could not say; "the telephone wire was about 14 or 16 inches above the messenger."

Witness Charles Bertholas, foreman of the Northern California Power Company, formerly worked for the Sacramento Valley Power Company and had its lines constructed where Cole was killed. He testified that the wires are higher to-day than when he left Corning. The place where Cole was working when he was killed was pointed out to him, and he testified that it would be a dangerous place to send a man with "two months' experience in telephone work." He testified that the power line wire carried 7,200 volts.

Witness Robert Stewart, "engaged as an electrician by the North California Power Company," who "had worked for the Pacific Gas in construction work for 6 years," testified that he knew Oscar Cole by sight during his lifetime, and knew where he was killed; that he saw him while he was on the pole, dead; that the messenger wire of the telephone company was about 3 feet from the power wire at the time Cole was killed. "Q. Well, how far was the brackets—if those brackets were on that pole at the time Cole was killed, at the same place they are now, how far would they have been then from the power wire?" (Objected to on the ground that "the evidence shows that there were no brackets on there at the time Cole was killed." Objection overruled.) "A. About 18 inches." He testified "that there was no place above the messenger wire 4 feet from the power wire, and it didn't make any difference where a man would nail if it was above the messenger, it would be within the 4-foot limit." He testified that where Cole was working was a dangerous place for a man of only two or three months' experience. He also testified that "the distance between the wires on the poles at this time are the same that they were then."

Witness Melvin Kingsley was local manager of defendant company in November, 1911; "that he saw Cole at the telephone pole after his death; that he saw him taken down; that witness had the two brackets that are now on the telephone pole, nailed there a day or two after Cole's death, and the wires were strung on"; that he was directed by Manager Reeves to nail them on; that he received no instruction as to the distance the wires should be from the power wire and he did not measure the distance, and does not know whether they were four feet apart or not.

Witness De la Montanya, for defendant, was one of the crew working with deceased. He helped take deceased down from the pole, but did not witness the accident. He testified that he "heard Foreman Holt give instructions to be careful as to the danger of the power lines several times. I heard him give instructions to that effect to Cole the day before the accident happened. This was in reference to the high voltage power lines in Corning." He testified that he did not measure the distance between the high voltage power line and the cable of the telephone company, but he believed there was room enough for Cole to work safely. His estimate of the distance was 3 feet. His theory of the accident was that "when he buckled the belt he threw his hand around with the snap, and then is when I think he came in contact with the wire with his thumb." He said there was a slack in the power wire that brought it nearer to the telephone cable, and that "right after he was killed the slack was pulled up."

Witness Duncan was called for defendant, and testified "that it was Cole's thumb that came in contact with the wire, and not the other part of his body; his hand was behind him, along the side of him like. We had not completed the work where Cole was."

Defendant's foreman, Holt, testified: That Cole commenced work on the Red Bluff and Orland line November 15, 1911; that he instructed Cole, as he did "all the rest of the boys in the gang, to be very careful while working, particularly in the town of Corning, about coming in contact, or bringing their person in contact, with any voltage wires while being in contact with grounded messengers." That he read the recent law on the subject of placing wires. "When Duncan went up his pole I told him to sight and see how the power wires were. Of course, going along in his duties it would be necessary to put brackets on, and Cole went up his pole without my directing him, but he knew it was in his force of duty, as he had been doing from day to day going along. I told Duncan to sight through for clearance at that point for Cole * * * to see whether they (the power wires) would interfere with us in any form or manner through there." That at the time of Cole's death witness was four or five poles east of him. That Duncan called him when the accident happened, and he went to his assistance. That "he saw the condition of the power wire at the time Cole was taken down from the pole, and saw it subsequent to that time on the same day, and that the condition had changed. That the wire had in the meantime been cut and pulled up. That he didn't measure the distance, but that the distance

of clearance was much greater after the slack was pulled up and the clearance was greater than before." There was evidence that according to the survey of the line which Holt was given to work by he found that in several places it would bring the line in contact with the power line, and he changed the location upon his own judgment. That at a point south of the place where Cole was killed the company ran its line at a crossing between two power lines not more than five feet apart.

A map or plat, showing the location of the poles, wires, etc., immediately at the scene of the accident, was introduced, but does not appear in the record. It probably made clear to the jury evidence otherwise more or less obscure. The office of the "messenger wire," spoken of by witnesses, is not explained. Whatever its use, it was there as part of the construction work, was connected with the pole on which Cole was working, and was "grounded"; i. e., became a conductor of electricity brought in contact with it. The brackets, as we understand the evidence, were the wooden fixtures to be nailed to and projecting from the poles and to which the wire was fastened. It is not made clear just where the pole was situated, on which Cole was working, with reference to the power line poles. Judging from the significance given to the slack in that wire, we infer that this pole was midway between the poles carrying the power line wire, and hence the slack or sagging in that wire brought it nearer the pole which Cole ascended. We have, then, from the evidence this situation: Cole was sent to work with directions to nail brackets on a pole at a point above the messenger wire, which latter, witnesses testified, was 18 or 19 inches from the power wire; one of defendant's witnesses said it was 3 feet, while others, not giving exact distance, testified that at no point above the messenger wire was it possible to place a bracket which would leave a "clearance" between it and the power wire of 4 feet. The relative position of these various objects was well known to defendant's agents. Expert witnesses, familiar with this sort of work and its risks, testified that, to a person inexperienced or not capable, the place where Cole was sent was dangerous. Cole had no experience in electrical construction and but a short time as telephone lineman, an employment in itself without the risk which proved fatal to him. He had been instructed, as defendant's witnesses testified, to be careful not to come in contact with a power wire, which may be conceded and still it would not relieve defendant from the charge of negligence in sending him to work in a place known to defendant to be dangerous without specially warning him of the danger and providing for his protection. This would be true under the general law governing such cases, and particularly so under existing statutes making it a misdemeanor to construct a telephone line, carrying less than 600 volts of electricity, within 4 feet of a power or other line carrying more than 600 volts—in this instance carrying more than 7,000 volts.

[1] Cole seems to have done the thing naturally suggesting itself to one of his experience, acting under the orders of his superior. He climbed the pole, threw a leg over the messenger wire, and was fastening his belt to the pole to support himself while nailing on the brackets. In doing so he came in contact with the power line wire, thus forming a circuit with the grounded messenger wire on which he was resting, and was killed. Whether he was guilty of contributory negligence is a question apart from defendant's negligence, and will be noticed later. We think there was sufficient evidence to justify the jury in finding that defendant was culpably negligent.

[2] We are also of the opinion that had the court not taken from the jury by its instructions the question of Cole's negligence as the proximate cause of his death, now claimed as error by defendant, the circumstances were such as would have justified the jury in finding that defendant failed to establish this defense. The court, however, instructed the jury as follows:

"You are instructed that the statute law of this state makes it unlawful for any commission, officer, agent, or employé of the state of California, or of any city and county, or city or county, or other political subdivision thereof, or any person, firm or corporation, to run, place, erect, or maintain above ground, within a distance of 4 feet from any wire or cable which shall conduct or carry at any one time more than 600 volts of electricity, any wire or cable conveying or carrying less than 600 volts of electricity, and that the statute above referred to in this instruction was enacted for the safety of employés, and in this connection I charge you that if you find the Tehama County Telephone Company, at the time of the killing of Oscar Cole, was, in the erecting and constructing of the telephone line upon which Oscar Cole was working at the time of his death, violating such statute law, and you further find from the evidence that such violation of such statute contributed to the death of said Oscar Cole, then and in that event the law conclusively presumes that said Oscar Cole was not guilty of contributory negligence, and you must so find.

[3] Defendant challenges the soundness of this instruction on the ground that the statute authorizing it is unconstitutional "as class legislation." The act of April 8, 1911 (Stats. 1911, p. 796), went into effect September 1, 1911. Section 1 reads as follows:

"In any action to recover damages for a personal injury sustained within this state by an employé while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the dam-

ages may be diminished by the jury in proportion to the amount of negligence attributable to such employé, and it shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to such employé's injury; and it shall not be a defense:

"(1) That the employé either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused wholly or in part by the want of ordinary or reasonable care of a fellow servant."

The act of April 22, 1911 (Stats. 1911, p. 1037), "regulating the placing, erection, use and maintenance of electric poles, wires, cables, and appliances, and providing the punishment for the violation thereof," in its first section provided that:

"No commission, officer, * * * and no other person, firm, or corporation shall * * * (C) Run, place, erect or maintain, above ground, within the distance of four (4) feet from any wire or cable conducting or carrying less than six hundred volts of electricity, any wire or cable which shall conduct or carry at any one time more than six hundred volts of electricity, or run, place, erect or maintain within the distance of four (4) feet from any wire or cable which shall conduct or carry at any one time more than six hundred volts of electricity any wire or cable conducting or carrying less than six hundred volts of electricity."

Section 4 provides:

"Any violation of any provision of this act shall be deemed * * * a misdemeanor, and shall be punishable upon conviction by a fine of not exceeding five hundred dollars ($500.00) or by imprisonment in a county jail not exceeding six (6) months or by both such fine and imprisonment."

This act by its terms went into effect "six months from the date of its passage so far as it relates to new work." Both acts were therefore in effect when Cole was killed.

We do not feel called upon to discuss the constitutionality of these acts. They clearly apply to a single class of individuals or objects, and apply uniformly to all of the class, and, we think, fall within the principles enunciated in Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604, and numerous subsequent cases on the subject. See the discussion in the recent case of City of Sacramento v. Swanston, 155 Pac. 101.

[4] The instruction complained of was not error. If a case may be supposed where the conduct of the injured party was so grossly negligent as to place him beyond the pale of the protection given by the statute, this was no such case. There is no merit in the contention that the statute is intended solely "for the protection of the general public, for the patrons of telephone companies," etc. In our opinion, it was intended to apply to just such a case as we have here, and, under the uncontradicted facts, the court was justified in instructing the jury that:

"If you find that the defendant was, in the erecting and constructing of the telephone line upon which Oscar Cole was working at the time of his death, violating such statute law (referred to in the instruction), and you further find from the evidence that such violation of such statute contributed to the death of said Oscar Cole, then and in that event the law conclusively presumes that said Oscar Cole was not guilty of contributory negligence, and you must so find."

[5] Error is claimed in the court's refusing evidence and instructions which were offered to shift the responsibility for the accident upon the power company in causing its line to sag, thus bringing it within the forbidden limit of clearance. The court was clearly right in its ruling. The power line was erected before defendant's line was started and defendant knew, or should have known, that at the point involved the power line was dangerously near where defendant was locating its line. The duty of defendant obviously was to adapt its line to the situation in which it found the power line or first causing the power company to take up its slack if that would have removed the danger. In no sense was the power company liable, nor could it be made the scapegoat of defendant. It was not error, therefore, for the court to instruct the jury:

"That the Sacramento Valley Power Company has nothing to do with this case, and their neglect, if any, is no defense in this action. The defendant here is bound by the conditions existing as found at the time of the accident."

[6] We have given careful attention to alleged errors in ruling upon evidence offered, and find none calling for special consideration. Some objections were made to instructions given, not already noticed, and to instructions offered by defendant and refused by the court. The instructions given were full, and correctly presented every essential element and issue in the case. We find no error in any given or refused.

[7] Finally, it is urged that the order must be reversed for the reason that the action should have been brought by plaintiff's husband. The argument is that "the character of the property, which consisted of a chose in action, as community property or separate property, is governed solely by the statute," that it appeared by the answer and by the evidence that plaintiff is a married woman whose husband was living with her when her son was killed; that the earnings of the minor son went to support the family, the community; that the loss of this support constituted damages, and the damages occurring became community property, not having been acquired by gift, devise, or descent. The question cannot be considered on this appeal. The demurrer claimed a misjoinder of parties plaintiff because plaintiff's former husband and the father of the deceased was not made a party. The answer alleged that plaintiff is a married woman, and was such at the time of the accident, "and that her husband was at all times mentioned in said complaint fully able and willing to support the said plaintiff, and did so support said plaintiff." No suggestion is made that he should have brought the action. The cause was tried on the pleadings as they stood, without objec-

tion to the evidence in support thereof. The appeal from the judgment was not taken in time to avail the appellant.

The grounds stated in the motion for a new trial were: (1) Insufficiency of the evidence to justify the verdict; (2) that the verdict is against law; (3) errors in law occurring at the trial; (4) excessive damages appearing to have been given under the influence of passion and prejudice.

[8] The sufficiency of the pleadings to support the judgment, or the sufficiency of the findings of fact to sustain the conclusions of law, cannot be considered on an appeal from an order denying a new trial. Swift v. Occidental, etc., Co., 141 Cal. 161, 74 Pac. 700; Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62; Hoover v. Wolfe, 167 Cal. 337, 139 Pac. 794.

[9] The appellate court is limited in its review of the action of the lower court, on appeal from the order denying a new trial, to the grounds upon which the new trial was asked. Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558.

[10] The only ground made the basis of the motion for a new trial having any application to the point now raised is "that the verdict is against law." In discussing the office of new trial when sought on the ground that the decision is against law, it was pointed out, in Swift v. Occidental Co., supra, that where a new trial could afford no relief, and other and effective means of relief are expressly provided in the Code of Civil Procedure (sections 663 and 663½), the motion for a new trial is necessarily overruled. An example is thus given:

"Where the findings are full and complete as to all the issues and fully sustained by the evidence, but the conclusions of law are erroneous or misapplied in framing the judgment. In such a case," said the court, "it is plain that a new trial—a re-examination in the same court of the issues of fact, or some of them, (Code Civ. Proc. § 656)—would accomplish nothing, whereas a motion in pursuance of section 663 to vacate or correct the judgment would secure the appropriate relief in the trial court, or, if relief was denied there, it could be secured by an appeal from the judgment." Id.

And it was held that a motion for a new trial is not a means of correcting the error in the decision where the only fault in the findings is that they do not support the legal conclusions drawn from them, and still less is it a means of remedying a fault in the pleadings or an error in granting relief not warranted by the pleadings. Id.

"A new trial is a re-examination of an issue of fact in the same court after a trial and decision." Code Civ. Proc. § 656. "The question whether the judgment is authorized by the pleadings or findings cannot be agitated on the motion for a new trial, for it is not involved in a re-examination of the issues of fact. * * * The question whether the issues of fact were correctly found does not depend in any manner on the question whether a pleading states sufficient facts to entitle a party to the relief granted by the judgment, or whether the issues as found sustain the judgment." Martin v. Matfield, 49 Cal. 45; In re Doyle, 73 Cal. 571, 15 Pac. 125.

It was hence held, in Brison v. Brison, 90 Cal. 323, 27 Pac. 186, that, upon an appeal from an order denying a new trial, the court "can only review the action of the court below, we cannot consider whether the findings are sufficient to sustain the judgment, and that our examination of the evidence is limited to a consideration of its sufficiency to sustain the findings of fact."

It is not now claimed that the damages awarded were excessive.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(29 Cal. App. 407)

COOS BAY MFG. CO. v. CALIFORNIA SELLING CO. (Civ. 1739.)

(District Court of Appeal, First District, California. Jan. 18, 1916. Rehearing Denied by Supreme Court March 16, 1916.)

1. SALES ⟸52(6)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action to recover for a box shook which it was claimed defendant purchased in the name of another, evidence *held* to warrant a finding to that effect.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 138; Dec. Dig. ⟸52(6).]

2. SALES ⟸52(3)—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where it was claimed defendant purchased a box shook in the name of another corporation, evidence that a judgment was recovered against the corporation which was the ostensible buyer, and execution returned unsatisfied, was admissible as tending to show that such corporation was insolvent and was not the actual buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 126; Dec. Dig. ⟸52(3).]

3. WITNESSES ⟸324—IMPEACHMENT OF PARTY'S OWN WITNESS—RIGHT TO IMPEACH.

Where plaintiff to establish its case called as a witness the president of the defendant corporation, the witness being the principal stockholder was so identified with defendant that plaintiff might impeach him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1097; Dec. Dig. ⟸324.]

4. APPEAL AND ERROR ⟸1048(7)—REVIEW—HARMLESS ERROR.

Where, after defendant's objections to plaintiff's impeachment of a witness it called, by reference to a deposition in which it was claimed such witness gave contradictory statements, were overruled, the act of the parties in introducing the whole deposition under stipulation rendered the error, if any, harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4160; Dec. Dig. ⟸1048(7).]

5. APPEAL AND ERROR ⟸237(2), 301 — OBJECTIONS BELOW—RIGHT TO MAKE.

In an action tried to the court, evidence offered by defendant was excluded. On the day of submission, or the following day, plaintiff notified defendant that its objections to the evidence were withdrawn, but defendant refused to then introduce the evidence. On a subsequent day without notice to defendant's attorney, the court at request of plaintiff made a nunc pro tunc order admitting such evidence, and defendant's counsel was immediately notified of the order. The court did not decide the case for over 10 days and in its findings expressly stated that the evidence so received was considered. *Held*, that defendant not having moved the court to reopen the case to admit any similar evidence that might have been excluded, though there was sufficient time and not having made such matter ground for new trial, it could not on appeal complain of the original exclusion of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753, 1754; Dec. Dig. ⟸237(2), 301; Trial, Cent. Dig. § 251.]

Appeal from Superior Court, City and County of San Francisco; Eugene P. McDaniel, Judge.

Action by the Coos Bay Manufacturing Company against the California Selling Company and others. From a judgment against the named defendant and an order denying a new trial, such defendant appeals. Affirmed.

Wise & O'Connor, of San Francisco, for appellant. A. P. Dessouslavy, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor and an order denying defendant's motion for a new trial. The action was brought against the California Selling Company, Sunnyvale Canneries, Napa Valley Improvement Company, Napa Valley Packing Company, corporations, and against George H. Hooke and Julius Wolff, defendants, to recover the sum of $7,872.02, alleged to be due from said defendants for certain "box shook" sold and delivered to them. The answer of the defendants was in the form of a general denial. Upon the trial the plaintiff dismissed the action against all of the defendants except California Selling Company, the appellant herein, and recovered judgment against it for the full amount of its claim.

[1, 2] The first contention of the appellant is that the evidence is insufficient to justify the decision of the court. The evidence discloses that the box shook in question was ordered from the plaintiff by and in the name of the Napa Valley Packing Company, and was shipped to it and was charged upon the books of the plaintiff to the said Napa Valley Packing Company.

The facts upon which the plaintiff relies to sustain its judgment against the California Selling Company are substantially as follows: The Napa Valley Packing Company was organized as a corporation in 1901 for the purpose of canning, preserving, packing, handling, and dealing in fruits, vegetables, etc., and for some years it owned and operated its own packing house, and preserved and handled these products under its own labels, and had an established line of customers and of trade. In the year 1908 its factory was destroyed by fire and was not rebuilt, and at the close of that year, according to the testimony of Mr. Hooke, about all that the Napa Valley Packing Company had left was its labels and its reputation for packing. The California Selling Company was organized as a corporation in the latter part of the year 1908, with George H. Hooke, Julius Wolff, and Mary L. Baraty as its organizers and stockholders. Mr. Hooke was made president; Mr. Wolff, who was the president of the Napa Valley Packing Company, became vice president and manager; and Mary L. Baraty, who had also been secretary of the Napa Valley Packing Company, became secretary of the new corporation. The former offices of the Napa Valley Packing Company were taken over by the California Selling Company, who paid the rent thereafter, although the former occupant still maintained desk room there and had its name on the

door. In the early part of 1909 the order for the box shook was placed with the plaintiff by Mr. Wolff in the name of the Napa Valley Packing Company, and the material was received in due course. There were two payments made on account of this order, one of $464.31 in August, 1909, and another of $560 in September, 1909. It does not appear by whom the first of these remittances was made, but the second was by the check of the California Selling Company. While the material was in the course of delivery, several letters passed between the California Selling Company and plaintiff, in one of which the order for this material was referred to as "our contract." The box shook when received was sent out in lots as ordered to various packing houses, and in several specifically proven instances was billed by and shipped as the property of the California Selling Company, and was paid for in checks drawn to it. During the year 1909 the Napa Valley Packing Company, according to the testimony of Mr. Hooke, had no credit, and for that reason its name did not appear on the books of the California Selling Company, and whatever business the latter company did with it was done in the name of Mr. Wolff, the president of the one and the vice president and manager of the other corporation. There was also offered in evidence the record of an action brought in that year against the Napa Valley Packing Company by one of its creditors to recover a considerable sum of money, in which judgment was had against it, and an execution issued which was returned unsatisfied. The defendant objected to this evidence, and now complains of its admission as error; but we are of the opinion that it was admissible as in some degree tending to show that the Napa Valley Packing Company was at the time in a practically insolvent condition.

From the foregoing, and from other more or less direct evidence not necessary to be recapitulated, the court arrived at the conclusion that the transaction with the plaintiff, while apparently undertaken in the name of the Napa Valley Packing Company, was in reality a transaction in which the California Selling Company was the real actor and beneficiary, and that the name of the Napa Valley Packing Company was merely a cover or designation under which it and its organizers were doing business during the year 1909. We think this conclusion is abundantly sustained by the proofs, and hence that the appellant's first contention that the evidence does not justify the decision of the trial court is without merit.

[3, 4] The appellant further contends that the trial court committed an error in permitting the plaintiff to attempt to impeach the testimony of Mr. Hooke, called as plaintiff's witness, by reference to a deposition of the latter, in which it was claimed he had given other and contradictory evidence to that elicited from him during the trial. The appellant urges that the plaintiff should not have been permitted to impeach its own witness; but we think that the record sufficiently shows that the witness Hooke was so identified with the California Selling Company as its president and principal stockholder at the time this debt (if it was its debt) was incurred as to make him clearly such a witness as the plaintiff might feel obliged to call, but by whose testimony it should not be bound. In addition, however, it appears that at a later stage of the case the entire deposition of Hooke was put in evidence by stipulation of the parties, and thus the error, if any occurred, was rendered immaterial if not altogether cured.

The appellant has a further objection to the ruling of the court in refusing to permit the witness Hooke to answer certain questions put to him by the defendant upon cross-examination as calling for the conclusion of the witness. We are of the opinion that the answers to these questions were properly excluded upon that ground.

[5] Upon oral argument of this cause upon the appeal, the main contention of the appellant was that the court committed an error of procedure during and after the trial of the cause which must result in its reversal upon appeal, and which arose in the following manner: During the course of the trial, the defendant offered in evidence a number of letters which the witness Hooke stated had been taken by him from the files of the Napa Valley Packing Company, and by which letters the defendant offered to prove that the Napa Valley Packing Company during the period covered by the transaction with the plaintiff was conducting a considerable business and had dealings with parties in several states in the sale of corn and canned goods and in the purchase of box stock. It also offered in evidence the bank books of the Napa Valley Packing Company as indicating the amount deposited by that company during the year 1909, and as showing that during that period it was a going concern. To both of these offers the plaintiff objected upon the ground that they were incompetent, irrelevant, and immaterial, and the court sustained this objection. On April 30, 1913, the cause was submitted to the court for decision upon briefs thereafter to be presented. After the submission of the cause and either on the same day or the following day, plaintiff's counsel orally notified defendant's counsel that plaintiff withdrew its objection to the admission in evidence of the said correspondence and bank books, and that it consented to the admission thereof in evidence, to which the defendant's counsel replied that he would not consent to the admission of such testimony and that he was satisfied with the record as it stood. Thereafter, and on May 5, 1913, without any further notice to attorney for the defendant but prior to the decision of said cause, the court upon the request of plaintiff's counsel, but without the pres-

ence of counsel for defendant, made an order reciting that counsel for plaintiff having appeared and withdrawn its objection to the introduction of the above-mentioned evidence, the ruling of the court would be reversed and the evidence admitted, and when produced would be properly marked as the defendant's exhibits, and that said order was made nunc pro tunc as of the date of the former ruling and prior to the submission of the cause. Plaintiff's counsel immediately notified defendant's counsel of the making of said order. Thereafter, and on May 17, 1913, the court decided the case, and in its findings expressly stated that in considering the evidence in the case it had also considered the foregoing evidence which had been admitted after the plaintiff's objection had been withdrawn. The judgment of the court was in plaintiff's favor, and thereafter the defendant in due time served and filed its notice of intention to move for a new trial, wherein it specified as errors of law the rulings of the court in at first refusing to admit the foregoing evidence, and also specified as error the subsequent order of the court admitting the same in evidence in the absence of the defendant and without previous notice of the making of said order. Upon this appeal from the order of the court denying its motion for a new trial, the appellant insists that the action of the court in reference to the foregoing matters was entirely irregular; that it was entitled in the first instance to have had the correspondence and bank books of the Napa Valley Packing Company admitted in evidence for the purposes for which they were offered; that the offer of plaintiff's counsel orally made to defendant's counsel to withdraw its objection to this evidence and consent to its admission made after the submission of the cause, and their subsequent appearance in open court, but without the presence of the defendant or notice to it of such action, to withdraw their objection to the evidence, and the order of the court made thereon admitting the same, and the statement of the court in its findings that it had duly considered such evidence, did not operate to cure the prior error and irregularity of the court's action, and hence that the cause must be reversed therefor upon this appeal.

Conceding for the sake of argument, though not deciding in the absence of the evidence itself from the record, that the original ruling of the court in refusing to admit the said correspondence and bank books of the Napa Valley Packing Company in evidence in the first instance was erroneous, we are of the opinion that such error, if any, was sufficiently cured by the subsequent acts of the parties and proceedings of the court; for it appears that on the very day of the submission of the cause or on the following day, and while the cause, though under submission, was still in legal contemplation on trial (Dore v. Southern Pacific Co., 163 Cal. 183, 195, 124 Pac. 817), the plaintiff notified the defendant of the withdrawal of its objection to the admission of this evidence. Where this offer was made does not appear, and for aught that the record discloses it may have been in open court. However that may be, it seems to us plain that in the presence of this offer, which was the equivalent of an offer to reopen the case for the admission not only of this particular evidence but of such further proofs of a like nature as the defendant might wish to present, the defendant was not entitled in all fairness to refuse the offer, or to sit back in reliance upon a possible error in the record which it might use to work a reversal of the case upon appeal, and the fact that the case was under submission at the time of such offer and of its refusal does not in our opinion change the rule as laid down very recently by the Supreme Court in the case of Estate of Ross, 151 Pac. 1138, wherein the court says with respect to a state of facts not essentially dissimilar from those in the case at bar:

"Before the close of the trial, counsel for respondents withdrew all objections of this character and offered to allow the appellant to recall the witnesses and elicit from them fully the reasons and bases of their respective opinions, to which offer counsel stated that, while they thanked opposing counsel for the splendid offer, they preferred to stand upon the record as made. If counsel truly desired to have further evidence upon this subject introduced, they should have availed themselves of this opportunity, and should have recalled the witnesses accordingly. It does not appear that there would have been any difficulty in doing so, or that the court refused to allow it to be done. The record indicates that the court would have allowed it. If, on the other hand, they desired to preserve the ruling in the record for the purpose of thereby securing a ground upon which to obtain a new trial, or reverse the order on appeal to this court, it need scarcely be said that we will not entertain the objection under those circumstances. In either alternative the objection must be deemed to have been effectually waived." Estate of Ross, supra; Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 690, 46 Pac. 738; Kahn v. Triest-Rosenberg Co., 139 Cal. 340, 346, 73 Pac. 164; 38 Cyc. 1462, and cases cited.

It is true that, as the record discloses, the action of the plaintiff in suggesting to the court that its objection to the admission of the evidence in question was withdrawn was taken, and the order of the court in admitting said evidence was made, in the absence of the defendant and without prior notice thereof other than that theretofore orally given, but the record also shows that the defendant was immediately thereafter notified of such action and order; the cause was still under submission and undecided, and so remained for a period of 12 days after such notification, during which the defendant had ample opportunity to take such action as it might be advised with reference to such order and to the reopening of the case for further evidence of a like nature if such was desired. No such action was taken, and when, after the court's decision,

a motion for a new trial was made by the defendant, it did not specify among the grounds of such motion either misconduct of the court in the making of this order, or accident or surprise by which it was prevented from having a fair trial; nor did it set forth or suggest the existence of other evidence which for any reason it was prevented from introducing at the former trial. Under these circumstances, we think the appellant is no longer in a position to urge upon this appeal the alleged error or irregularity in the action of the trial court in respect to the matters above set forth.

Judgment and order denying a new trial are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

29 Cal. App. 313

TORREY et al. v. SHEA et al. (Civ. 1750.)

(District Court of Appeal, First District, California. Jan. 4, 1916. Rehearing Denied by Supreme Court March 2, 1916.)

1. EVIDENCE ⟸444(2)—PAROL EVIDENCE TO VARY WRITINGS—ADMISSIBILITY.

Where the defendants, in an action for damages for breach of a written contract, answered that the contract was one of three intended to constitute a single instrument, and that there was a specific oral agreement to that effect, and that the plaintiffs failed to perform during the term of one of the contracts, whereupon the defendants elected to treat all as abandoned, parol evidence to establish the alleged oral agreement was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1936, 2049; Dec. Dig. ⟸444(2).]

2. EVIDENCE ⟸444(2)—PAROL EVIDENCE TO VARY WRITINGS—ADMISSIBILITY.

In such case, Code Civ. Proc. § 1856, providing that parol evidence is inadmissible to alter, vary, or contradict the terms of a written instrument, does not apply.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1936, 2049; Dec. Dig. ⟸444(2).]

3. CONTRACTS ⟸176(1)—BREACH—ACTIONS—QUESTIONS FOR JURY.

In such case, it was a question of fact for the jury whether the instrument in suit, in conjunction with the other instruments pleaded, constituted a single and indivisible contract covering a single transaction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 767; Dec. Dig. ⟸176(1).]

4. CONTRACTS ⟸323(1)—BREACH—ACTIONS—QUESTIONS FOR JURY.

In such case, the question whether the plaintiffs had failed without just cause to observe their contract was a question of fact for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1543–1548, 1827, 1827½; Dec. Dig. ⟸323(1).]

5. APPEAL AND ERROR ⟸1002—MATTERS REVIEWABLE—CONFLICT IN EVIDENCE.

The determination of the jury on a question of fact, when there is a substantial conflict in the evidence, cannot be reviewed by the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⟸1002.]

6. CONTRACTS ⟸328(1)—ACTIONS—DEFENSES.

The remedy provided by Civ. Code, § 3399, for the reformation of a contract on the ground of fraud or mistake, is not exclusive, and does not prevent a defense, against a suit for damages for breach of the contract, that the contract was one of several, which by contemporaneous oral agreement were to constitute one transaction, one of which contracts the plaintiffs had breached.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1571–1580, 1583, 1584; Dec. Dig. ⟸328(1).]

7. CONTRACTS ⟸318—BREACH—WHAT CONSTITUTES.

A willful and inexcusable failure of one party to perform a material part of a contract is an abandonment of the entire contract, after which he cannot recover for failure of the other party to perform.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508–1527; Dec. Dig. ⟸318.]

8. CONTRACTS ⟸319(1)—BREACH—RIGHTS OF PARTIES.

When one contractor refuses to perform any portion of the agreement, the other may treat the whole contract as abandoned, whether the time for performance has arrived or not, and regardless of the fact that the contract has been partially performed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1493–1507; Dec. Dig. ⟸319(1).]

9. APPEAL AND ERROR ⟸843(1)—REVIEW—MATTERS NOT NECESSARY TO DECISION.

Where one of several findings of the jury is supported by some evidence, and it alone is sufficient to support the verdict, it is unnecessary to consider on appeal the sufficiency of the evidence to support the further findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3335, 3337–3341; Dec. Dig. ⟸843(1).]

Appeal from Superior Court, Sonoma County; H. C. Gesford, Judge.

Action by Edwin F. Torrey, Jr., and others against Con Shea and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. R. Leppo, of Santa Rosa, for appellants. T. J. Geary and T. J. Butts, both of Santa Rosa, for respondents.

LENNON, P. J. In this action the plaintiffs sought to recover damages for the alleged breach of a written contract entered into by them with the defendants, whereby the latter agreed to deliver to the plaintiffs, at the city of Santa Rosa not later than October 15, 1911, 40,000 pounds of hops at 11 cents per pound, of a specified quality, from the hops produced and picked during the season of 1911 upon the ranch of the defendants Shea Bros. in Sonoma county. Judgment was entered for the defendants upon the verdict of a jury, from which the plaintiffs have appealed.

The plaintiffs' complaint alleged that they had duly performed all the terms of the contract on their part to be performed, and that during the season of 1911 the Shea Bros. ranch produced 40,000 pounds and more of hops of the kind and quality specified in the contract, but that the defendants refused to make any delivery of hops in keeping with

the terms of the contract, and sold the season's crop to other parties. The defendants, answering separately, admitted the due execution of the instrument sued upon, but pleaded the contemporaneous making of two other written instruments by the same parties, one of which called for the delivery to plaintiffs by the defendants of 40,000 pounds of hops at 10 cents per pound from the Shea Bros. ranch during the season of 1909, and the other for the delivery to the plaintiffs by the defendants of 40,000 pounds of hops at 11 cents per pound from the crop grown upon the same ranch during the season of 1910. The answers of the defendants further alleged that these two instruments with the instrument in suit, by the terms of a collateral contemporaneous oral agreement, constituted but one single and indivisible contract covering a single transaction, but which for the convenience of the parties was expressed in three separate instruments, and which were executed by the parties thereto at the same time upon the consideration and with the understanding and agreement that the three instruments would constitute but a single contract for the purchase and sale of 40,000 pounds of hops per year for three successive years from the crops produced upon the hop ranch of said Shea Bros. The answers of the defendants further alleged that pursuant to the terms of the contract there was delivered to the plaintiffs 40,000 pounds of hops in the year 1909, and that in the year 1910 the defendants delivered to the plaintiffs 100 bales of hops, aggregating 26,000 pounds, of that year's crop, and thereafter tendered and offered to deliver to plaintiffs 14,000 pounds of hops, the balance of the 40,000 pounds deliverable in that year; that the plaintiffs refused to accept the same, and that thereupon the defendants notified the plaintiffs that because of their failure to accept the hops tendered the contract was rescinded and terminated; and that no hops grown upon the ranch of Shea Bros. during the year 1911 would be delivered to plaintiffs under the terms of the contract. The answers of the defendants also alleged that the plaintiffs consented to the termination of the contract, and thereupon settled with the defendants by paying for the hops delivered up to that time.

[1] Under the issues thus raised the trial court ruled—and we think correctly—that the defendants were entitled to show by parol evidence that the three instruments were intended and executed by the parties thereto to cover but one transaction, and that the controlling consideration for the execution of the particular writing in suit, contracting for the delivery of hops during the year 1911, was the contemporaneous execution of the two other instruments calling for similar deliveries in the years 1909 and 1910.

"Several contracts relating to the same matter between the same parties and made as parts of substantially one transaction are to be taken together." Section 1642, Civil Code.

Ordinarily, as in the present case, the identity of the parties to several instruments will be disclosed by a reference to the instruments themselves; but the question as to whether or not several instruments between the same parties were contemporaneously executed and intended by the parties thereto to cover a single transaction oftentimes cannot be ascertained from an inspection of the instruments themselves; and consequently, if the intention of the parties be either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made, for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments. Johnson v. Levy, 3 Cal. App. 591, 86 Pac. 810; Curtin v. Ingle, 137 Cal. 95, 69 Pac. 836, 1013.

[2] The general rule that parol evidence is not admissible to alter, vary, or contradict the terms of a written instrument (Code Civ. Proc. § 1856) has, we think, no application to the question presented here. The defendants did not seek, nor were they permitted, to contradict by parol proof the covenants of the particular instrument in suit. They sought and were permitted to show in evidence a contemporaneous, collateral oral agreement of the parties to the several instruments, to the effect that the subject-matter of each instrument should be but a unit in a series of sales which as a whole were to constitute the subject-matter of a single transaction, and that the paramount consideration, undisclosed in the instruments themselves, which induced the execution of each instrument was the contemporaneous execution of all three instruments which, when executed, were to constitute a single contract for the purchase and sale of 40,000 pounds of hops per year during the period of three designated years. The instrument in suit being silent upon the subject of the interdependence of the three writings, and failing to disclose the true consideration, or any consideration save that implied from the mutual covenants of the parties, which induced its execution, obviously the proof proffered and admitted in no wise contravened its express terms; and such evidence was therefore well within the exception to the general rule which permits proof of the execution and existence of an oral agreement collateral to and executed contemporaneously with a written instrument, covering and controlling a material matter agreed to by the parties, distinct from but closely related to the express subject-matter of the written instrument and not embodied therein. 1 Elliott on Evidence, §§ 582 to 585; Stephens on Evidence, art. 90; 3 Jones on Evidence, § 439; Howard v. Stratton, 64 Cal. 487, 2 Pac. 263; Moffatt v. Bulson, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192; Wolters v. King, 119 Cal. 172, 51 Pac. 35; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571; Guidery v. Green, 95 Cal.

630, 30 Pac. 786; Bonney v. Morrill, 57 Me. 369; Michels v. Olmstead (C. C.) 14 Fed. 219; Oregon R. R. Co. v. Wright, 10 Or. 162; Sutton v. Griebel, 118 Iowa, 78, 91 N. W. 825. Of course this exception to the general rule can be invoked and applied to a written instrument, which prima facie purports to embody the complete legal obligations of the parties, only where the established circumstances surrounding and attending its execution warrant the inference that the parties did not intend that it should be a complete and final statement of the whole transaction before them. Seitz v. Brewers, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; 3 Jones on Evidence, § 439; Stephens on Evidence, art. 90; Sivers v. Sivers, supra; Savings Bank, etc., v. Asbury, 117 Cal. 96, 48 Pac. 1081. This exception to the general rule is stated with more precision and perspicacity in Jones on Evidence (vol. 3, § 439), where it is said:

"The general rule under discussion is not violated by allowing parol evidence to be given of the contents of a distinct, valid, contemporaneous agreement between the parties which was not reduced to writing, when the same is not in conflict with the provisions of the written agreement. The exception is thus stated somewhat more guardedly by Stephens (Stephens on Evidence, art. 90). The party may prove 'the existence of any separate, oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them, or the existence of any separate, oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property.'"

The same authority (Jones), commenting upon the exception to the general rule, declares the law to be:

"That agreements or representations, made prior to the written contract, under which the party was induced to sign the contract, may be shown. In other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract, or when the parol agreement forms part of the consideration for a written contract, and where the written contract was executed upon the faith of the parol contract or representations, such evidence is admissible." Jones on Evidence, § 439, p. 178.

The reason for the exception to the general rule is to be found in the fact that the exclusion of such evidence, when relevant to the issues joined in a given case, would operate to permit one of the parties to the written agreement to take an unjust advantage of the other by receiving all of the benefits accruing to him under the contract without assuming all of the burdens imposed upon him by the terms of the contract. Gibbons v. Bush Co., 52 App. Div. 211, 65 N. Y. Supp. 215; 3 Jones on Evidence, § 493.

[3] If we are correct in our understanding of the exception to the general rule and its application to the issues joined and the evidence adduced in the present case, it follows that the trial court did not err in the particular stated; and likewise correctly charged the jury that it was a question of fact for them to determine whether or not the instrument in suit, in conjunction with the other two instruments pleaded and proven in support of the defendants' case, constituted but a single, indivisible contract covering a single transaction. First Nat. Bank v. Rothschild, 107 Ill. App. 133; Dillon v. Watson, 3 Neb. (Unof.) 530, 92 N. W. 156; Rosenthal et al. v. Ogden, 50 Neb. 218, 69 N. W. 779; Meyer v. Shamp, 51 Neb. 424, 71 N. W. 57; Weeks v. Crie, 94 Me. 458, 48 Atl. 107, 80 Am. St. Rep. 410.

[4, 5] Likewise the question of whether or not plaintiffs had failed without just cause to keep and perform the terms and conditions of the contract imposed upon them by the covenants of the instrument covering the transaction for the year 1910, and were induced to repudiate the same, not because the hops tendered by the defendants for that year were inferior in quality to those called for by the contract, but rather because the market price of hops for that year had fallen below the purchase price specified in the contract, was a question of fact for the jury to determine; and their determination in that particular, having been made adversely to the plaintiffs upon what we conceive to be a substantial conflict in the evidence, cannot, under the familiar rule, be reviewed or revised by this court.

[6] It seems to be one of the contentions of the plaintiffs that the defendants were not entitled, as a matter of law, to defend against the action upon the theory that the three instruments constituted but a single contract, and that a breach of one constituted a failure of consideration which would entitle the defendants to rescind the entire contract. In this behalf it is insisted that the defendants should have resorted to the remedy given by section 3399 of the Civil Code for the reformation of a contract which, through fraud or mistake, does not truly express the intention of the parties. Perhaps the defendants, if they had seen fit, might have resorted to the latter remedy rather than to a rescission of the contract, but they were not compelled to do so. If the instruments in question in law and in fact constituted but a single contract, the defendants were entitled to consider and declare the same rescinded and terminated upon the happening of a partial failure of consideration which resulted from the alleged willful and wrongful failure of the plaintiffs to keep and perform an integral part of the entire contract. Richter v. Union, etc., 129 Cal. 367, 62 Pac. 39; Sterling v. Gregory, 149 Cal. 118, 85 Pac. 305.

[7, 8] This is so because the willful and inexcusable failure of one party to perform a material part of a contract on his part to be performed is tantamount to an abandonment of the entire contract; and clearly, if the plaintiffs in the present case so failed, they should not be permitted to recover damages for the refusal of the defendants to further comply with the contract. Graves v. White,

87 N. Y. 463; Cal. Sugar, etc., v. Penoyar, 167 Cal. 274, 139 Pac. 671. And, as was said in Lake Shore, etc., v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 36:

"It can make no difference whether a contract has been partially performed, or the time for performance has not yet arrived, in determining the right of one party to regard it as abandoned by the other. Upon election to treat the renunciation of the contract by the other party, whether by declaration or by acts or conduct, as a breach of the contract, the rights of the parties are to be then regarded as culminating."

It is claimed that the trial court in one of its instructions in effect charged the jury that as a matter of law the three instruments in question constituted but a single contract, and in the same instruction declared that a breach of the instrument covering the purchase and payment for the defendants' hops for the year 1910, would suffice to warrant a judgment for the defendants without regard to its relation to the instrument covering the transaction for the year 1911. We do not think that the instruction complained of, even when considered alone and without reference to the other parts of the court's charge, is susceptible of any such construction; and we are satisfied that, when considered and construed in conjunction with the charge of the court as a whole, it correctly stated the law and had no tendency to confuse or mislead the jury.

[9] There is some evidence to support the finding of the jury implied from the verdict, to the effect that the plaintiffs willfully and wrongfully defaulted in the performance of their part of the contract covering the transaction for the year 1910, and that thereupon the defendants elected to rescind and cancel the entire contract. These findings are sufficient in themselves to support the judgment; consequently it becomes unnecessary for us to determine whether or not the evidence supports the further finding likewise implied from the verdict that the plaintiffs consented to the rescission and cancellation of the entire contract upon their refusal to accept and pay for the hops tendered to them in 1910.

We think this disposes of all of the points involved upon this appeal.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

29 Cal. App. 405

MILLS v. GEORGE A. MOORE & CO.

(Civ. 1583.)

(District Court of Appeal, First District, California. Jan. 15, 1916.)

NEW TRIAL ⊂⊃165—ORDER—SETTING ASIDE—DISCRETION OF LOWER COURT.

It was within the discretion of the trial court to set aside its former decision and grant a new trial where the sufficiency of the evidence in support of its first finding was doubtful.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 334, 335; Dec. Dig. ⊂⊃165.]

Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by E. T. B. Mills against George A. Moore & Co. There was a judgment for plaintiff, and from an order of the court granting a new trial, the plaintiff appeals. Affirmed.

Samuel T. Bush, of San Francisco, and Barnett Lyon, of Chicago, Ill., for appellant. Denman & Arnold, of San Francisco, for respondent

RICHARDS, J. This is an appeal from an order granting the defendant's motion for a new trial.

The action was brought to recover judgment for certain commissions alleged by the plaintiff to be due him from the defendant under certain oral contracts, by which the defendant agreed to constitute the plaintiff its agent for the sale of grain bags. The issues presented by the pleadings related to the time these contracts were entered into and their terms, but the chief question presented at the trial and upon the motion for a new trial was as to whether plaintiff had sufficiently performed his part of these agreements so as to be entitled to recover his commissions. Upon this issue the findings of the trial court were in favor of the plaintiff, but these were assailed upon the motion for a new trial as not sufficiently supported by the evidence in the case, and in granting the motion for a new trial the court evidently adopted this change of view.

We are unable to say that the court was in error in so doing. The first oral agreement, which the court found the parties to have entered into in February, 1910, and which was modified in certain other respects by the second oral agreement of April, 1911, provided that the plaintiff was to keep the defendant informed as to the conditions and doings of the market in grain bags, and to furnish defendant with confidential information which plaintiff was not to furnish other persons in the same line of business, and to inform defendant of the prices at which bags were offered and quoted to plaintiff in order to give the defendant the first opportunity to sell and to give said defendant the preference in all sales. The plaintiff relied upon his own testimony as showing that these provisions of his contracts had been complied with. A reading of the plaintiff's testimony upon the extent of his performance of these portions of his agreements will show that the trial court might well have entertained grave doubt as to the sufficiency of this evidence upon the maturer consideration of it which the motion for a new trial afforded. For example, the plaintiff testifies:

"I agreed to post him on the market at all times and give him an opportunity to make sales, and I did so when I thought it was a case he could meet."

And again:

"If I thought he could fill them, if he was in position, I would bring him offers; it all rested with me. He was glad to take what I gave him."

And yet again:

"I could not say whether I gave him every bid; I gave him a chance at every trade where I thought he could fill it."

In the light of the evident infirmities of this proof and of the entire evidence in the case, we think the trial court did not abuse its discretion in setting aside its former decision and in granting the defendant a new trial.

This view renders unnecessary a consideration of the other points presented upon this appeal.

The order is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(29 Cal. App. 382)

MERRILL v. KOHLBERG. (Civ. 1751.)

(District Court of Appeal, First District, California. Jan. 14, 1916. Rehearing Denied by Supreme Court March 13, 1916.)

1. APPEAL AND ERROR ⟸1001(1)—REVIEW—VERDICT.

Where the verdict was general in its terms, and covered every issue in the case, it must be upheld if it finds support in the evidence adduced upon the whole case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928–3933; Dec. Dig. ⟸1001(1).]

2. TRIAL ⟸330(4)—VERDICT—SUFFICIENCY.

Where the complaint was in two counts, one setting up a right of action for breach of a written contract and the other for breach of an oral contract, proof of a breach of either contract will warrant a general verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 780, 781; Dec. Dig. ⟸330(4).]

3. FRAUDS, STATUTE OF ⟸115(3) — CONTRACTS.

Where a memorandum of an oral contract for the purchase of a large quantity of gloves was signed by defendant, the party sought to be charged, defendant cannot defeat recovery by the statute of frauds (Code Civ. Proc. § 1973).

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 244–246; Dec. Dig. ⟸115(3).]

4. FRAUDS, STATUTE OF ⟸89(1)—PART PERFORMANCE.

An oral contract for the sale of a large quantity of gloves is taken without the statute of frauds (Code Civ. Proc. § 1973) by delivery and acceptance of part of the order.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 165; Dec. Dig. ⟸89(1).]

5. APPEAL AND ERROR ⟸882(19)—PERSONS ENTITLED TO ALLEGE ERROR—INVITED ERROR.

In an action for breach of contract for the purchase of gloves, defendant contended that the measure of damages was the difference between the contract price and the market value, instead of the difference between the contract price and the cost of manufacturing. Plaintiff was induced to amend its complaint to conform to that theory, and the action was so tried. *Held*, that though the theory was erroneous under the statutes, defendant, having invited the error, cannot complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3608; Dec. Dig. ⟸882(19); Pleading, Cent. Dig. § 1145½.]

6. PLEADING ⟸376—ADMISSIONS — FAILURE TO DENY.

In an action for breach of contract to purchase gloves, where the averment of the complaint that the nearest market for the gloves was New York City, which was not the place of manufacture, was not denied, defendant cannot complain that there was no evidence of the market value of the gloves in the place of manufacture, where delivery was to be made.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225–1227; Dec. Dig. ⟸376.]

7. PLEADING ⟸34(3)—PRESUMPTIONS—PROOF —VARIANCE.

In an action for defendant's breach of a contract to purchase gloves, where the complaint averred the seller performed all the terms and conditions of the contract to be performed, and the evidence showed that, after delivering a part of the gloves ordered, defendant refused to accept other gloves, there is no variance, for the complaint must be interpreted as meaning that the seller performed all provisions of the contract which she was permitted to perform.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 69; Dec. Dig. ⟸34(3).]

8. APPEAL AND ERROR ⟸231(2)—COMPLAINT —AMBIGUITY—SPECIAL DEMURRER.

In the absence of a special demurrer, the question of the ambiguity of a complaint cannot be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⟸231(2); Pleading, Cent. Dig. § 1439; Trial, Cent. Dig. §§ 194–210, 223–227, 689, 690, 694, 696.]

Appeal from Superior Court, City and County of San Francisco; Franklin J. Cole, Judge.

Action by George W. Merrill, administrator of the estate of Harriett S. Hall, deceased, against M. S. Kohlberg. From a judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

Wise & O'Connor, of San Francisco, for appellant. Philip Bancroft, of San Francisco, and Lawrence L. Levy, of New York City, for respondent.

LENNON, P. J. In this action for damages for breach of contract the plaintiff upon the verdict of a jury recovered a judgment against the defendant in the sum of $3,000, from which and from an order denying a new trial the defendant has appealed.

The plaintiff's complaint purported to state a cause of action in two counts; one upon an oral contract, and the other upon a written contract. The first count, in substance, alleged that in the month of May or July, 1907, the defendant at Jersey City, state of New Jersey, entered into a contract with Harriett S. Hall, plaintiff's testatrix, a memorandum of which was signed and delivered to her on the 10th day of July, 1907, by the defendant, whereby it was agreed that she would sell to the defendant 1,200 dozen pairs of gloves of a quality known as the 2074 M.

C., at the rate of $9.50 per dozen, to be delivered each month, commencing with the month of December, 1907; that the gloves were to be manufactured by said Harriett S. Hall upon receiving from the defendant a sufficient length of time in advance of the manufacture, to enable her to comply with the desires of the defendant, specifications designating the sizes and colors in which he desired the gloves to be manufactured and delivered; that such specifications were made and furnished by the defendant for 275 dozen pairs of gloves which were actually manufactured, delivered to, and accepted by, the defendant and paid for; that notwithstanding the fact that said Harriett S. Hall performed all of the conditions of said contract on her part to be performed, and was at all times ready and willing to deliver the gloves contracted for to the defendant at the rate of 200 dozen pairs per month, the defendant continually, intentionally, and in breach of said contract failed to specify the sizes or colors in which the remaining deliveries of gloves were to be made, and finally, on July 10, 1908, informed said Harriett S. Hall that he was not in a position to take any more gloves from her, and would not accept any further delivery of gloves contracted for, and that he would not pay for the same if they were delivered, all of which it was alleged prevented said Harriet S. Hall from manufacturing and delivering the full quantity of the gloves called for by the contract. Then follows an allegation to the effect that said Harriett S. Hall could have manufactured and delivered the remaining 925 dozen pairs of gloves at a total cost to her of $4.62 per dozen, which would have resulted in a net profit to her of $4.87 per dozen pairs, and that as a consequence of the refusal of the defendant to perform his part of the contract she was damaged in the sum of $4,514. The second count of the plaintiff's complaint consisted of a restatement of the allegations of the first cause of action in every particular save and except that the contract was specifically alleged to have been expressed in writing. The defendant, answering, denied all of the material allegations of the plaintiff's complaint, and at the same time cross-complained upon a purported cause of action for damages in the sum of $2,636.25, based upon the alleged refusal of the plaintiff's testatrix to manufacture and deliver to the defendant the full quantity of the gloves called for by the contract. The defendant, however, does not appear to be dissatisfied with the verdict and judgment entered against him upon the issues raised by the cross-complaint, and therefore that phase of the case need not be further adverted to.

[1, 2] The principal point presented in support of the appeal is that the evidence adduced at the trial is not sufficient to support a finding which it is insisted, in order to support the judgment, must be implied from the verdict of the jury to the effect that the contract pleaded and relied upon for a cause of action in the second count of the plaintiff's complaint consisted of a valid and binding obligation. Conceding, without deciding, the question as to whether or not the contract relied upon in the second count of the plaintiff's complaint was defective in the several particulars claimed by counsel for the defendant, nevertheless the judgment and verdict must stand.

The vice of the argument of counsel for the defendant made in this behalf is to be found in the erroneous assumption that a finding of the validity of the alleged written contract was essential to support the verdict. The verdict was general in its terms, and consequently covered every issue in the case, and must be upheld if it finds support in the evidence adduced upon the whole case. The evidence proffered and admitted in support of the plaintiff's case was not directed or limited to any particular phase of the case; and, as a matter of course, it was not essential to a recovery by the plaintiff that he should establish the due execution and breach by the defendant of both an oral and written contract. Proof of either would suffice to warrant and support a judgment in his favor. An inspection of the record satisfies us that the evidence adduced upon the whole case is amply sufficient to support the finding of the jury implied from the verdict that the defendant entered into and subsequently willfully and without just cause breached the oral contract alleged and relied upon for a cause of action in the first count of the plaintiff's complaint; and therefore, conceding the correctness of the defendant's contention concerning the insufficiency of the evidence to support the implied finding of the execution and breach of an express contract, the verdict and judgment must stand.

[3] Incidentally it is urged that, even though the evidence shows the execution and breach of the oral agreement pleaded in the first count of the complaint, the plaintiff was not, as a matter of law, entitled to recover thereon because prima facie it was inhibited by the statute of frauds. The answer to this contention is that the plaintiff's complaint pleaded, and the evidence adduced in support thereof, showed that a written memorandum of the contract relied upon in the first count of the complaint was signed by the defendant, the party to be charged.

[4] Moreover, the plaintiff's complaint alleged—and the allegation is amply supported by the evidence—that the plaintiff's testatrix manufactured and forwarded 275 dozen pairs of gloves pursuant to the terms of the contract, which the defendant received and accepted. These pleaded and proven facts were sufficient to take the contract in question without the statute of frauds. Code Civ. Proc. § 1973.

[5] Evidently the case was tried upon the suggestion of counsel for the defendant, and despite the persistent protest of counsel for

the plaintiff, upon the theory that the measure of the plaintiff's damage was covered and controlled by the provisions of sections 3311 and 3353, which in effect declare that the measure of damages for the breach of a buyer's agreement to purchase personal property is the difference between the contract price and the market value. It is now insisted upon behalf of the defendant that the plaintiff's damages should have been established under the provisions of section 1512 of the same Code, which in effect provide that the measure of damages in cases of the character pleaded and proven by the plaintiff in the present case is the difference between the cost of manufacture and the contract price. There would be much force in this contention if it were not for the fact that the record shows that the counsel for the defendant insisted that the trial of the case should proceed upon the theory that the measure of the plaintiff's damage was the difference between the contract price and the market value of the goods contracted for.

The plaintiff pleaded a cause of action which proceeded upon the theory that the gloves contracted for were not manufactured by plaintiff's testatrix because of the defendant's refusal to keep his part of the contract, and clearly contemplated that the measure of the plaintiff's damage resulting from the defendant's prevention of the plaintiff's performance of the contract would be the difference between the contract price and the cost of manufacture, as provided in section 1512 of the Civil Code. Counsel for the plaintiff endeavored to present the case upon that theory, but was thwarted in his efforts to introduce evidence of the cost of manufacture by the insistent and successful objections of the counsel for the defendant that:

"Such evidence was incompetent, irrelevant, and immaterial, as the true measure of damages was the difference between the contract price of $9.50 per dozen pairs of gloves, and the market price of the gloves at the nearest market, Jersey City; and that plaintiff's theory of damages as set forth in the first amended complaint, viz., the difference between the cost of manufacture of the gloves and the contract price, was erroneous."

Upon this objection being sustained by the trial court over the protest of the plaintiff, permission was asked and granted to amend the plaintiff's complaint to meet the objection and conform to the ruling of the court. Thereafter counsel for the respective parties and the trial court proceeded in the trial of the case upon the theory that the measure of the plaintiff's damage was the difference between the market value at the nearest market and the contract price.

After having led the court into error and compelled counsel for the plaintiff to adopt and conform to an erroneous theory for the trial and determination of the case, it surely does not lie in the mouth of the defendant to insist in support of the appeal that the case should have been tried upon the theory first adopted by the plaintiff, which counsel for the defendant now contends to be the correct one. Durkee v. Chino Land, etc., Co., 151 Cal. 561, 91 Pac. 389; Hasler Co. v. Griffing, etc., Co., 133 Ill. App. 635; Wilson v. Chicago, etc., Ry. Co., 144 Iowa, 99, 121 N. W. 1102.

The opinion of the Supreme Court of the state of Utah in the case of Lebcher v. Lambert, 23 Utah, 1, 63 Pac. 628, in disposing of a similar point, aptly applies to the situation presented here. In that case the court said that:

"To permit a party who has tried his case * * * wholly or in part on a certain theory, which theory was acted on by the trial court, to change his position and adopt another and different theory on appeal would not only be unfair to the trial court, but manifestly unjust to the opposing litigant; and especially would this be true where, as in the case at bar, respondent insisted in the lower court on trying the case on the theory now contended for * * * by appellant, but, in pursuance of objections made by her, was overruled by the court."

It should be noted in passing that the counsel who now raises this point is not responsible for the objection made during the trial; he not having participated therein.

[6] The complaint, as amended by leave of the court during the trial, alleged that the nearest market for the gloves contracted for was the city of New York, in the state of New York. This allegation was not denied in the amended answer of the defendant, filed during the trial and after the plaintiff's complaint had been so amended. This being so, it is an admitted fact in the case that the city of New York was the nearest market for the gloves contracted for, and therefore the defendant will not now be heard to complain that there was no evidence of the market value of the gloves in Jersey City, where delivery was to be made under the terms of the contract.

[7, 8] The plaintiff's pleading and proof are not at variance. True it is that the plaintiff alleges that the plaintiff's testatrix performed "all the terms and conditions of the contract on her part to be performed," and the evidence shows that she did not manufacture and deliver the full quantity of gloves contracted for. But the allegation of the complaint in this particular, considered and construed in conjunction with other allegations of the complaint, may be fairly said to mean no more than that plaintiff's testatrix duly performed all the conditions of the contract on her part to be performed up to the time she was prevented from further performance by the wrongful conduct of the defendant. And even if that were not the correct construction of the plaintiff's pleading, the worst that could be said of it is that it was ambiguous and uncertain—a fault which cannot be availed of here, in the absence of a special demurrer.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(29 Cal. App. 388)

BRONGE v. MOWAT & CO. (Civ. No. 1430.)

(District Court of Appeal, Third District, California. Jan. 14, 1916. Rehearing Denied by Supreme Court March 13, 1916.)

1. PLEADING ⊂=248(4) — AMENDMENT — NEW CAUSE OF ACTION.

Error cannot be predicated on refusal to strike the amended complaint, although the original was grounded on an implied contract and the amended complaint was on a contract in writing, where the matters alleged grew out of the same transaction since the facts would be the same in any case and the liability the same if the facts were proved.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 701–706, 708½; Dec. Dig. ⊂=248(4).]

2. APPEAL AND ERROR ⊂=1042(3)—REVERSAL —PREJUDICE.

Under Code Civ. Proc. § 475, requiring that no judgment be reversed on account of error, unless it appears from the record that the complaining party sustained substantial injury and that a different result would have been probable in the absence of such error, error if any, in overruling a motion to strike an amended complaint, is harmless where it was based on the same transaction as the original and required the same evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4112; Dec. Dig. ⊂=1042(3); Pleading, Cent. Dig. § 1144.]

3. APPEAL AND ERROR ⊂=1011 — REVERSAL — CONFLICTING EVIDENCE.

Evidence in an action on contract for sale of raisins *held* to show such conflict on the issue whether the raisins were of the specified grade as that a finding for either party was justified so that the court on appeal could not reverse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. ⊂=1011.]

4. SALES ⊂=181(11)—CONTRACTS — CONSTRUCTION—TIME—EVIDENCE.

Evidence, considered with provisions of contract, *held* to show that delivery of raisins was completed within due time so that the seller could recover the stipulated price therefor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 486, 487, 490; Dec. Dig. ⊂=181(11).]

5. SALES ⊂=181(1, 11)—ACTIONS—BURDEN OF PROOF.

Where the seller of raisins established that they were delivered in time and were of the specified grade, the burden was then on the buyer to prove that he had rejected them, and acceptance was made out unless the evidence showed that the seller admitted they were not of grade and agreed to adjust the matter on that basis.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473–476, 486, 487, 490; Dec. Dig. ⊂=181(1, 11).]

6. APPEAL AND ERROR ⊂=1068(1)—HARMLESS ERROR—INSTRUCTIONS.

Although under the evidence it was error to instruct that raisins sold by plaintiff to defendant were accepted, the error was harmless where the jury found the raisins to have been of the required grade and to have been delivered on time, since the buyer thereupon became liable for their price whether he accepted them or not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. ⊂=1068(1); Trial, Cent. Dig. §§ 475, 526, 553.]

7. TRIAL ⊂=252(13) — INSTRUCTIONS — EVIDENCE.

Error cannot be predicated on refusal of a requested instruction that raisins sold to defendant were delivered too late and were received by mistake, where the evidence failed to justify such statement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604; Dec. Dig. ⊂=252(13).]

8. SALES ⊂=364(7) — ACTIONS—INSTRUCTIONS —TIME OF DELIVERY.

In an action for the purchase price of raisins sold by plaintiff to defendant, where the evidence showed that a portion of the raisins were accepted, it was not error to refuse an instruction on time of delivery, since even if the raisins were delivered too late, the condition of time of delivery was waived.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1072; Dec. Dig. ⊂=364(7).]

9. APPEAL AND ERROR ⊂=1068(5)—HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT.

Error cannot be predicated upon refusal of an instruction based on a set of facts which would require a finding for the defendant, where, on submission of the issues, the finding was for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4230; Dec. Dig. ⊂=1068(5); Trial, Cent. Dig. §§ 475, 525, 553.]

10. APPEAL AND ERROR ⊂=1068(4) — HARMLESS ERROR—INSTRUCTIONS—AMOUNT OF RECOVERY.

Where raisins were delivered in sweat boxes and the seller sued for the purchase price of the goods, including a demand for the value of the boxes, and there was no evidence that it was customary to return such boxes, the error, if any, in submitting the question of recovery of their value, was harmless, where the verdict returned was for less than the contract of the raisins alone, the full amount of which could have been recovered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. ⊂=1068(4).]

11. TRIAL ⊂=414—OBJECTIONS TO EVIDENCE —WAIVER.

Where counsel moved to strike certain testimony to which he had previously objected, and thereafter withdrew the motion, such objection was waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 979; Dec. Dig. ⊂=414.]

12. APPEAL AND ERROR ⊂=204(1)—REVIEW— SUFFICIENCY OF OBJECTION.

Where the court admitted certain testimony as to inadmissible matters, stating that if after hearing the testimony it appeared to be immaterial, it would be struck out on the defendant's motion, and the defendant failed to so move, no question is presented for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258, 1259, 1274–1277; Dec. Dig. ⊂=204(1).]

13. EVIDENCE ⊂=213(1)—OFFERS OF COMPROMISE—ADMISSIBILITY.

Since offers of compromise are not necessarily admissions that the offerer's claim or defense is of no merit, such offers are not in general admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745, 748–750; Dec. Dig. ⊂=213(1).]

14. APPEAL AND ERROR ⊂=1056(1) — HARMLESS ERROR—STRIKING OF EVIDENCE.

It is not prejudicial error to strike testimony of the buyer of goods which is irresponsive to the question asked, throws no light on the matter in issue, and is a part of a conversation had in an effort to compromise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187, 4191, 4207; Dec. Dig. ⊂=1056(1).]

15. PRINCIPAL AND AGENT ⟸116(1) — LIABILITY OF PRINCIPAL — AUTHORITY OF AGENT—EVIDENCE.

The principal cannot evade liability for her superintendent's acts by showing a want of his authority to accept goods purchased by her, although she could have shown that he refused to accept the goods.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 377; Dec. Dig. ⟸116(1).]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by A. Bronge against Mowat & Co. From a judgment for plaintiff, and order denying motion for new trial, defendant appeals. Judgment and order affirmed.

Strother & Aynesworth and M. K. Harris, all of Fresno, for appellant. James Gallagher and L. L. Cory, both of Fresno, for respondent.

CHIPMAN, P. J. The original complaint alleged that, "on or about the 17th day of September, 1912, plaintiff sold and delivered to defendant 78,458 pounds of raisins at the agreed price of 3 cents per pound, making a total price of $2,353.54, and defendant purchased and received the same at said price"; that the whole thereof is now due and unpaid, with interest at 7 per cent. per annum from said date. In a second cause of action it is alleged that, on or about the 17th day of September, 1912, defendant took and converted to its own use 454 sweat boxes belonging to plaintiff which were of the reasonable value of 75 cents each, or a total value of $340.50; that no part of said sum has been paid and the same is due and owing from defendant to plaintiff, with interest thereon at 7 per cent. per annum from said date. Judgment is prayed for $2,694.24, with interest, at 7 per cent. from September 17, 1912, to date of judgment. The complaint was filed September 27, 1912.

On October 23, 1912, plaintiff filed a first amended complaint. The first cause of action is the same as in the original complaint. The second cause of action is the same as stated in the original complaint, except that it is alleged that "said raisins were so delivered and received in 454 certain sweat boxes belonging to plaintiff, of the reasonable value of 75 cents each and which sweat boxes defendant took, applied, and appropriated to its own use and benefit," and that plaintiff demanded of defendant a return, which defendant failed and refused to do.

On January 13, 1913, plaintiff served and filed a second amended complaint by leave of court. In this amended complaint plaintiff alleged that, on or about June 10, 1912, "a certain agreement in writing was made and entered into between the plaintiff and the defendant for the purchase and sale of a certain crop of raisins then owned by the plaintiff, to wit, all the crop of loose muscatel raisins grown and produced during the season of 1911, upon the ranch of said plaintiff at Las Palmas, Fresno county, estimated in quantity to be about 40 tons at the agreed price of 3 cents per pound, all in accordance with the terms and provisions of said contract, a true copy of which is hereto annexed and marked Exhibit A and made part of this amended complaint"; that, by the provisions in said contract, "to wit, 40 tons L. M., 1911 crop, 3" the parties hereto meant, to wit, 40 tons of loose muscatel raisins of the 1911 crop, price 3 cents per pound, and was so understood by the parties; that, pursuant to said contract, plaintiff delivered and defendant accepted 78,458 pounds of the raisins therein referred to at the agreed price of 3 cents per pound, amounting in all to $2,353.74; that no part of the same has been paid and there is now due and owing from defendant to plaintiff the said sum of $2,353.74, with interest from September 17, 1912; that plaintiff has duly performed each and all the provisions of said contract on his part to be performed. In a second cause of action it is alleged that, on or about June 10, 1912, the plaintiff sold and delivered to defendant and defendant purchased of plaintiff 78,458 pounds of loose muscatel raisins at the agreed price of 3 cents per pound, the reasonable market price thereof; that no part of the same has been paid and there is now due and owing to plaintiff from defendant $2,353.74, with interest at 7 per cent. per annum from September 17, 1912. As a third cause of action it is alleged that, on or about September 17, 1912, plaintiff was the owner of and entitled to the possession of 454 sweat boxes of the reasonable value of 75 cents each, amounting to $340.50, and that, on said day, without plaintiff's knowledge or consent, defendant took and appropriated said sweat boxes and all thereof and ever since has retained and still retains the same to her own use and benefit; that no part of the same has been paid and the whole thereof is due and unpaid. Plaintiff prays judgment for the sum of $2,694.24, with interest from September 17, 1912, at 7 per cent. per annum.

In each of the complaints it is alleged that V. A. Mowat was, at all times mentioned therein, transacting business under the fictitious name of Mowat & Co., in which business said V. A. Mowat was the only person interested and that neither said defendant nor said V. A. Mowat has at any time filed in the office of the county clerk of Fresno county any certificate stating either the name, or her place of business, and no such certificate was ever published in any newspaper.

Defendant answered and interposed demurrers to the original and first amended complaints, which need not be further noticed as the latter were superseded by the second amended complaint.

The contract pleaded is dated June 10, 1912, and is between plaintiff seller and defendant buyer and states that:

"In consideration of the price per pound herein specified, the seller has sold and the buyer has bought the hereinafter mentioned first crop of the seller as follows (estimated by seller):

Quantity.	Variety.	Price.
40 tons	L. M. 1911 crop	3

"To be paid for by September 14, 1912." Buyer to pay "at the price above named when delivery is completed, provided the seller delivers the same thoroughly and properly dried and cured, of good color, in original condition, free from defective fruit or damage of any kind and in good marketable and merchantable condition, at buyer's packing house at Fresno, California, and not later than the ——— day of ——— any time after September 1, 1912 (unless otherwise agreed upon, which seller agrees to do). Provided, however, and it is hereby expressly agreed, that buyer shall not be compelled to receive or pay for any fruit not delivered by the last-named date nor pay for any fruit which exceeds said estimate plus ten per cent. (10%) thereof, nor to receive or pay for any fruit which is not a part of such crop. * * * Buyer shall be entitled to weigh back and reject any portion of crop delivered, not conforming with the terms and conditions of this contract and such rejection by buyer shall not invalidate this contract or release the seller from any of its obligations. * * * This contract is understood by both parties to constitute an absolute sale, but until delivery has been completed, seller agrees to and does assume all risks of loss or damage to any undelivered fruit. * * * Time is of the essence of this contract.

"[Signed] A. Bronge, Seller.
"Mowat & Co., Buyer.
"By E. V. Foley."

Defendant served and filed its answer January 23, 1912, and therein denied that plaintiff delivered the raisins mentioned in said contract; alleged that in accordance therewith the raisins were to be delivered, and it was so understood by the parties, after the 1st and on or before the 14th day of September, 1912, and plaintiff failed to deliver the raisins therein mentioned, or any raisins, until said contract had expired and none was tendered to defendant until September 17, 1912; denied that defendant accepted 78,458 pounds or any number of pounds of raisins at the agreed price of 3 cents per pound, and alleged that the contract had expired before any raisins were tendered or offered to defendant, and defendant refused to receive or accept the same "and did not receive or accept the same or any thereof"; alleged that "when said raisins were tendered and offered to defendant the same were not thoroughly or properly dried or cured, of good color, in original condition, free from defective fruit or damage of any kind, marketable and merchantable, * * *" but "were wet, sugared, fermented, rotten, decayed and in an unfit condition to be packed or sold"; denied that there is due plaintiff from defendant the sum claimed or any sum. Answering the second cause of action: Denied that, on June 10, 1912, or at any time, plaintiff sold and delivered to defendant or that defendant purchased of plaintiff 78,458 pounds or any number of pounds of raisins at the agreed price of 3 cents per pound or any price per pound; alleged that, during the month of June, 1912, the reasonable value of loose muscatel raisins was not above 2¼ cents per pound. Answering the third cause of action: Denied that, on September 17, 1912, or at any time, defendant took or appropriated 454 sweat boxes belonging to plaintiff; denied that said sweat boxes were of the value of 75 cents each or of any greater value than 25 cents each; alleged that on said date plaintiff brought to defendant's packing house a large number of sweat boxes containing raisins; "that defendant's foreman rejected said raisins and refused to accept the same, but that defendant (plaintiff?) requested plaintiff's (defendant's) workmen to unload said sweat boxes and store them so as to save plaintiff demurrage on the cars, and that said sweat boxes were unloaded and placed in and around defendant's packing house at plaintiff's request and not otherwise; that at the time of the unloading of the same defendant "tried to get plaintiff to take the same home, but that he refused to do so"; that defendant has frequently since said date requested plaintiff to remove said sweat boxes, but he has neglected and refused so to do; "that plaintiff (defendant?) has never used or claimed said sweat boxes and the same are and have been at all the times herein mentioned under the control and subject to the disposition of the plaintiff."

The cause was tried by the court with a jury and plaintiff had a verdict for $2,309.59 on which judgment was entered. Defendant appeals from the judgment and from the order denying its motion for a new trial. The pleadings are verified.

[1, 2] Defendant's first assignment of error arises out of the refusal to grant defendant's motion to strike the second amended complaint from the files, made upon the ground that it "states an entirely new and different cause of action from any stated in the prior complaints herein and substitutes an entirely different and new cause of action."

The second amended complaint was served and filed January 13, 1913, and, on January 23, 1913, defendant served and filed its answer thereto. On January 21, 1913, defendant served and filed its motion to strike the amended complaint from the files, noticing the hearing thereof for January 26, 1912. The motion was denied. The cause came on for trial February 27, 1913, and was tried on the issues made by the second amended complaint and the answer thereto. No objection was made at the trial to evidence submitted in support of this complaint on the ground stated in the motion. The cause was tried upon the merits of the action therein set forth and upon the merits of defendant's view of the transaction as alleged in the answer. Both complaint and answer, as well as the evidence, showed beyond any question or doubt that there was but one transaction in controversy, and that was the alleged sale

by plaintiff and purchase by defendant of a certain lot of raisins at a certain price per pound alleged to have been delivered in a certain number of sweat boxes, as to which latter the only dispute was whether or not defendant had appropriated them to its own use and benefit and their value. Even if the original complaint was grounded on an implied contract and the second amended complaint counted on a contract in writing, the facts all related to one and the same transaction and the relative rights of plaintiff and defendant growing out of that transaction were fully exploited at the trial upon the second amended complaint and defendant's answer thereto. We cannot see how defendant was prejudiced or injured by the action of the court in refusing to strike from the files the second amended complaint. If the ruling was error, still we are not permitted to reverse the judgment on account of it—

"unless it shall appear from the record that such error * * * was prejudicial, and also that by reason of such error, * * * the * * * party complaining * * * sustained and suffered substantial injury, and that a different result would have been probable if such error * * * had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." Section 475, Code Civ. Proc.

[3] Defendant pleaded and at the trial relied upon and now relies upon the following defenses: (1) That the raisins were not of the quality or in the condition agreed upon in the contract; (2) that the raisins were not delivered within the time provided in the contract and were never accepted by defendant; (3) that the sweat boxes were never appropriated by defendant but, on the contrary, defendant notified plaintiff to remove the boxes.

The execution of the contract is not disputed and the uncontradicted evidence was that the raisins were shipped in two carloads from plaintiff's warehouse on September 17th and reached defendant's packing house on September 18th, and plaintiff testified that there were 78,450 pounds in the lot. It appears that the contract was for plaintiff's 1911 crop and was made with plaintiff by defendant through its agent, E. V. Foley, the raisins at that time being in plaintiff's warehouse. Foley testified:

"I am a fruit buyer and green fruit shipper, and signed Mrs. Mowat's name to the contract with Bronge. I inspected Bronge's raisins before I bought them. I possibly inspected a dozen boxes on the top of the pile. I dug in five or six boxes of raisins and found them dry raisins. They were uniform in size. I made all the inspection I thought necessary. It depends upon who you are buying from whether you inspect all the boxes in the pile. I didn't examine any other raisins. I made the contract as the result of my inspection and considered what raisins I saw as good merchantable and marketable, good standard raisins."

Plaintiff testified:

"They were all the loose muscatel raisins produced on my vineyard during the year 1911. The raisins were standard quality, properly dried, cured the year before, 1911. They were the old raisins. They were in a marketable and merchantable condition. They were delivered in the ordinary sweat boxes. When this action was brought I was returned 150 sweat boxes. I delivered 454, all told, to Mrs. Mowat. The value of these sweat boxes were 55 cents each. At the time I shipped them to the defendant, they were just bought. No part of the price for the sweat boxes has been paid to me. I demanded the return of the sweat boxes before bringing the action. The only response I got to the demand was I received 150. * * * I was present when the raisins was loaded in September and weighed them off. The raisins were in good condition. There was no difference in the condition of the raisins when they were delivered and when they were examined by Mr. Foley in June."

Witness S. J. Wall testified:

"I am a fruit and raisin buyer. I wanted to buy the raisins for Bonner Packing Company and examined them near the latter part of August, 1912. I examined 15 or 20 boxes and considered them standard raisins. I offered Bronge 2¼ cents for the muscats. I think they were properly dried and cured, good marketable and merchantable raisins of good color and free from defective fruit."

Witness T. E. Braley testified:

"I am engaged in buying and handling raisins. I am familiar with the kinds of raisins produced here, and what are good standard merchantable raisins. At Mr. Bronge's request, I examined the raisins involved in this suit. I examined 10 or 15 boxes. I took some down and examined the boxes under them. The ones I examined were good merchantable raisins, good standard muscatel raisins, and thoroughly dried and cured."

Bearing somewhat upon the quality of the raisins is the undisputed fact that defendant's employés unloaded and put through the stemmer nearly all of one carload before any question was raised as to their condition. On the other hand, Mrs. Mowat (who constituted the firm of Mowat & Co.) testified that she examined the raisins on September 26th (on her return from Portland, Oregon) and found practically all of them "bad, fermented and sour and partly sugared"; she testified that "they were not standard or merchantable raisins."

Witness Cobleigh was defendant's superintendent in the packing house. He testified:

"The first ones I saw were poor, fermented raisins. * * * The raisins that had been run showed that they were wet raisins, had been mixed in wet and had fermented. The raisins that were stemmed were worth from a quarter to a half a cent less than the market price for standard raisins which was at that time from two to two and a quarter cents a pound."

Of the raisins in the second car he testified that he had examined them to "some extent." He testified:

"I would not say I had given them a thorough examination."

He testified further:

"I don't know what time these raisins came in. I was not there at the time. At the time my attention was called to them, the greater part of the raisins in the one car had been unloaded, all but 15 or 20 boxes. Most of the rest had been stemmed, and some of them were still on trucks in the packing house. The second car was still unloaded when Mr. Bronge came in, it was still intact and sealed. I made no at-

tempt to examine them while he was there. I would not accept or reject them."

Witness G. E. Ricker "was Mrs. Mowat's foreman." He testified: "I saw the raisins being weighed in from the first car and put through the stemmer." He testified that the raisins "were rotten." Several other witnesses, some of them raisin growers, testified that the raisins were not standard, merchantable raisins.

We have given enough of the facts upon the question of the quality of the raisins to show that the evidence is sharply conflicting. It is too well settled to require supporting authorities that where the evidence is conflicting, and there is substantial evidence sufficient to justify the finding in question, the reviewing court will not disturb it; and this is true, even though the evidence would have justified a finding favorable to the opposing party. There was evidence from which the jury were justified in finding that the raisins were of the quality called for by the contract.

[4] As to the time of delivery the contract is not clear. It provided that the raisins were "to be paid for September 14, 1912." The provision as to delivery is incomplete. It reads: "Not later than the ——— day of ——— any time after September 1, 1912 (unless otherwise agreed upon), which seller agrees to." It then provides "that the buyer shall not be compelled to receive or pay for any fruit not delivered by the last-named date. * * * Time is of the essence of this contract." On Saturday, September 14, 1912, plaintiff wrote defendant that he had been busy shipping malagas and "delayed in delivering 1911 raisins, but," he wrote, "having spare men and teams now I shall load these raisins (two carloads) on Monday next, and you may expect them the day after." They were loaded the 16th, shipped the 17th, and arrived at defendant's packing house the 18th. One car was unloaded and the raisins run through the stemmer before any objection arose, and the objection was to the quality and not to the delay in delivering them. That question was not raised until the return of Mrs. Mowat. On September 26th she wrote plaintiff:

"On my arrival home I found your raisins were delivered during my absence, after the expiration of your contract, though I left positive instructions not to take in any raisins after the expiration of contract. Several tons had been stemmed, when part of these raisins were found to be badly fermented and sugared, and unfit for human consumption."

After calling plaintiff's attention to the provision, "Payment to be made by September 14th," she adds:

"Which presupposes delivery to have been completed by that date. Mr. Foley in writing out your contract omitted to state, 'delivery to be completed by 14th.' * * * We therefore reject on quality, and also refuse to take because contract had expired when delivery took place."

Mr. Foley testified that when he and plaintiff were arranging the terms of the contract the time of delivery came up and plaintiff told him he could ship them on the 1st of September and that defendant could pay September 14th, as Mrs. Mowat—

"would be back by that time. He said it would be all right. Q. Did he say anything about what time he could ship them? A. Not at that time, only he said he would ship them at any time after the first of the month. Q. Was there anything said in that connection in regard to his shipping them in time to be disposed of by the 14th? A. The only thing I remember of, I told him she would be able to finance herself and move raisins and pay for them by the 14th."

Considering all the circumstances, together with the failure to express a definite date for the delivery of the raisins, we think the jury were justified in finding that there was no violation of the terms of the contract so far as the time of delivery was concerned.

[5] The question of acceptance remains. We have stated Mr. Cobleigh's testimony in part when he discovered the condition of the stemmed raisins. He testified further:

"I called Mr. Bronge up on the telephone before noon (the day the raisins were stemmed) and told him there were rotten raisins in the lot. He came in after dinner, and I showed him the raisins that were scattered through the boxes, and told him that it would be impossible to accept anything like that and he asked me how many there were and we had one truck load saved out, loaded, and some on the floor. He mentioned an adjustment and I told him Mrs. Mowat was away, and that I would not make any adjustment but leave it up to her when she returned. Mr. Bronge said he knew there were two boxes that were a little off; otherwise, supposed the whole lot was first class. When I showed them to him, he said he was not aware that they were that way—in that condition."

He testified that the result of the meeting was that the other car was to be unloaded at plaintiff's request to save demurrage, and "he agreed to let things rest until Mrs. Mowat returned. I refused to unload them on any condition. I did not accept nor reject that car of raisins."

As to this conversation plaintiff testified:

"I had a conversation with Mr. Cobleigh on the 19th of September, 1912, in regard to the raisins which he showed me at that time. I did not make the statement to him in that conversation that if I had known the raisins were in the condition they were in, I would not have sent them in. The raisins were not damaged at all. One car had not been unloaded at that time. Part of the other car had not been unloaded. Mr. Cobleigh did not tell me that he would not take the raisins—that they were not in good shape. He did not tell me that they were wet, sugared, and had fermented, and that he would not take them. He proposed to unload the remaining sweat boxes to save me demurrage on the car. I did not urge him to do it. He did not unload them at my request. I did not ask him to place them on the porch so as to get them out of the car. No conversation of that kind took place at all at that time and place. He showed us the raisins about half past 11. We came in the afternoon. He said the raisins were too heavy and sticky. There were nine boxes left in the car that were unloaded. The others had gone through the stemmer and stemmed out. He showed us the raisins, and argued the point. He said he would not unload the other car. I said that he had to unload the car because it was part of the shipment of the other car. It was one order, that

was all. That is everything that was said between Mr. Cobleigh and I. I did not examine the raisins that were stemmed. I examined the ones that were unloaded. Only examined those that they had in the car. Nine boxes had not been unloaded. I did not admit to Mr. Cobleigh that the raisins were not up to standard. I didn't have an understanding with Mr. Cobleigh that the remaining part of the car would be unloaded and try to adjust the matter with Mrs. Mowat when she came back from 'Frisco. There was nothing said about my adjusting the matter of the damaged raisins with Mrs. Mowat. I didn't tell Mr. Ricker at the packing house that if I had known the condition which the raisins were in, I would not have shipped them."

It seems to us that, having shown that the raisins were such as called for by the contract and were delivered on time, it became defendant's duty to accept and pay for them. Plaintiff was not required to prove more, and acceptance was made out unless the jury were compelled from the evidence to find that plaintiff admitted the inferiority of the raisins and agreed to adjust the matter on the assumption that the raisins were not up to standard. We cannot say that the jury were under any such compulsion. The jury had the right to believe plaintiff when he denied having admitted or said what witness Cobleigh testified to.

[6] Upon this point error is claimed because the court gave the following instruction:

"And you are further instructed that the evidence is without contradiction in this case that the raisins in question were tendered to defendant, who thereupon accepted a portion thereof. If you believe such evidence and so find, then the court instructs that the defendant is estopped from claiming that such raisins were not delivered on time."

This instruction defendant claims is error and was prejudicial because by it "the jury are told that the evidence showed without contradiction that the defendant accepted a portion of the raisins," whereas it "was a question which should have been submitted to the jury." Attention is called to the concluding paragraph of the instruction which states "if you believe such evidence"—i. e., the evidence which the court said was uncontradicted—"the defendant is estopped from claiming that such raisins (all of them) were not delivered." We do not think, in view of all the evidence, that the court was justified in instructing the jury that defendant accepted a portion of the raisins. The only evidence on that point was that a portion was unloaded and run through the stemmer in the absence of the superintendent who, as soon as his attention was called to it and while the work was going on, stopped stemming and immediately called up plaintiff who came at once to the packing house. The unloading and stemming of these raisins was a strong circumstance indicating acceptance of the raisins taken from the car, but under the circumstances it was not conclusive and the court was not justified in telling the jury that the evidence of acceptance was uncontradicted, thus taking the fact away from the jury. But the jury found, on sufficient evidence, as we have held, that all the raisins were of the quality required by the contract and that plaintiff tendered them on time; defendant was therefore liable whether it accepted or rejected the raisins. Hence the instruction was without prejudice.

[7] Defendant was refused the following instruction:

"You are instructed that the raisins received into defendant's packing house were received after the contract had expired, and if said raisins were received under a mistake of fact as to their quality or condition, then defendant is not liable for their value as per the contract, but only for the market value of raisins of that kind at that time."

The raisins were delivered in time, so the jury found, though a few days after September 14th, and there was no claim made in the answer and no evidence in support of a claim that the raisins were received by mistake. It was not error to refuse the instruction.

[8, 9] Instructions marked 12 and 13, offered by defendant, were refused. They were as follows:

"12. Should the jury believe that according to the terms of said contract, and the intention of said parties, said raisins were to be delivered before the 14th day of September, 1912, and they were not, as a matter of fact, delivered or offered to be delivered until the 17th day of September, 1912, then as to the raisins rejected and not accepted by defendant, your verdict should be for the defendant.

"13. Should the jury find that the delivery of the raisins was not accepted by defendant or its agents, but that said raisins were unloaded from said cars at defendant's packing house at plaintiff's request and for his accommodation to save demurrage, and to await the return of Mrs. Mowat, then, in that case, plaintiff cannot recover in this action, and you must find a verdict in favor of the defendant."

Number 12 ignores the consideration of evidence tending to show that even if the intention was as claimed by defendant the condition was waived. Number 13 is based upon a condition of facts which if found by the jury would have required a verdict for defendant. The facts were found against defendant. We discover no error in refusing the instructions.

[10] As to the alleged conversion of 454 sweat boxes less 150 returned, the evidence is slight. Plaintiff testified:

"When this action was brought I was returned 150 sweat boxes. I delivered 454 all told to Mrs. Mowat. The value of these sweat boxes was 55 cents each. * * * No part of the price has been paid me. I demanded the return of the sweat boxes before bringing the action. The only response I got to the demand was I received 150. * * * They were brand new sweat boxes in November, 1911, when the raisins were put on them. * * * The 150 sweat boxes were returned to me the latter part of October."

In the letter sent by Mrs. Mowat, September 26, 1912, she said:

"Please call and remove your goods at the earliest convenience and greatly oblige, Yours," etc.

She testified:

"Mr. Bronge never asked me for the boxes; never made a demand on me for them. I wrote him a letter in regard to his taking the boxes—the one introduced in evidence this morning."

(The letter said "goods" not "boxes.") On cross-examination she testified:

"Mr. Bronge never made a demand upon me either verbal or written for the boxes."

The plaintiff in his testimony does not say upon whom or when he made a demand for the boxes, except that it was before the commencement of the action. The contract is silent on the subject and there is no evidence as to custom. Plaintiff was to deliver the raisins and did so in boxes. There was no obligation on defendant's part to return them to plaintiff's warehouse. Defendant's obligation was to deliver them to plaintiff when called for. Plaintiff testified that he made a demand for the return of the boxes and, though Mrs. Mowat testified that no demand was made upon her, it is fair to assume that it must have been made upon some person authorized to deliver them, for plaintiff got 150, and this, he testified, was the only response he got to the demand. It was within defendant's power to explain what became of the boxes for they were in its possession and control. The verdict was for $2,309.50, which is less than the contract price for 78,450 pounds of raisins, the amount plaintiff testified he delivered. If the jury allowed anything for the boxes we cannot say they so found without any substantial evidence.

[11] Some assignments of error are made arising out of rulings of the court upon the admission or rejection of evidence. Objection was made to plaintiff's offer of testimony as to a certain transaction between plaintiff and defendant's agent (Foley) occurring prior to the execution of the contract. It appeared from the record that, after making a motion to strike out the testimony, defendant's counsel withdrew the motion. This removed the sting from the objection.

[12, 13] When plaintiff was testifying, his counsel said to him:

"Did Mrs. Mowat say anything to you about paying for these raisins?"—referring to a conversation had in her office. Objected to as irrelevant and incompetent and because on his cross-examination. "Mr. Bronge denied that he ever had any conversation with Mrs. Mowat on that subject. Mr. Cory (attorney for plaintiff): He certainly testified to some conversation with Mrs. Mowat. The Court: Well, if it is relevant I will hear it; and if it is not relevant, make a motion to strike it out. Mr. Cory: Answer the question. Relate the conversation with Mrs. Mowat. (Question read.) A. Mrs. Mowat offered us to pay us the market price of 2 cents for those muscat raisins, or, if we didn't accept, to keep us five years in court. Of course, we didn't like the remark, and we walked out."

An exception was noted but no motion made to strike out the answer. Subsequently Mrs. Mowat was called as a witness and defendant sought by her to show what the conversation above referred to was.

"Q. Did you in that conversation say anything, you or Mr. Bronge or any one else, in regard to these raisins that are involved in this suit? A. Yes. Q. What was said? A. I don't remember as to who brought up the conversation. I may have done so, but I said that it was too bad to have a lawsuit over a matter that might be settled out of court; that if it went into court it might be in court for years, and that I was willing to pay a fair market price for the few tons of raisins that had been actually stemmed out by my employés during my absence when he sent them in, but as to the rest of them I would not consider them at any price, as they were not merchantable, could not be shipped out, were not fit for human food."

Plaintiff objected and moved to strike out the answer.

"There is no statement of Mr. Bronge, those were statements in favor of the witness, and also an attempt to compromise pending litigation.

"The Court: I rather expected for you to object to that as a matter of compromise, and that it couldn't be given, anything of that kind, because the court desires that there should be a compromise of all disagreements. I think the motion should be granted.

"Mr. Aynesworth (defendant's attorney): Because they put it in themselves, can they object to Mr. Bronge's reply?

"The Court: It doesn't follow that because one thing was wrong, the other ought to be allowed. Two wrongs do not make a thing right."

That meeting of the parties was brought about to effect an adjustment of their differences, as appears from the record. Plaintiff's testimony should not have been allowed, but the court permitted the witness to answer with the understanding that if not relevant a motion might be made to strike it out. This, however, was not done and the answer stood. We cannot say the court erred in cutting off further testimony as to what was said in the effort to adjust existing differences. Offers of compromise are not necessarily admissions that the claim or defense is lacking in merit; and such offers are not in general admissible. Jones, Law of Evidence, § 293.

[14] Continuing her examination, she was asked whether in that conversation Mr. Bronge made—

"any statement to you at the time (as to the time?) of the delivery of the raisins. A. I asked them why they delivered them or attempted to deliver them after their contract had expired, and they answered— The Court: You mean Mr. Bronge? A. Mr. Bronge and also Mrs. Bronge. They said: 'Well, why did you men touch them, we sent them—if we sent them in after the contract had expired, why did they touch them?'"

On motion of plaintiff the answer was stricken out. The contract was before the jury and also the undisputed fact that the raisins were delivered three days after the date claimed by defendant for the delivery. The contract, we have seen, was not clear on the point. The answer cast no light upon the matter and was not responsive to the question; besides, it was part of a conversation had in the effort to compromise. We cannot see that the ruling was prejudicial.

[15] Later on Mrs. Mowat was asked what Mr. Cobleigh's authority was, the purpose being to show that he had no authority to accept the raisins or to accept raisins tendered after the contract had expired. The court ruled that defendant could show that Cobleigh rejected the raisins but could not show that he had no authority to accept the raisins. The undisputed fact was that Cobleigh was defendant's superintendent and in full charge of her business at the packing house in her absence; that he assumed to act in the matter as such superintendent. Under the circumstances shown in this case we do not think that defendant could evade responsibility by showing want of authority in her superintendent.

We have noticed all the assignments of error which seem to call for consideration and discover no ruling justifying a reversal.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

MILLER v. KRAUS. (Civ. 1428.)

(District Court of Appeal, Third District, California. Dec. 2, 1915. On Petition for Rehearing, Jan. 1, 1916. Denied by Supreme Court Feb. 1, 1916.)

1. APPEAL AND ERROR ⊜907(1) — RECORD — PRESUMPTIONS IN SUPPORT OF JUDGMENT.

In the absence of any record of the evidence taken at the trial, it must be presumed that the trial court's findings were justified by the proofs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2915, 3673, 3678; Dec. Dig. ⊜907(1).]

2. EQUITY ⊜65(1)—DENIAL OF RELIEF—UNCLEAN HANDS.

A court of equity is a court of conscience, and where a suitor appeals for aid in that forum, he must go there with clean hands, or he will be denied relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185, 187; Dec. Dig. ⊜65(1).]

3. PARTNERSHIP ⊜25—VALIDITY OF AGREEMENTS—FRAUD.

Partnership contracts create a fiduciary relation and must be founded in good faith and upon the consent of the parties and for a lawful purpose, and where one of the parties is induced to enter into the agreement by the fraudulent representation of the other, the partnership may be declared void and dissolved, or the agreement of partnership rescinded.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 11; Dec. Dig. ⊜25.]

On Petition for Rehearing.

4. PARTNERSHIP ⊜313—SUITS FOR ACCOUNTING—DENIAL—UNCLEAN HANDS.

Where defendant was induced to enter into a partnership with plaintiff for the manufacture of ice cream by plaintiff's false representations that certain machinery, equipment, and utensils contributed by him to the partnership assets were worth $800 and was free from debt, when in fact they were worth only about $100, and plaintiff had paid only $13 on the purchase price, and defendant upon learning of the fraud took exclusive possession of the business and excluded plaintiff therefrom, plaintiff was not entitled to any relief in a suit for dissolution of the partnership and an accounting, and it was immaterial that he had contributed property and services to the partnership, since the very transaction as to which he asked equitable relief was tainted by his own fraud, and equity will not grant relief to a party not appealing to it with clean hands as to the subject-matter of the controversy.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 679, 729, 729½; Dec. Dig. ⊜313.]

5. PARTNERSHIP ⊜344 — SUITS TO DISSOLVE —DECREE OF DISSOLUTION.

As the contract of partnership was conceived and executed in fraud, it was void ab initio, and when defendant elected to avoid the contract, the situation in contemplation of law was as if no partnership had ever existed and no dissolution was necessary or could be decreed, and hence where the court rendered a decree purporting to dissolve the partnership, but denying an accounting, the part dissolving the partnership might be treated as a nullity or, as a judicial adjudication, that the partnership agreement was void and that the partnership never existed, and did not violate Civ. Code, § 1691, requiring a party desiring to rescind to restore or offer to restore everything of value received from the other party, section 2412 providing that each member of a partnership is entitled to be reimbursed by the partnership for everything that he has properly expended for its benefit, and section 2452 prescribing the conditions the existence of any one of which will justify a judgment of dissolution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 813–818; Dec. Dig. ⊜344.]

6. EQUITY ⊜65(1)—DENIAL OF RELIEF—UNCLEAN HANDS.

That a party has no remedy at law or no adequate remedy does not affect the right and duty of a court of equity to refuse to grant aid to a party as to a transaction which is unconscionable or has been brought about by him through his own wrongdoing, misconduct, or fraud.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185, 187; Dec. Dig. ⊜65(1).]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco and Adolphus E. Graupner, Judges.

Action by Max O. Miller against Frederick W. Kraus. Judgment for defendant, and plaintiff appeals. Affirmed.

Rehearing denied by Supreme Court, 155 Pac. 838.

Arthur Crane, of San Francisco, for appellant. Edward Lande, of San Francisco, for respondent.

HART, J. This is an appeal by the plaintiff from the judgment on the judgment roll alone.

The action is for an accounting of the property, assets, and transactions of a contract of partnership entered into and existing between the plaintiff and defendant and for a decree dissolving said partnership. The complaint alleges that the parties to this action, on the 17th day of February, 1913, formed a copartnership for the purpose of carrying on and conducting an ice cream factory in the city of San Francisco. The agreement of partnership was reduced to writing and is set out in hæc verba in the complaint.

The said agreement recites, stipulates, and

covenants, in substance, as follows: That the plaintiff was the owner of an ice cream manufacturing equipment, consisting of a number of enumerated articles, which equipment Miller guaranteed "to be free and clear of debt," and that he would and did by said agreement contribute said manufacturing equipment and set over the same to the "partnership and assigns," free from liability to the defendant; that Kraus was to contribute to the partnership the sum of $600; that each party was to own a one-half interest in the machinery, equipment, money, earnings, and profits of said business, which was to be conducted under the name of the "Union Ice Cream Company"; that the expense of conducting said business was to be equally borne by the parties; that each of the parties would devote his personal undivided attention to said business "in order to make the same a success"; that each party was to be entitled to draw from the partnership funds the sum of $20 per week until such time as the parties might decide that the business justified a larger allowance per week to each partner; that no money should be paid out of the partnership on account of the business of said partnership, except upon the joint check of the two partners, and that both partners should have an equal voice in the hiring of help and the fixing of wages.

The complaint states that the plaintiff and the defendant proceeded under said agreement to carry on as partners the business of manufacturing and selling ice cream and continued to do so until the 2d day of July, 1913, when the defendant, by means not sanctioned by good morals or law, completely "froze" the plaintiff out of the business, or, as the complaint puts it, "without cause, reason, or excuse took possession of the property and business of said partnership, and excluded plaintiff therefrom, and took exclusive possession of the books of said partnership, and refused to account to plaintiff for the profits of said partnership or any thereof or at all, and refused to let plaintiff see said books, and forcibly and wrongfully ejected plaintiff from the premises of said copartnership." The value of the partnership property so alleged to have been taken exclusive possession and control of by the defendant is alleged in the complaint to be the sum of $1,024.10. It is declared that the defendant is insolvent "except for his claim on said partnership property, and plaintiff has no plain, speedy, and adequate remedy at law." It is further alleged that the defendant threatens to and will sell all said property and convert the same to his own use, unless restrained by appropriate judicial process.

The answer, however, as is to be supposed, tells a much different story about the business deal referred to in the complaint. Admitting the partnership agreement as it is set forth in the complaint, the defendant charges that he was induced to and did sign the said agreement and enter into partnership with the plaintiff "upon the false representation and pretense by and on the part of the plaintiff"; that such false representation and pretense consisted of the statement made by the plaintiff to the defendant and which statement is embodied in the written agreement of partnership, that "Max O. Miller contributes to the partnership and assigns and sets over to the same a manufacturing equipment, such as cabinets, ice cream manufacturing machinery and implements, which he represents and guarantees to be his property and to be free and clear of debt and without liability on any account to Frederick W. Kraus or to the said partnership"; that the plaintiff falsely represented to the defendant that he had paid for said described property the sum of $800 cash, and that he was the owner thereof; "that said representation was false and known to be false by said plaintiff at the time he made the same, and was made with the intent to defraud and deceive this defendant, and this defendant, not knowing otherwise, relied upon said representation and was deceived thereby; that a short time after the formation of said partnership, the party who sold said merchandise to said plaintiff levied a writ of attachment thereon for the purchase price of the same and caused said personal property to be seized by the sheriff, and in order to prevent the sheriff from removing said personal property this defendant paid and advanced to the sheriff $105." The defendant avers that but for the false and fraudulent representation of the plaintiff that he owned said property and was able to contribute to said partnership "an asset equal in value to the moneys contributed and actually paid in by this defendant, the defendant would not have entered into said agreement or had any business relations with said plaintiff."

The answer also denies that the defendant "refused to account to the plaintiff for the alleged profits of said partnership, or that there are profits of said partnership, or at all, refused to let plaintiff see said alleged books or forcibly or wrongfully ejected plaintiff from the premises of said partnership"; denies that "he took possession of any property belonging to said partnership of any kind or character whether the total value of said alleged property of said partnership or belonging thereto is or was on July 2, 1913, the sum of $1,024.10, or that there is any property of any value belonging to said partnership"; denies that he is insolvent "except for his alleged claim on said alleged partnership property and denies that he is insolvent at all"; alleges that the "basis of the alleged cause of action herein is founded upon a fraud upon this defendant, because of the fraud and deceit on the part of plaintiff which induced defendant to sign the alleged partnership agreement."

The court found that the parties to this action entered into a copartnership on February 17, 1913, on the terms and for the pur-

pose specified in the written agreement as pleaded in the complaint; that the plaintiff represented to the defendant that he was the owner of the certain machinery, equipment, and utensils referred to in the partnership agreement; that said property was free from debt and that it was of the value of $800; that it was not true that said personal property was free from debt, or was of the value of $800, but that the plaintiff, at the time of entering into the partnership agreement and the making of the representation to the defendant as to the value of said property and its status as to its ownership, had paid on the purchase price of said property the sum of $13 only, that there then remained unpaid on said price the sum of $88, and that the total value of the said property when the partnership agreement was under negotiation and executed and the representations by the plaintiff to the defendant as to its value and ownership were made, was the sum of $101 only; "that said representations were made by plaintiff, knowing them to be false and for the purpose of inducing defendant to enter into the partnership agreement; * * * that plaintiff was the owner of said personal property, but still owed the vendor thereof said sum of $88." The court further found that, upon the execution of the partnership agreement, the defendant "paid the sum of $600 into the partnership account of said business, and plaintiff and defendant devoted the whole of their time and attention to said business from said February 17, 1913, to and including July 1, 1913; that plaintiff has never drawn any money out of said partnership, but has paid the sum of $33 for the benefit of said partnership business during said period from February 17, 1913, to July 1, 1913." The court then found:

"On or about April 15, 1913, it came to the knowledge of defendant that the sum of $88 still remained unpaid upon plaintiff's purchase of said personal property and thereon, and thereafter, July 1, 1913, said defendant took exclusive possession of the business of said partnership and excluded plaintiff therefrom and refused to account to plaintiff for the profits of said partnership."

From its findings the court deduced the following conclusions of law:

"(1) That said partnership had its inception in the fraud of plaintiff and that defendant was entitled to take possession of the business of said partnership and exclude plaintiff therefrom on the discovery of said fraud; (2) that plaintiff does not come into court with 'clean hands' and is entitled to no redress; (3) that defendant is entitled to have said partnership dissolved by this court without an accounting to plaintiff of his interest therein; (4) that upon the dissolution of said partnership plaintiff is entitled to nothing, and the defendant is entitled to a judgment for his costs."

In conformity with the conclusions of law so arrived at by the court, judgment was rendered and entered.

The answer in effect admits that the value of the business and its equipment is, as the complaint alleges to be the fact, the sum of $1,024.10. Counsel for the plaintiff contends, however, that even waiving the right of his client to one-half of the value of the partnership business and property as so admitted, he is, nevertheless, under the findings, entitled to a judgment for at least the sum of $426, and that it thus appearing that the findings do not support the judgment, a reversal thereof must follow. The items making up said last-mentioned sum are: Twenty dollars per week for 19 weeks, which the plaintiff was entitled to receive from the partnership funds under the agreement, totaling $380; $33 paid to the partnership, as found by the court, and $13 paid on the equipments contributed by him to the partnership assets.

But the sole theory of the defense interposed by the defendant and upon which the decision proceeded is that the establishment of the copartnership between the parties was the direct result of actual fraud practiced by the plaintiff upon the defendant, and that a court of equity will not grant relief to a party as to a transaction tainted by his own fraud, but will leave or remit him to whatever remedy he may have at law for the injury he claims to have suffered from the act or acts of the defendant.

[1, 2] In this case, there being no record of the evidence taken at the trial, it must be presumed that the finding of the fraudulent representations of the plaintiff and the finding that the defendant was induced to enter into the partnership agreement solely by such fraudulent representations were justified by the proofs. And upon these findings, the court, sitting in equity, was obliged to deny to the plaintiff equitable relief. A court of equity is a court of conscience, and where a suitor appeals for aid in that forum he must go there with clean hands, otherwise he will be incontinently refused the assistance thus sought by him. As is plainly manifest from the findings, a copartnership between the plaintiff and the defendant was established or brought into existence through fraud practiced by the former upon the latter, and certainly the plaintiff is in no position to ask the favor of equity as to a transaction thus brought about by him.

"Whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." 1 Pom. Eq. Juris. § 397.

[3] Partnership contracts create a fiduciary relation between the partners and they must be founded in good faith and upon the consent of the parties and for a lawful purpose. And it is a settled as well as a most salutary rule that where one of the parties to an agreement of partnership has been induced to enter into it by the fraudulent representations of the other, the partnership may be declared void and dissolved, or, what in effect amounts to the same thing, the agree-

ment of partnership rescinded. 30 Cyc. of Law, p. 657; Story on Partnership, § 6; Hynes v. Stewart & Owens, 49 Ky. (10 B. Mon.) 429. This rule proceeds from the theory, of course, that where one partner is induced by the fraudulent representations of the other to enter into the partnership the consent of the former to the agreement has not been obtained.

It follows that the court was not only justified upon the findings in refusing to award an accounting, but was likewise warranted in decreeing a dissolution of the partnership.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

Asking a rehearing of this cause, the plaintiff declares that, in the original opinion, we failed to consider sections 1691, 2412, and 2452 of the Civil Code and certain cases expounding those sections. The points made and the sections of the Code and the authorities cited in the petition were not called to our attention in the brief of the appellant. We therefore feel impelled to make some observations in reply to the petition.

Section 1691 of the Civil Code provides that there can be no rescission, where the same is sought to be effected without the consent of the parties, unless the party to the contract desiring to rescind restores or offers to restore everything of value which he has received from the other party under the contract. Section 2412 provides that each member of a partnership is entitled to be reimbursed by such partnership for everything that he has properly expended for the benefit thereof. Section 2452 prescribes the several conditions the existence of any one of which will justify a judgment of dissolution.

In addition to the sections of the Code thus referred to, attention is called to the cases of Cottle v. Leitch, 35 Cal. 434, 440, and Bradley Co. v. Bradley, 165 Cal. 242, 131 Pac. 750, and also to section 356 of Story on Partnership. In Cottle v. Leitch, it is said that "as an incident to the dissolution there must be an accounting." In Bradley Co. v. Bradley, it is said:

"It is not every wrongful act, nor even every fraud, which prevents a suitor in equity from obtaining relief. His misconduct must be so intimately connected to the injury of another with the matter for which he seeks relief, as to make it inequitable to accord him such relief" —referring to 1 Pomeroy's Equity Jurisprudence, § 399.

Section 356 of Story on Partnership merely declares the rule to be, as obviously it should be, that where a partnership is dissolved by a decree of a court of equity, the court will see that the property of the partnership is properly and equitably divided according to the circumstances of the case, as disclosed by the proofs.

The law as above stated will not be disputed, but it has no application to this case. This is simply a case in which, by reason of the fraud of the plaintiff "in regard to and connected with the matter in litigation," thus affecting "the equitable relations subsisting between the two parties" to the suit and arising out of the transaction on which the action is founded (1 Pomeroy's Eq. Juris. § 399), a court of equity must refuse to interfere in behalf of the plaintiff. It is not, as we conclude upon reconsideration of the case, and as we shall presently see, a case of rescission nor one in which the principles applicable to an adjudication dissolving a partnership may of right be invoked.

It must be conceded that the situation presented by the record is rather a peculiar one. The court, although finding that the plaintiff was not, by reason of his fraud in inducing the defendant to join him in the partnership, entitled to an accounting, did, nevertheless, find the several amounts which the plaintiff contributed to the partnership, and further found that he had rendered service for several months to the concern, and that it was agreed that each of the partners was to be privileged to draw from the partnership funds the sum of $20 per week. In the absence of any record of the evidence, it is to be presumed that thus the court found all that the plaintiff was entitled to, if anything at all, from the partnership assets upon a dissolution. So it will be observed that, with the exception of awarding the plaintiff a judgment for the amount so found, there was, in effect, an accounting of the partnership assets, notwithstanding that the court found that "the defendant is entitled to have said partnership dissolved by this court without an accounting to plaintiff of his interest therein."

[4] But we think it is clear that, in this case, the findings, so far as they relate to the several amounts and the personal services contributed by the plaintiff to the partnership, are wholly immaterial and unnecessary. The proposition, as it was presented by the defendant and sustained by the court, was that the plaintiff induced the defendant to enter into the partnership through misrepresentation and fraud. In other words, the very transaction as to which the plaintiff has asked equitable relief was tainted by his own fraud—the creature of his fraudulent practices upon the defendant. Having appealed to a court of equity for aid, and the fraudulent character of the transaction, made so by himself, having been made to appear, the court, acting upon those primary considerations which, in the very nature of things, must necessarily govern such a court in the disposition of causes coming before it, refused to grant the relief sought by the plaintiff. As the court found, the plaintiff did not appeal to it with clean hands as to the subject-matter of the controversy here (1 Pomeroy's Eq. Juris. § 399), and clearly

the doors of the court were properly closed to him.

[5] As to that portion of the judgment decreeing a dissolution, it might well be replied to the objection of the plaintiff thereto that, having himself asked for a dissolution, he is in no position now to complain of the action of the court in granting it. But there is another and a conclusive answer to the objection. The contract of partnership having been conceived and executed in fraud, it was void ab initio. The effect of the defendant's election to avoid the contract of partnership for the fraud practiced upon him by the plaintiff was that, as between the plaintiff and defendant, there had never existed any copartnership, although the defendant, having held himself out as an apparent member of the firm prior to his ousting the plaintiff from the business rendered himself liable to the creditors of the copartnership. Richards v. Todd, 127 Mass. 167, 173; Story on Partnership (7th Ed.) § 285. It follows that, in contemplation of law, there existed between the parties no partnership as to which a dissolution was necessary or could be decreed. There was in other words, nothing to dissolve. Therefore, that part of the decree which purports to dissolve the partnership may be treated as a nullity, or, since there should be a judicial adjudication of the character of a business association so brought about, it should be, if it may be given any force at all, construed as a declaration in the decree that the partnership agreement was absolutely void, and that, consequently, no partnership ever existed between the parties. Under this view, the observations made in our former opinion respecting the propriety of decreeing a dissolution of a partnership under certain indicated circumstances may be regarded as having no special application to this case.

[6] The suggestion that the plaintiff has no remedy at law or any legal relief against the defendant argues nothing against the right and the duty of a court of equity to refuse to grant aid to a party as to a transaction which has been brought into existence solely by the fraud practiced by him upon the party against whom he seeks relief as to said transaction. A court of equity, in the administration of its principles, does not concern itself about what may or may not be done in another forum. It does not stop to inquire whether the party may or may not have a remedy at law with respect to the matter as to which, under its principles, it is required to refuse relief or aid of any character. To know that the transaction is unconscionable or has been brought about by the party seeking its interposition through his own wrongdoing, misconduct, or fraudulent acts, is an end to the inquiry, so far as that court is concerned; and if it be true that the party has no adequate remedy in the ordinary course of law or none at all, it is, as stated, no argument against the exercise by a court of equity of the jurisdiction made peculiar to it by virtue of the fundamental conceptions of that branch of our jurisprudence.

We adhere to the conclusion arrived at in our former opinion that the court was right in refusing to grant any relief to the plaintiff upon the ground, as assigned by the court, that the transaction as to which he asked for aid was infected with his own fraud.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

MILLER v. KRAUS. (S. F. 6885.)

(Supreme Court of California. Feb. 1, 1916.)

1. JUDGMENT ⇐735 — CONCLUSIVENESS — MATTERS CONCLUDED.

Where, in a suit for the dissolution of a partnership, a sale of its property and the division of the balance remaining after payment of its debts between the partners, plaintiff did not ask an accounting and the findings laid no foundation for an accounting, there being no statement of the partnership debts, the amount of property on hand or the shares of the partners, and the judgment merely provided that the partnership be dissolved and that plaintiff take nothing by his action, the judgment would not bar a subsequent suit for an accounting.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265; Dec. Dig. ⇐735.]

2. COURTS ⇐92—PRECEDENTS—DICTA.

In such action the question whether plaintiff was debarred from maintaining an action for an accounting by reason of frauds practiced by him did not arise, and anything said on that subject in the opinion of an appellate court was obiter dictum, and not the law of the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. ⇐92.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco and Adolphus E. Graupner, Judges.

Action by Max O. Miller against Frederick W. Kraus. Judgment for defendant, and plaintiff appeals. On application for rehearing after the affirmance of the judgment by the District Court of Appeal for the Third District. 155 Pac. 834. Application denied.

Arthur Crane, of San Francisco, for appellant. Edward Lande, of San Francisco, for respondent.

SHAW, J. [1, 2] The plaintiff in this case did not expressly ask an accounting. His express prayer was that the partnership be dissolved, and that a receiver be appointed to sell the property, and out of the proceeds to pay the partnership debts, dividing the balance, if any, between the partners. The findings lay no foundation for an accounting. They do not state either the partnership debts, the amount of property on hand, or the shares of the partners. The judgment

merely is that the partnership be dissolved, and that plaintiff take nothing by his action. Under these circumstances we do not think the judgment would be a bar to a subsequent suit for an accounting, and the question whether or not the plaintiff is debarred from maintaining such an action in equity by reason of the frauds practiced by him, as found by the court, in obtaining the agreement of partnership, does not arise in the case. Consequently what is said in the opinion of the District Court of Appeal on that subject is obiter dictum, and does not constitute the law of the case. Regarding that opinion as a mere declaration that the judgment dissolving the partnership was properly given, we have no fault to find with it, and for that reason the application for rehearing is denied.

We concur: HENSHAW, J.; MELVIN, J.; LAWLOR, J.

(172 Cal. 94)

WORDEN v. CENTRAL FIREPROOF BLDG. CO. (L. A. 3597.)

(Supreme Court of California. Feb. 10, 1916. Rehearing Denied March 9, 1916.)

1. CARRIERS ⇐316 — ACTIONS — PRESUMPTIONS—RES IPSA LOQUITUR.

An elevator passenger is only required to show that he was injured by the rapid descent and sudden stopping of the elevator while under the control and management of defendant, to make out a case presumptively showing negligence of the defendant, and throwing the burden on defendant of showing that it was not negligent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285–1294; Dec. Dig. ⇐316.]

2. APPEAL AND ERROR ⇐1064 — HARMLESS ERROR—INSTRUCTIONS.

That an instruction that an elevator passenger had sustained the burden of proof of negligence of the owner by showing that he was injured while a passenger in the elevator is incomplete in failing to state that it must also appear that the injury was caused by the operation of the elevator was immaterial, where the evidence shows it must have been so caused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⇐1064.]

3. DAMAGES ⇐159(3)—ASSESSMENT — PLEADING AND PROOF.

In an action for personal injuries, an allegation that plaintiff has suffered great physical pain, and will continue to suffer, and that the injury to his knee is permanent, is sufficient to include whatever loss of earning power may have been caused by the permanent injury stated; consequences naturally following from a personal injury being general damages, which need not be specially pleaded.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 443; Dec. Dig. ⇐159(3).]

4. DAMAGES ⇐208—ASSESSMENT—QUESTION FOR JURY.

Evidence that prior to his injury plaintiff was enjoying good health, was active for a man of his years, and that he had been engaged in the real estate business, though his income did not appear, and that his leg was stiff from the injury and too weak to support his weight, presented the question of his earning power and the extent of his damage to the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 553, 554; Dec. Dig. ⇐208.]

5. DAMAGES ⇐216—ASSESSMENT—INSTRUCTION.

An instruction allowing compensation for "loss of earning power" is not objectionable for failure to limit recovery to loss of power to earn money in the future, where the instruction further stated that no damages could be allowed for loss of specific wages or earnings, since none were proven.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548–555; Dec. Dig. ⇐216.]

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Walter Worden against the Central Fireproof Building Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Morton, Hollzer & Morton, of Los Angeles (O'Melveny, Stevens & Millikin and Harry A. Hollzer, all of Los Angeles, of counsel), for appellant. E. B. Drake, of Los Angeles, for respondent.

SHAW, J. This is an action for damages on account of personal injuries sustained by the plaintiff while being conveyed as a passenger in an elevator owned and operated by the defendant in its building in Los Angeles. The allegations of the complaint are, substantially, that while the plaintiff was descending in the elevator in defendant's building, and after passing the seventh floor, the elevator, because of failure to have proper clamps and brakes thereon, fell to about the third floor, resulting in an injury to plaintiff's left knee and affecting the general condition of his health. There was a trial by a jury, a verdict and judgment being given for the plaintiff. The defendant appeals from the judgment and from an order denying its motion for a new trial.

[1] The first point urged by the appellant is that the verdict is against law and is not supported by the evidence. The appellant insists that there was no negligence shown upon its part in the operation of the elevator, and that therefore judgment should have been given against the respondent. Elevators do not usually fall or stop so suddenly as to cause injury to passengers when operated with due care. The doctrine of res ipsa loquitur applies to a passenger elevator. The plaintiff was only called upon to show that he was injured by the rapid descent and sudden stopping of the elevator and that the elevator was under the control and management of the defendant. When he had made such proof he had made out a case presumptively showing negligence on the part of the defendant. The burden then devolved upon the defendant to show that it was not guilty of neg-

ligence for which it could be charged. Treadwell v. Whittier, 80 Cal. 582, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; I. C. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737. The verdict implies a finding against appellant on this point. There was evidence of a substantial character to support it. The judgment cannot, therefore, be disturbed on this ground.

[2] Appellant objects to an instruction on the same point to the effect that the plaintiff had sustained the burden of proof of negligence on the part of the defendant "by a showing that the plaintiff was injured while a passenger in the elevator of the defendant." As an abstract proposition this instruction is incomplete, in that it fails to include the further statement that it must also appear that the injury was caused by the operation of the elevator, its mode of motion, or from something connected therewith, in this case, as the evidence shows, by the sudden stop in its descent. This rule is fully explained in Wyatt v. Pacific, etc., Co., 156 Cal. 170, 103 Pac. 892, and Steele v. Pacific, etc., Co., 168 Cal. 375, 143 Pac. 718. But no prejudice could have been caused to the defendant by this omission. Under the evidence there could be no doubt of the fact that, if plaintiff suffered the injury complained of at all while in the elevator, it was because of the manner of its operation, its rapid descent, and sudden stop. It was not claimed or suggested that his injury was from any independent cause.

[3, 4] Complaint is made of an instruction given to the jury, relating to the measure of damages, which is as follows:

"If the injury has impaired the plaintiff's power to earn money, such sum as will compensate him for such loss of earning power."

It was not necessary to allege specially the damage to the complainant from this cause. The complaint alleged that by reason of the injury he had suffered great physical pain, "and will continue to suffer," and that the alleged injury to his knee is permanent, "all to his damage in the sum of $15,000." This is a sufficient allegation of the damage and it includes whatever loss of earning power may have been caused by the permanent injury stated. Consequences which naturally follow from a personal injury, because of the nature of the injury, are general damages, and need not be specially pleaded in order to recover damages resulting therefrom. Treadwell v. Whittier, supra; Sloane v. Southern C. R. Co., 111 Cal. 685, 44 Pac. 320, 32 L. R. A. 193; Castino v. Ritzman, 156 Cal. 588, 105 Pac. 739; Storrs v. Los Angeles Traction Co., 134 Cal. 93, 66 Pac. 72. There was evidence that prior to the injury the respondent was enjoying good health, was active for a man of his years, and that he had been engaged in the real estate business, although his income from such business does not appear, and that his leg was stiff from the injury and too weak to support his weight. From this the jury could form some estimate of his earning power and the extent of his damage in that particular. Storrs v. L. A. Traction Co., supra.

The decision in Rouse v. Pacific, etc., Co. (App.) 151 Pac. 164, is not inconsistent with the above authorities. It holds in effect that, where evidence is given on the subject of damages from loss of earning power, it is error to instruct the jury that they may estimate such damages without regard to the evidence on the subject.

[5] The appellant further criticizes the instruction because it authorizes the jury to allow compensation for the "loss of earning power" and does not expressly limit it, as does the instruction approved in the Storrs Case above cited, to the loss of power "to earn money *in the future*." The argument is that under the instruction, as given, the jury might have supposed that they were at liberty to give damages for loss of specific earnings prior to the beginning of the action, or prior to the trial, although there was no evidence of such loss, and it would obviously be the subject of direct proof, and that therefore it was error to instruct, as the succeeding part of the instruction does, that this element of damage is not, like expenses for medical treatment, "the subject of direct proof," and therefore to be determined from the evidence before them, but was "left to the sound discretion of the jury." The instruction, however, further stated that no damages could be allowed "for loss of specific wages or earnings," since none was proven. The jury could not have been misled by the omission of the words "in the future." There was no error in the instruction.

No other points are presented which warrant consideration.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 157

SPURRIER et al. v. RECLAMATION DIST. NO. 17. (Sac. 2194.)

(Supreme Court of California. Feb. 24, 1916. Rehearing Denied March 23, 1916.)

1. DRAINS ⟸18 — RECLAMATION DISTRICTS — REPORTS OF TRUSTEES.

Pol. Code, §§ 3454, 3455, empowering the trustees of a reclamation district to survey, plan, locate, and estimate the cost of the works necessary for the reclamation and to report such plans with estimates of the cost to the supervisors, does not require the report to show the exact present location of existing levees referred to, their width at the top, the slope of their sides, their present condition and construction, the number of cubic yards contained in them, the exact location of places where rocking and brushing is to be done, the amount of brushing, the quantity and kind of rocks, and the extent and location of scraping and dredging to be done; it being sufficient that the report enables

interested persons, from their knowledge of conditions or by personal inspection, to understand with reasonable certainty the work to be done and the cost thereof.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13; Dec. Dig. ⟸18.]

2. Drains ⟸18—Reclamation Districts—Reports of Trustees.

Pol. Code, § 3455, requiring the report of trustees of a reclamation district to present an estimate of incidental expenses, does not require them to be segregated.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13; Dec. Dig. ⟸18.]

3. Drains ⟸67—Reclamation Districts—Assessments—Statutory Provisions.

The provision in Pol. Code, § 3466½, that any landowner paying an assessment in a reclamation district afterwards declared invalid shall be credited with the amount paid and legal interest thereon on any subsequent assessment of the amount therein assessed against the land is repealed by its omission from the section as amended by St. 1911, p. 647.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 73, 76, 91; Dec. Dig. ⟸67.]

4. Drains ⟸82—Reclamation Districts—Assessments—Recovery of Money Paid.

In an action brought as authorized by Pol. Code, § 3462, for the sole purpose of annulling an assessment of a reclamation district, the question whether the plaintiffs are entitled to credit for former payments on an assessment subsequently declared invalid or to the return of the money paid cannot be considered.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83–87; Dec. Dig. ⟸82.]

5. Drains ⟸82—Reclamation Districts—Assessments—"Actual Reduction."

Within the contention of plaintiffs, seeking to annul a reclamation district assessment, that those who did not pay a former invalid assessment were given an advantage over those who had paid the former assessment, and by not paying the former assessment saved interest besides actual reductions in the present assessment, "actual reductions" means the difference between the sum assessed upon the land by the invalid assessment based on estimated costs and benefits and the new assessment in accordance with the benefits derived.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83–87; Dec. Dig. ⟸82.]

6. Drains ⟸82 — Reclamation Districts — Assessments—Validity.

Whether an assessment for a new improvement and a reassessment of a former invalid assessment at the same time be regarded as one or as separate assessments, a landowner who is not charged anything on account of the former assessment is not prejudiced.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83–87; Dec. Dig. ⟸82.]

7. Appeal and Error ⟸1011(1)—Review — Questions of Fact — Conflicting Evidence.

In an action to annul an assessment of a reclamation district, a finding adverse to plaintiff's contention that the assessment upon the lands of plaintiffs and other lands based on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸1011(1).]

8. Pleading ⟸8—Form of Allegations—Conclusions or Matters of Fact.

Allegations in a complaint to annul a reclamation district assessment that the lands of plaintiffs were not charged in the present assessment with their just proportion of a former assessment nor the proper proportion of the costs of the reclamation were legal conclusions which had no proper place in the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12–28½, 68; Dec. Dig. ⟸8.]

9. Pleadings ⟸122—Objections—Materiality.

Plaintiffs in an action to annul a reclamation district assessment were not misled by the form of a denial of their allegations relating to the assessment based on information and belief where they treated it on the trial as a disputed question of fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249–252; Dec. Dig. ⟸122.]

Department 1. Appeal from Superior Court, San Joaquin County; G. W. Nicol, Judge.

Action by S. M. Spurrier and another against Reclamation District No. 17. From a judgment for defendant and an order denying a new trial, plaintiffs appeal. Affirmed.

S. M. Spurrier and A. H. Ashley, both of Stockton, for appellants. Nutter & Orr and Clary & Louttit, all of Stockton, for respondent.

LAWLOR, J. This is an action brought under the provisions of section 3462 of the Political Code, as amended in 1911 (Stats. 1911, p. 644), by the appellants herein, owners of certain tracts of land in the defendant reclamation district, for the purpose of annulling or canceling all assessments (aggregating the sum of $2,764) upon their lands, which consist of three contiguous tracts having a total area of 304 acres. The assessment levied upon the lands of the appellants involved only levee and protective embankments. Upon the trial judgment was rendered in favor of the defendant. An appeal was taken therefrom and from the order denying plaintiffs' motion for a new trial.

1. The record discloses that on October 16, 1911, the board of trustees of the defendant reclamation district filed with the board of supervisors its petition and report setting forth that the original and subsequent assessments levied upon the lands of the district had been and were insufficient to provide for the completion, protection, maintenance, and repair of the reclamation works thereof, and praying that three commissioners be appointed for the purpose of levying an assessment in the sum of $131,727.04 upon the lands of the district. The petition, including the accompanying maps and profiles, sets forth that the said sum of money was required for the purpose, among other things, of satisfying an indebtedness of $97,058.74 on account of outstanding warrants, approved by the board of supervisors. Other items are given as follows in the report:

To raise levees to height shown in said profile and for completion of head levee and with dimensions when completed at a top width of 20 feet and side slopes of 3 to 1 and require deposit made by scraper and dredger of 70,000 cubic yards of the estimated cost of	$10,000
Rocking and brushing bank of San Joaquin river on lands of Sanguinetti and Colures	5,000
Rocking and brushing levee at tower where power line of Standard Electric Company crosses San Joaquin river	500
Estimated cost of superintendence, engineer's fees, brushing and harrowing levees, and incidentals	2,560
Estimated cost of secretary's salary, expenses of collecting assessment, and other incidental expenses	2,500

It further appears in the report that:

"In the reclamation of the lands within said district there have been constructed a head levee, a levee along the San Joaquin river, and a levee along French Camp slough, and also a levee along the French Camp road, as shown by map of said district and profile of said levees attached to report * * * hereunto attached."

The attached report of the engineer which is mentioned in the petition refers to the same items as follows:

"The levees, under the efficient management of your superintendents, have been steadily raised and strengthened. A new head levee, designed to protect the district from the water of a flood far greater than that experienced this spring, has been completed. Part of the French Camp toll road, forming the northeast side of your district, and hitherto a source of danger from the flood waters of French Camp slough, has been raised to a height far above the flood plane of that slough, and the board of supervisors intend to extend the same to the Southern Pacific Railroad, rendering this portion of your district as safe from overflow as any other portion. * * * The following work is necessary, and will have to be done to place the district in first-class condition:

70,000 cu. yds. of dredger fill on the levees bordering the San Joaquin river and French Camp slough	$10,000 00
Rocking and brushing 1,000 ft. east of the bank of the San Joaquin river, ¼ mile below the S. P. R. R. bridge	5,000 00
Rocking and brushing fill along east bank of San Joaquin river in the N. E. ¼, section 5, T. 1 S., R. 6 E., at power crossing	500 00
Incidental expenses	2,500 00
Superintendence, engineering, etc.	2,560 00"

This report also contains references to the drainage system of the district. One of the attached maps was a map of the entire district, indicating by a meandering line or lines between engineer stations the present route of the levees along the French Camp slough, the San Joaquin river, and the Walthall slough, where it is known as the head levee, with the boundaries and names of the owners of the various tracts of land indicated, and containing columns of figures giving the elevations of the surface of all the lands of the district. The pumping stations, canals, and other data, with which we are not concerned herein, are also shown on the map. At the lower part thereof the right of way of the new head levee is indicated. Another map shows the profile lines of the entire system of existing levees with dimensions and elevations, the high-water mark of 1907 and 1911, respectively, the height to which it is proposed to raise the levees, and the surface of the ground over which the new head levee is to be constructed. The names of the owners of the land upon which the present levees are located, the profile lines for the work done in the spring of 1911, and the location of canal and railroad crossings, are also shown. A third map shows the right of way for the new head levee and a rough sketch of the location of the present head levee, with the breaches indicated. This map also gives the contours of the surface of the ground. Other maps are attached to the petition which relate to the existing and proposed canals of the district. But, as appellants are not assessed for drainage, no objection has been raised to the sufficiency of the petition in that behalf. Excepting for the part of the report dealing with a former assessment which had been declared invalid in Reclamation District No. 17 v. Bonbini, 158 Cal. 197, 110 Pac. 577, which we shall presently consider, no other data was filed with the board of supervisors by the trustees.

Upon filing the petition and report the board of supervisors appointed the commissioners, who thereafter made an assessment for the amount prayed for, and filed the list on March 28, 1912. An order was thereupon made fixing a time and place in conformity with section 3462 of the Political Code, and due notice was given for the filing by interested persons in writing of such objections, as they might have to offer. Accordingly various objections were filed, among which were those of the appellants. These were heard on May 21, 1912, and thereafter, on June 18, 1912, the board of supervisors filed its order approving the said assessment. On July 17, 1912, or within the prescribed period of 30 days (Pol. Code, § 3462), this action was commenced.

The first objection made by the plaintiffs, the appellants herein, was to the sufficiency of the petition and report, taken in connection with sections 3454 and 3455 of the Political Code, which empowers the trustees "to survey, plan, locate, and estimate the cost of the works necessary for the reclamation," and to report such "plan or plans of the work" to the board of supervisors, with estimates of the costs thereof, "together, also, with an estimate of incidental expenses." Relying upon the decision in Reclamation District No. 17 v. Bonbini, supra, the appellants point out that there is no data given in the petition and report to show the exact present location of the existing levees, their width at the top, the slope of the sides, their present condition and mode of construction, or the number of cubic yards contained in them; that there is nothing to show the character or cost of the work done in other particulars; that there is not sufficient data

to enable the landowners to compute the amount of the filling or excavating which is proposed to be done, at any particular point, upon the lands; and that no data is given by which the estimates of the board of trustees and the engineer as to the costs and expenses of the proposed work can be checked up. It is further claimed that the reference to the work on the old head levee and on the French Camp toll road levee as to the rocking and brushing and in other particulars is too indefinite. Exception is also made to the estimate for rocking and brushing as not showing the exact location of the places where the work is to be done, the amount of brushing required and the cost thereof, the quantity and kind of rocks and the cost of putting the same in place, or the extent or location of both the scraping and dredging to be done. Among the other objections are included the failure to specifically state how long the engineer and the secretary were expected to be employed, the remuneration each was to receive, the character of their services, the charge for superintendence, the expenses of collecting the assessments, and the meaning of the incidental expenses. It is also claimed that the cost in each instance should be separately stated. And finally, in support of these various objections, the appellants say:

"That there must be such description given the landowner that he will have notice and be informed of the location, character, plans, and probable cost of the work (Reclamation District No. 17 v. Bonbini, 158 Cal. 202, 110 Pac. 577), so that he can make intelligent written objections under section 3462, and that money so reported and assessed must be kept and expended as a distinct and separate fund for which it is reported, assessed, and collected (Swamp Land Reclamation District No. 341 v. Blumenberg, 156 Cal. 538, 106 Pac. 389)."

[1, 2] We have thus stated at some length the data contained in the petition and its accompanying reports and maps, together with the general nature of the objections raised thereto by the appellants, because we think that a consideration of the facts themselves tend to furnish, in large measure, the answer to such objections. It should always be the aim of the officers of a reclamation district, however, to make the petition and reports as full and complete as is practical, to the end that the landowners may be reasonably informed of the various objects of the proposed assessment and have the means, at least, of determining the real value of the proposed work and its effect as regards the probable benefits to be derived therefrom, or the detriments which may result. Likewise the board of supervisors should not approve an assessment unless the law has been substantially complied with in this respect. But we do not think the law requires that the report of the trustees shall contain the elaborate and specific deatails contended for by the appellants. The statute only requires a report of the original and supplemental plans, if any, "together with the *estimates* of the cost of the works necessary for the reclamation of the lands of the district in pursuance of any such plan or plans; together, also, with an *estimate* of incidental expenses." Pol. Code, § 3455. (The italics are ours.) Until the assessment has been approved by the board of supervisors, the moneys collected, and the final contracts let for the work to be done, it would be extremely difficult for the trustees to state in minute detail the nature of each item of work proposed, the exact cost, and its precise location. Indeed, the expense of preparing such elaborate drawings and detailed estimates at a time when the approval of the plans or the assessment would still be uncertain would incur considerable expense without proportionate benefits to the district. Furthermore, the plans of the trustees may be subject to some change, particularly during the actual construction of the proposed improvements, when, for instance, it may be decided by the engineers in charge, with the approval of the trustees, that it would be more practical to face a certain portion of the levee with rock than with brush, as first planned, or vice versa, or that the work on a particular embankment would be accomplished with greater facility by scraping from a higher point than by dredging from the river. The reports, plans, and estimates should, however, be sufficiently definite to enable interested persons, from their own knowledge of existing conditions, or by personal inspection, to understand with reasonable certainty the work proposed to be done and the cost thereof. In this case the existing levees, canals, embankments, sloughs, and the like are visible and accessible, and furnish, in connection with the reports, the means of verifying the plans of the projected work. In Meyer v. Reclamation District No. 17 (Sac. No. 2193) 155 Pac. 635, this court, in considering other objections which had been raised to the same petition and report herein discussed, found that the items of "rocking and brushing" were sufficiently definite to satisfy the requirements of the law. As regards the "incidental expenses," it is sufficient to state that there is no provision of law which provides that they must be segregated. Although possibly the trustees could have set forth more in detail the existing condition of the levees and other details of the work done, or described more elaborately various items, such as the salaries of the secretary, engineer, and superintendent, we think that the petition is, on the whole, a sufficient compliance with the statute. It is not every omission to state all the details that will invalidate an assessment.

What has been said in Meyer v. Reclamation District No. 17, supra, and in other recent decisions of this court in answer to similar objections, is equally applicable to the objections interposed by the appellants. Rec-

lamation District No. 730 v. Hershey, 169 Cal. 793, 148 Pac. 185; Reclamation District No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763; Reclamation District No. 730 v. Hershey, 160 Cal. 692, 117 Pac. 904; and Reclamation District No. 535 v. Clark, 155 Cal. 345, 100 Pac. 1091. They are for the most part extremely technical. Upon this point it was said in Reclamation District No. 730 v. Hershey, 169 Cal. 793, 148 Pac. 185:

"We are not unmindful of the fact that proceedings leading to such assessments are in their nature in invitum, and that the property owner is entitled to have the courts scrutinize these proceedings with proper care. But this does not mean that an individual property owner may defeat an assessment by showing some minor ministerial or administrative defect upon a doubtful proposition in no wise involving any substantial right, and thus by excessive litigious astuteness secure benefits for his lands for which either his neighbors will be compelled to pay, or for which he ultimately will himself be compelled to pay under a new assessment."

2. In paragraph 3 of the statement of objections filed with the board of supervisors the appellants attack the validity of the assessment upon the ground that the present assessment was not proportionately levied upon all the lands of the district, inasmuch as certain landowners who had not paid a former assessment, since declared invalid (Reclamation District No. 17 v. Bonbini, supra), are not charged in this assessment with their proper proportion of the costs of reclamation, or that, in any event, the appellants are entitled to credit for such payments as had been made upon their lands at the time of the former assessment, or to the return of the money so paid, together with legal interest thereon, from the dates of the respective payments. The facts are that on August 29, 1907, an assessment amounting to $113,014.07 was levied upon the lands of the district, and that $89,827.21 had been paid thereon by various landowners, among whom were the grantors of appellants. On August 12, 1910, this entire assessment of 1907, as already stated, was declared void by this court. Reclamation District No. 17 v. Bonbini, supra.

[3] We will first consider whether the appellants are entitled to credit for the payments made on the invalid assessment. At the time of the above decision the owners would have been entitled to credit for such payments had they then been called upon to pay a new assessment. Pol. Code, § 3466½; Stats. 1899, p. 46. The section at that time provided, in part:

"In all cases in which an assessment shall have been levied * * * for reclamation purposes, upon the lands embraced within any reclamation district, and the assessment shall have thereafter been or shall be adjudged invalid, by any court of competent jurisdiction, and any landowner of the district shall have paid the amount assessed, in said assessment, against land belonging to him, before said assessment shall have been or shall be so adjudged invalid, the amount so paid by said landowner, together with the legal interest thereon from the date of its payment, shall be credited, by the treasurer of the county in which said land is situated, to the tract of land on which the same was paid, and shall be applied upon any assessment thereafter levied on the lands of the district, to the payment, pro tanto, of the amount therein assessed against said tract of land."

The grantors of the appellants had paid, in three installments, the sum of $3,459.18 as their proportion of the invalid assessment. If this section had not, in the meantime, been changed, the appellants, according to its terms, would have been entitled to credit for the said sum and interest.

But section 3466½ was amended in 1911 (Stats. 1911, p. 647) whereby all reference to the assessments which may have been paid in under an invalid assessment was omitted from its provisions, and a scheme provided which, in effect, amounted to a reassessment of the lands of the district for the costs of the reclamation work done by virtue of the invalid assessment. The amended section, after designating the lands which have not been charged with an assessment and those which had been charged under an assessment adjudged invalid, reads as follows:

"Then such tract or tracts of land shall be charged in any subsequent assessment with such proportion of the former assessment, as the benefits derived by said land from the reclamation works for which said former assessment was levied bears to the whole amount of said former assessment; or a subsequent reassessment of such tract or tracts of land may be made separately for the purpose of charging said land with its proper proportion of the cost of reclamation. * * *"

The legal effect of the amendment was, of course, to repeal the portion of the section which had been omitted, and leave the rights of those owners who had paid an assessment adjudged invalid unaffected by any express statutory provision as regards the obtaining of credit for such payments. Finnan et al. v. Reclamation District No. 273 et al., 26 Cal. App. 714, 148 Pac. 227, 152 Pac. 1197. The omission was not supplied until 1915. Stats. 1915, p. 350.

In their opening brief, however, the appellants contend that section 3466½, as it stood when these payments were made and the case of Reclamation District No. 17 v. Bonbini, supra, was decided, recognized the ownership of the landowners in the money so paid, and operated to create a contractual relationship between such owners and the district, which could not be impaired by subsequent legislation, and that, notwithstanding the amendment of 1911, they are entitled to such credit upon making the necessary payments upon the present assessment. On the other hand, the respondent declares that:

"The section involved permits a reassessment of the original assessment and interest without regard to benefits and is therefore a statute authorizing a confiscation of property without due process of law and without compensation."

While we do not find it necessary to adopt either of these contentions, it seems to us that the section was rather intended, on the one hand, to relax the rule of the common law which only permitted the return of the

illegal taxes or assessments when paid involuntarily or under legal compulsion (37 Cyc. 1174; Justice v. Robinson, 142 Cal. 199, 75 Pac. 776), and, on the other, to conserve the interests of reclamation by providing a method for applying the credit "upon any assessment thereafter levied. * * *" (see Reclamation District No. 17 v. Bonbini, supra).

[4] But the appellants in their reply brief apparently abandon the contention that they are entitled to the credit and assert that they are entitled to the actual return of the money. The contention made by them is thus expressed:

"The Legislature took away the theretofore existing sole, special remedy of the landowners, since that remedy was a limitation upon the landowner's common right to recover. When that limitation was wiped out, their common rights were liberated and became applicable."

No such relief can be afforded herein. This is a special proceeding brought under section 3462 of the Political Code for the purpose, alone, of annulling or avoiding the present assessment, and neither the question whether the appellants are entitled to credit for the former payments or to the return of the money can be considered on this appeal. The remedy for the appellants to pursue, if any there be, would be to first demand of the treasurer of the county that said moneys be returned, with the legal interest thereon, or be applied in payment pro tanto of the present assessment, and upon refusal to test the claim by appropriate proceedings.

3. In the written statement of objections filed with the board of supervisors the appellants say further:

"And now here said objectors object to the whole assessment, which is practically one, stating as grounds therefor that by said separate assessment above mentioned said lands which had not paid the former assessment are not assessed with their proper proportion of the cost of the reclamation in said district according to the benefits received, and that by said separate assessment there is an inequality between the lands which have paid all former assessments and the lands which did not pay the former assessments, which inequality favors the lands which did not pay the former assessment."

The appellants also call attention to the fact that no interest is charged against the delinquent owners. The trial court found, in this connection:

"That in the estimate and assessment herein complained of no allowance was made for interest, as such, on moneys paid by landowners in reclamation district No. 17 upon assessments which had theretofore been declared invalid, but the said commissioners, in making this assessment, charged said lands as had not paid prior assessments with such proportion of the former assessment as the benefits derived by said lands from the reclamation works for which said former assessment was levied [and?] bears to the whole amount of said former assessment."

That is, the said lands were assessed for their proportion of the costs of the reclamation work of 1907, and, in addition, for the proposed work for 1912 as outlined in the report of the trustees, as well as their proportion of the existing indebtedness, represented by the outstanding warrants. The assessment list shows these two sums in separate columns and the total in another column. The amendment of 1911 makes no provision for the charging of interest, and, as is evident from the above finding of the court, the commissioners made no charge for interest in determining the amount of the present assessment levied upon those lands in lieu of the former assessment which had not been paid. At the same time the commissioners assessed the lands of the appellants for the sum of $2,764, as already stated, on account of the proposed work and the said existing indebtedness, but did not reassess nor in any manner charge such lands on account of the assessment adjudged invalid.

In this connection the appellants claim that, under the amendment of 1911, the two separate assessments now levied upon the lands which had not paid the former assessment must be regarded as a single assessment, consisting of the sum levied in lieu of the former assessment and that levied to provide for the proposed work of reclamation and the said indebtedness. Upon like reasoning they contend that the amounts theretofore paid on their lands in payment of the assessment thereafter adjudged invalid, together with the legal interest thereon from the dates of the respective payments, and the amount of the present assessment, should also be regarded as a single assessment; the whole constituting the appellants' proportion of the costs of the reclamation work done and to be done in the district by reason of the respective assessments of 1907 and 1912. Upon this basis the appellants argue that "relatively a greater sum was apportioned to their lands than was apportioned" to certain other lands that had not paid the former assessment—a difference represented in large part, as will presently appear, by the interest on the paid-in assessment. It is also said that:

"The assessments are not apportioned in an equitable manner; neither can it be said that the commissioners have apportioned such sums estimated according to the benefits that will accrue to each tract of land, respectively, by reason of the expenditures of said sums of money."

These contentions are illustrated in the briefs of the appellants by comparing the total sums that were paid upon their lands under the 1907 assessment, the legal interest thereon, and the amount of the 1912 assessment with the assessments now levied on the lands of Caroline B. McDougald and Mary B. Percival, whose lands, it is claimed, were similarly benefited and are substantially of a similar character, and upon which the former assessments had not been paid. Caroline B. McDougald held 467.57 acres, and was assessed on account of the unpaid assessment of 1907 for $4,732.10, and for the 1912 assessment the sum of $4,438.30, making a total

of $9,170.40, or an average of $19.61 per acre. In like manner the lands of Mary B. Percival, consisting of 113 acres, were assessed for $1,139.50 and $1,073.50, respectively, making a total of $2,213, or an average of $19.58 per acre. The appellants, as already stated, had paid, in three installments, $3,459.18, and are now assessed for $2,764, or a total of $6,223.18. To this the appellants add the sum of $940.90, which represents interest at 7 per cent. per annum, computed from the dates of the respective payments up to June 18, 1912, the date of filing the present assessment list, and thus reach the grand total of $7,164.08, or an average per acre of $23.56 on their 304 acres. This, it is claimed, shows an average difference per acre of about $3.96, or a total difference of $1,203.84.

"In other words," say the appellants, "Mrs. McDougald, by not paying the Bonbini $5,093.87 assessment, and Mrs. Percival, by not paying the Bonbini $1,268.36 assessment, saved 7 per cent. interest for substantially 4¾ years (about 33⅓ per cent.), besides actual reductions in this assessment of respectively $361.57 and $128.96."

[5] By "actual reductions" is meant the alleged difference between the sum assessed upon said lands in 1907, which was based on the estimated costs and benefits, and that assessed in 1912 in lieu thereof in accordance with "the benefits derived."

[6] We have thus elaborately stated the position of appellants so that our conclusions may be better understood. There is no support for the statement that the reassessment and the present assessment on the delinquent lands "is practically one." The amended section does not contemplate that the two assessments shall be treated as a single assessment, and we know of no rule of law which so requires. The assessment list separates the reassessment from the assessment levied for the future work and the existing indebtedness, as we have already shown. It has also been made clear that we cannot consider on this appeal whether the appellants are entitled to credit for the amount paid on the assessment declared invalid and the interest thereon. It follows then that neither the principal nor the interest should be taken into account in determining the validity of the present assessment on the lands of the appellants; for such lands are herein assessed only for their proportion of the existing indebtedness and the cost of the proposed reclamation work. But, even if it be conceded that the legal effect of the amendment to section 3466½ was to merge the reassessment and the new assessment in the case of delinquent owners, this would not prejudice the rights of appellants so far as the present assessment on their lands is concerned, for the reason that they are in no way charged on account of the reclamation work of 1907. It is a well-settled rule that:

"A party who is not prejudiced in any way by an irregularity in levying an assessment cannot complain thereof, even if other property owners who are prejudiced have a right to complain." Page & Jones, Taxation by Assessment, § 1330; Cooley on Taxation (3d Ed.) p. 1427.

It follows, therefore, that the assessment upon the lands of appellants must be declared valid.

[7] 4. It is further contended that the present assessment for the proposed work was relatively disproportionate to the benefits to be derived therefrom, as compared with assessments upon other lands. There was a conflict of evidence upon this point, and the court found against the appellants. Hence the finding will not be disturbed. See Meyer v. Reclamation District No. 17, supra.

[8] 5. Further exception is taken to the ruling of the trial court upon a motion made by the plaintiffs to strike out portions of the defendant's answer. To the allegations of the complaint that the lands of the plaintiffs were not charged in the present assessment "with their just proportion of the former assessment," nor the "proper proportion of the costs of said reclamation," the defendant interposed a denial based upon information and belief. Plaintiffs moved to strike out that part of the answer on the ground that the information was presumptively within the knowledge of the officials of the reclamation district. But the motion was denied. Without deciding whether the officials were charged with such knowledge, it seems to us that the allegations of the complaint involved legal conclusions which had no proper place in the pleadings. Guy v. Washburn, 23 Cal. 111; 21 Cyc. 63.

[9] Furthermore, it is apparent from the record before us that the plaintiffs could not have suffered any substantial injury, even if it is conceded that the answer was insufficient. Nor were they misled by the form of the denial, for they treated it upon the trial as a disputed question of fact. Warring v. Couch, 165 Cal. 383, 132 Pac. 587.

We have considered the objections made by appellants to the rulings of the court on questions of evidence, and find that they have no substantial merit. The demurrer to the answer was properly overruled. No further points require discussion.

The judgment and order appealed from are affirmed.

SHAW, J. (concurring). I agree that the judgment be affirmed. In 1912, when the assessment here attacked was made, the amendment of 1911 of section 3466½ of the Political Code was in force. So far as material to this case, it then read as follows:

"In all cases in which an assessment shall have been levied * * * for reclamation purposes upon the lands embraced within any reclamation district, and if the assessment upon any tract or tracts of land shall have thereafter been adjudged invalid by any court of competent jurisdiction, * * * then such tract or tracts of land shall be charged in any subsequent assessment with such proportion of the former assessment, as the benefits derived by said land from the reclamation works for which said former assessment was levied bears to the whole amount of said former assessment; or a subse-

quent reassessment of such tract or tracts of land may be made separately for the purpose of charging said land with its proper proportion of the costs of reclamation."

A former assessment, referred to as the Bonbini assessment, had been adjudged invalid by this court. The appellants and others had paid the charge on their lands by that assessment. McDougald and other landowners had not paid it upon their lands. The part of the assessment of 1912 covering the charge against McDougald and others on account of their failure to pay the Bonbini assessment was made under the authority of the section above quoted. It will be seen from its language that it requires such delinquent lands to be charged in the subsequent assessment "with such proportion of the former assessment, as the benefits derived from the reclamation works for which said former assessment was levied bears to the whole amount of said former assessment," or, as stated in the clause immediately following, "with its proper proportion of the costs of reclamation."

These two clauses refer to the same thing, and were evidently intended to have the same meaning. In order to give the first clause a just operation and lawful effect and harmonize it with the second clause, it is necessary to qualify slightly the literal meaning of the phrase "benefits derived by said land from the reclamation works for which said former assessment was levied." If these are the entire actual benefits to such land from the works, it might happen that an unfair assessment would be the result; for the actual benefit might far exceed its just share of the expense. For illustration, works costing $5,000, or $5 for each acre, might conceivably benefit the 1,000 acres reclaimed thereby to the amount of $20,000, or $20 per acre. If 100 acres which had not paid the $500 at $5 per acre were afterwards charged with the proportion which the actual benefit thereto, $2,000, bore to the entire cost, $5,000, it would be charged two-fifths of the entire cost, or $2,000, which would be four times as much as the other lands had paid. The answer to this puzzle is found in the fact that, in contemplation of law in making such assessments, the actual total benefits to the property assessed are never estimated, except for the purpose of determining that such benefits will equal or exceed the cost. That being ascertained, the "benefits" are then taken as the equivalent of the total cost, and the benefits to each parcel as the equivalent of its just share of the total cost. Thus limited, in the illustration given the total benefits would be $5,000, and the benefits to the tract of 100 acres, assuming all the lands to be benefited alike, would be $500. The proportion of this sum to the total of the former assessment would be one-tenth, or $500, obviously its "proper proportion of the cost of reclamation" as provided by the second clause.

This statute was the sole authority for the portion of the present assessment constituting the separate charge for the delinquency upon the Bonbini assessment. That charge, of course, must conform to the statutory standard. That standard does not provide for or allow the commissioners to take into the account any interest upon the payments by other landowners upon the Bonbini assessment. That interest is a matter wholly foreign to the assessment of 1912, and therefore it follows that the failure to consider such interest in making up the sum charged to lands delinquent upon the Bonbini assessment does not affect the present assessment nor render it invalid. In my opinion, this effectually disposes of the objections relating to the interest allowed as a credit by section 3466½, as it stood at the time of the Bonbini assessment. If the parties who paid that assessment have any remedy for the interest afterwards accruing thereon, it must be sought by some other mode than by including it in a reassessment upon the delinquent lands under the section as amended in 1911.

In my opinion, none of the other objections to the assessment is tenable, but I cannot say that I agree with all of the reasoning upon which Mr. Justice LAWLOR founds his conclusions thereon.

I concur: SLOSS, J.

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DUFOUR v. WEISSBERGER et al.

(Sac. 2249.)

(Supreme Court of California. Feb. 28, 1916.)

TRUSTS ⚷372(3)—PROCEEDINGS TO ENFORCE —LACHES—SUFFICIENCY OF EVIDENCE.

Evidence in an action to have defendant adjudged trustee for plaintiff, her mother, as to certain real property, and to require her to convey the legal title to plaintiff, wherein plaintiff contended that defendant had agreed to purchase the property for plaintiff in consideration of care to be taken of defendant's infant son, but instead had taken title in her own

name in 1894, and retained same until commencement of suit in 1912, *held* not to show a repudiation of the trust by defendant in 1894, and consequent laches of plaintiff in deferring suit, though it appeared that defendant had several times stated relative to the property that, "It is my place," where it appeared that plaintiff had been in possession of the property during the entire time in confidence that it was her own, and that defendant, though knowing this fact, and often visiting her mother, never demanded rent, but acted as if recognizing her mother's authority over the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 602, 603; Dec. Dig. ⟸372(3).]

Department 2. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Mary E. Dufour against Maud D. Weissberger, etc., and others. From judgment for plaintiff, the defendant named appeals. Affirmed.

G. Gunzendorfer, of San Francisco, and Butler & Swisler, of Sacramento, for appellant. Grove L. Johnson, of Sacramento, for respondent.

MELVIN, J. Defendant Maud D. Weissberger appeals from a judgment that she is trustee for plaintiff of certain real property in the county of Sacramento and directing her to convey the legal title to said plaintiff.

Respondent and appellant are respectively mother and daughter. The court found that in October, 1890, appellant, who was then a Mrs. Higginson, living apart from her husband, entered into an agreement with her father and mother whereby she was to pay the sum of $40 per month to the latter for the care and nurture of Mrs. Higginson's infant son; the money so paid to be the separate property of Mrs. Dufour. After two payments had been made the daughter suggested to her mother that, instead of paying money for the service rendered, she should purchase a lot and build thereon a home for her mother. This modification of the arrangement for the care of the daughter's child was accepted by the mother, who thereupon returned the $80 already paid to her. Thereafter appellant purchased the land here in dispute, and, assisted by other relatives, erected a house thereon, into the possession of which Mrs. Dufour entered in 1892. Ever since that time plaintiff has maintained sole and exclusive possession of the premises. The court found that the land cost $150; that appellant paid between $300 and $375 for lumber used in the construction of the house, and became indebted to her father for carpenter work in an amount between $100 and $200. It was in evidence also that appellant had paid taxes on the property, but the court made no finding upon that subject, and there was evidence to the effect that these were voluntary payments made because of her wish to preserve the property for her mother. The evidence also showed that Mrs. Dufour cared for her daughter's child for five years. The court found that Mrs. Dufour had perfect trust and confidence in appellant when the latter purchased the land, but that fraudulently and by an abuse of that trust Mrs. Higginson (appellant's name at that time) took the deed of the property in her own name in July, 1892. There were findings that plaintiff did not learn of her daughter's action in that behalf until some time after the deed was recorded; that she then demanded that her daughter should deed the land to her; that appellant frequently promised that she would deed the land to respondent; and that, relying on such promise, Mrs. Dufour refrained from commencing legal proceedings to enforce a conveyance. It was also found that the money paid for the property by appellant belonged to the respondent.

Appellant contends that her motion for nonsuit, made at the close of plaintiff's case, should have been granted: (1) Because of laches; and (2) because of the insufficiency of the evidence to sustain the action in equity. As the briefs of appellant's counsel are devoted exclusively to the discussion of the question of laches, we shall not discuss the alleged insufficiency of the evidence beyond the statement that we think it sufficient to uphold the judgment.

It appears from the testimony of Mrs. Dufour that a few weeks after the deed to her daughter was made she protested that the title should be in her own name, and thereupon Mrs. Higginson promised to make a deed to her as grantee. About 2½ years later they had a dispute over the ownership of the property, Mrs. Higginson saying, "It is my place." Plaintiff consulted an attorney, but upon his advice refrained from bringing suit against her daughter. It is true that Mrs. Dufour said in the course of her testimony that every time she met her daughter after 1894 the latter said, "It is my place," but Mrs. Dufour also said that she never thought she would have any trouble about the title. It was also in evidence that during the time when the house was in course of construction Mrs. Higginson frequently declared that she was building a place for her mother, and that from time to time she stated to different members of the family her intention of deeding the premises to Mrs. Dufour. These statements were reported to the mother. In view of this evidence we cannot say that the testimony shows a repudiation of the trust by appellant in 1894 and the consequent laches of Mrs. Dufour in deferring suit for 18 years. (The action was commenced in 1912.) Each case where laches is depended upon must rest upon its own facts. It is difficult to state as a general proposition what period will bar relief from consequences of fraud, and there is wide scope for the exercise of

the discretion of the chancellor. There had been evidently a deep affection on the part of the mother for her daughter. She weaned her own infant in order that she might nurse her daughter's child. In the years following she occupied the property here in dispute, apparently in full confidence that it was her own, and her daughter, who knew this full well and often visited the mother, never demanded rent, and acted in every way as a person recognizing the authority of the mother over the property. It is in evidence that again and again appellant admitted that she was a trustee. Under the circumstances and in view of the possession of the property by the cestui que trust, the latter was not guilty of laches. Love v. Watkins, 40 Cal. 547–571, 6 Am. Rep. 624; Scadden Flat G. M. Co. v. Scadden, 121 Cal. 33–39, 53 Pac. 440; Plass v. Plass, 122 Cal. 3–16, 54 Pac. 372.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(172 Cal. 210)

LLEWELLYN IRON WORKS v. ABBOTT KINNEY CO. (L. A. 3588.)

(Supreme Court of California. Feb. 28, 1916.)

1. CORPORATIONS ⟸259(7) — STOCKHOLDERS' LIABILITY—SUIT IN EQUITY.

A corporate creditor who has exhausted his legal remedies may sue in equity against a stockholder who is indebted to the corporation on an unpaid stock subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1059–1062, 2272; Dec. Dig. ⟸259(7).]

2. ESTOPPEL ⟸110—PLEADING.

In a suit by a corporate creditor to enforce defendant's unpaid subscription to the stock of the corporation, against which the creditor had recovered judgment, the creditor, though it did not, defendant having pleaded the invalidity of the judgment against the corporation because of its prior dissolution for nonpayment of the corporate license tax, plead in the complaint or replication defendant's estoppel to rely on such defense, may urge the estoppel, for the pleading of the facts begins and ends with the complaint.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. ⟸110.]

3. CORPORATIONS ⟸253 — STOCKHOLDERS—DISSOLUTION.

Where, when a corporation was sued, its president did not disclose that its charter had been forfeited for nonpayment of a license tax, but verified an answer purporting to be the answer of the defunct corporation, he is estopped, on subsequent creditor's bill, to enforce his liability on an unpaid subscription to the stock, to set up the invalidity of the judgment, because of the corporation's dissolution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1024–1030; Dec. Dig. ⟸253.]

4. ESTOPPEL ⟸98(1)—LIABILITY OF CORPORATION—ACTS OF OFFICERS.

While a corporation will, where it was a mere instrumentality through which its president transacted his private business, be bound by the acts and conduct of its president, the fact that the majority stockholder was president does not show that an estoppel available against the president was available against the corporation.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. ⟸98(1).]

Department 2. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by the Llewellyn Iron Works, a corporation, against the Abbott Kinney Company, a corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Jones & Weller, of Los Angeles, for appellant. R. C. Gortner, of Los Angeles, for respondent.

HENSHAW, J. This action is in the nature of a creditors' bill to enforce payment by defendant of its unpaid subscription to the stock of the Venice Hotel Company, a corporation. Plaintiff, in 1908, brought its action against the Venice Hotel Company, a corporation. The Venice Hotel Company appeared and defended under a verified answer filed by Abbott Kinney, its president. The cause was tried, and resulted in a judgment for plaintiff. A notice of intention to move for a new trial was given, but the motion was not prosecuted, and the judgment became final. In that action the court found that the Venice Hotel Company was a corporation duly organized and existing under the laws of the state of California. As a matter of fact, as appears in the present action, the charter of the Venice Hotel Company had been forfeited on the 30th day of November, 1907, by reason of the corporation's failure to pay the license tax for that year. These matters were pressed upon attention of the trial court in the present action, in the defense to the complaint, it being contended: First, that plaintiff's judgment was a nullity; and, second, that the stock of the Venice Hotel Company owned by the Abbott Kinney Company was fully paid-up stock, and therefore not liable to the subscription call in this action.

[1] Unquestionably a creditor who has exhausted his legal remedies to collect his debt may maintain this action in equity against a stockholder who is indebted on an unpaid stock subscription, and this is conceded. Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158.

[2] Respondent's first proposition that the judgment obtained by the appellant in its action against the Venice Hotel Company is a void judgment is supported on the authority of Crossman v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335, Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341, and Newhall v. Western Zinc Co., 164 Cal. 380, 128 Pac. 1040. But this conceded fact does not meet the contention of appellant that the respondent is estopped from urging the invalidity and voidness of this judgment. That estoppel, it is asserted, arises out of the follow-

ing undisputed facts: At the time that the defendant in the action of Llewellyn Iron Works v. Venice Hotel Co., a corporation, filed its verified answer, Abbott Kinney, himself, acting as and purporting to be, and verifying the complaint as, the president of the Venice Hotel Company defendant, defended this action upon its merits, concealing and failing to state a matter of the utmost importance to the plaintiff, namely, that the corporation had ceased to exist by virtue of the prior forfeiture of its charter, a fact necessarily known to Abbott Kinney, its president, and unknown to plaintiff; that it was the manifest duty of Abbott Kinney, if he undertook to appear upon behalf of the defunct corporation at all, to have pleaded the facts, in which case the plaintiff would have been enabled to call in the trustees of the corporation and to have prosecuted its action against them (Newhall v. Western Zinc Co., supra); that Abbott Kinney deliberately refrained from doing this, and to the contrary adopted a course of action leading the plaintiff to believe that the defendant was an existing corporation, and inducing the plaintiff to prosecute its action against this corporation to final judgment. Therefore appellant argues Abbott Kinney is estopped from asserting the invalidity of this judgment. Still further, Abbott Kinney at this time was not only the president of the Venice Hotel Company, but he was also the president and principal stockholder of the defendant corporation which bears his name, and that corporation is chargeable with the knowledge which Abbott Kinney possessed, and bound by the conduct of Abbott Kinney in the matter. To countenance this conduct would be to permit Abbott Kinney and the defendant corporation to escape the payment of a just debt, the validity of which was determined after litigation on the merits, by the concealment of a fact which it was incumbent on Abbott Kinney to disclose.

Against this position of appellant respondent argues: First, that the question of estoppel may not be considered for the reason that, when presented with an opportunity to plead the estoppel, which opportunity arose when defendant by answer set up the invalidity of the judgment (because of the dissolution of the corporation through the forfeiture of its charter) it failed to do so. This position, however, is not well taken. It is well settled that under our simplified system of procedure, where plaintiff's pleadings on the facts begin and end with the complaint, there is by law afforded him an opportunity, without pleading, to interpose evidence overcoming any affirmative matter of defense set up in the answer. Thus he may establish a fraud or an estoppel. Rankin v. Sisters of Mercy, 82 Cal. 95, 22 Pac. 1134; Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423. It was not incumbent upon plaintiff, therefore, in the first instance, to plead the facts constituting this estoppel, as it was not advised of the nature of the defense which defendant corporation would interpose. Being so advised, it was within its rights to offer evidence to establish this estoppel without a pleading by way of replication.

[3, 4] The second ground urged by respondent is that the findings do not touch the question of estoppel, and that the evidence is wholly insufficient to establish an estoppel against the defendant corporation. The findings do not touch the question of estoppel, nor, unfortunately for appellant's position, are the stipulated facts sufficient to raise this estoppel against the defendant. We entertain no doubt of their sufficiency to raise an estoppel against Abbott Kinney personally. And upon a proper showing that the Abbott Kinney Company, a corporation, was but the instrumentality through which Abbott Kinney for convenience transacted his business, by all of the authorities, not only equity, looking through form to substance, but the law itself, would hold such a corporation bound as the owner of the corporation might be bound, or, conversely, hold the owner bound by acts which bound his corporation. Bank v. Deveaux, 5 Cranch, 90, 3 L. Ed. 38; Bank v. Patterson's Adm'x, 7 Cranch, 299, 3 L. Ed. 351; Society, etc., v. New Haven, 8 Wheat. 464, 5 L. Ed. 662; Newton Mfg. Co. v. White, 42 Ga. 148; Brannin v. Loving, 82 Ky. 370; McKinley v. Wheeler, 130 U. S. 636, 9 Sup. Ct. 638, 32 L. Ed. 1048; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; Schumacher v. Allis, 70 Ill. App. 556; Bank of England v. Moffatt, 3 Bro. Ch. Rep. 262; Bellona Co.'s Case, 3 Bland, 446; Hoffman Steam Co. v. Cumberland Coal & Iron Co., 16 Md. 456, 77 Am. Dec. 311; Melledge v. Boston, etc., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Des Moines Gas Co. v. West, 50 Iowa, 16; Swift v. Smith et al., 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336; Moore Hardware Co. v. Towers Hardware Co., 87 Ala. 206, 6 South. 41, 13 Am. St. Rep. 23; Pott v. Schmucker, 84 Md. 535, 36 Atl. 592, 35 L. R. A. 392, 57 Am. St. Rep. 415; Louisville Banking Co. v. Eisenman, 94 Ky. 83, 21 S. W. 531, 1049, 19 L. R. A. 684, 42 Am. St. Rep. 335; Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436; McElroy v. Percheron Horse Co., 96 Wis. 317, 71 N. W. 652. But the evidence, however, is insufficient to establish this unity of interest and ownership, the only stipulation upon this matter being that:

"Abbott Kinney was and now is the president of the Abbott Kinney Company, a corporation, and was and is the owner and holder of the greater portion of the stock of the said Abbott Kinney Company, a corporation."

A consideration of the authorities above cited will establish without the need of discussion the inadequacy of such a fact to accomplish the purpose here contended for, namely, the estoppel of a corporation by vir-

tue of its president's knowledge and conduct in the matter of another corporation of which also he is president.

It is conceded that unless the force of the finding of the invalidity of plaintiff's judgment against the Venice Hotel Company can be overcome, appellant is without redress in this action. For the indicated reasons it cannot be overcome so far as concerns the defendant and respondent, and this conclusion renders unnecessary the consideration of the second defense of the Abbott Kinney Company that its stock was fully paid-up stock.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

172 Cal. 199

BRUGUIERE v. BRUGUIERE. (S. F. 6750.)

(Supreme Court of California. Feb. 28, 1916.)

1. DIVORCE ⟸327—JUDGMENT—FOREIGN DIVORCE—FULL FAITH AND CREDIT.

Where one spouse goes into a state other than that of the matrimonial domicile and there obtains a divorce under a residence simulated for that purpose and not in good faith, the judgment is not binding on courts of other states and may be held void in any other state on proof of the fraudulent residence and of the fact that the divorce was obtained by substituted service only.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 831–834; Dec. Dig. ⟸327.]

2. DIVORCE ⟸328—JUDGMENT—FOREIGN DIVORCE—FULL FAITH AND CREDIT.

Where the husband leaves the matrimonial domicile in California and obtains a divorce decree in Nevada on substituted service only, such decree is not binding on the California courts, though he established a bona fide residence in Nevada.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 831–834; Dec. Dig. ⟸328.]

3. DIVORCE ⟸326—JUDGMENT—FOREIGN DIVORCE—PROCEEDINGS TO SET ASIDE—ESTOPPEL.

Where the wife, knowing that her husband had obtained a divorce decree in Nevada, married another and lived with the new husband for several years, she was precluded from setting up that the Nevada decree was invalid because obtained on a fraudulent residence established in that state and from claiming marital rights against her former husband, though at the time of her remarriage she did not know of the alleged invalidity of the decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 827–830, 840; Dec. Dig. ⟸326.]

Department 1. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Maryon Bruguiere against Peder S. Bruguiere. From judgment for defendant, plaintiff appeals. Affirmed.

Black & Clark, of San Francisco (Morrison, Dunne & Brobeck, of San Francisco, of counsel), for appellant. A. J. Treat, of San Francisco (R. P. Henshall, of San Francisco, of counsel), for respondent.

SHAW, J. The plaintiff began this action against the defendant for permanent support and maintenance. The court below sustained a demurrer to her complaint, and thereupon gave judgment for the defendant, from which plaintiff appeals.

The plaintiff and defendant intermarried in Reno, Nev., on December 20, 1902. They were both residents of San Francisco at that time and had gone to Nevada solely for the purpose of having such marriage ceremony performed. They immediately returned to San Francisco, where they lived together until July 24, 1904. In the meantime, the child Peder S. Bruguiere, Jr., was born to them. On the day last stated the plaintiff left the residence of the defendant and has ever since remained separate and apart from him. According to the allegations of the complaint she was compelled to leave him by his extreme cruelty toward her. In February, 1905, the defendant went to Nevada for the purpose of establishing a residence there for a sufficient length of time to enable him to obtain a divorce from the plaintiff in the courts of Nevada. He never in good faith resided in that state, but remained there only for the purpose of acquiring a pretended residence for the purpose of maintaining such action for divorce. His real residence during the entire period was in San Francisco, Cal. On June 28, 1906, under said fraudulent claim of residence in Nevada, the defendant obtained in said state a decree of divorce from the plaintiff. This decree was based on constructive service upon the plaintiff. She received no actual notice of the proceedings, and did not appear in the action. The ground of the divorce was the alleged desertion of the defendant by the plaintiff which, it is alleged, is not true. The custody of the child aforesaid was given by the said decree to the plaintiff herein. Immediately thereafter the defendant returned to San Francisco, again married, and has there remained continuously ever since. The plaintiff never resided in the state of Nevada. The plaintiff learning of the divorce decree and of defendant's subsequent marriage, and supposing that she had been legally divorced by the Nevada decree, and being ignorant of the law on the subject, entered into a marriage with Stewart Denning in July, 1907, said marriage taking place in New Jersey. She continued to live with Denning as his wife thereafter until the year 1910, when she learned for the first time that the Nevada divorce was invalid because of the lack of a bona fide residence in Nevada on the part of the husband. Thereupon she obtained in the state of New York, where she then resided with Denning, a decree declaring her marriage with Denning annulled on the ground that she had not been lawfully divorced from Bruguiere. This decree was entered in July, 1910. Thereafter the plaintiff began this

action to obtain maintenance and support for herself and child, claiming to be the wife of the defendant, notwithstanding the said Nevada decree of divorce. All these facts are admitted by the demurrer, for the purposes of the case.

The subject of the effect of a decree of divorce in a state other than that of the matrimonial domicile of the spouses was elaborately discussed by the Supreme Court of the United States in Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. The question was considered with reference to the effect of the full faith and credit clause of the Constitution of the United States. In that case the parties had been married and were domiciled in the state of New York in 1868. The husband, without cause, abandoned the wife and the matrimonial domicile and established a bona fide residence in Connecticut. Thereafter, in the courts of Connecticut, he obtained a decree of divorce from his wife upon constructive service only. Many years afterwards the wife, who had remained in New York, began an action in that state to obtain a divorce from the husband and obtained personal service upon him in the action. He appeared and set up the Connecticut decree, in defense, as an adjudication that the marriage had been previously dissolved. The Supreme Court of the United States held that, although the Connecticut decree was good in Connecticut, it was without binding force in the state of New York, that it rested with the state of New York to determine what force and effect should be given to it in that state, and that the Supreme Court of the United States would not overrule the action of the New York courts in refusing to give credit to the Connecticut decree as a bar to the action of the wife.

[1, 2] It is a well-established proposition that where one spouse goes to a state other than that of the matrimonial domicile and there obtains a divorce under a residence simulated for that purpose and not in good faith, the judgment is not binding upon the courts of other states of the Union, and upon proof of the fraudulent residence and of the fact that the divorce is obtained by substituted service only, it may be held void in any other state than that in which it was rendered. Estate of James, 99 Cal. 377, 33 Pac. 1122, 37 Am. St. Rep. 60. Whether it would be held valid in the state in which it was rendered is a question depending upon the policy and law of that state. The decision in Haddock v. Haddock, supra, declares that a husband who, without cause, abandons his wife and takes up his residence in another state than that of their residence, thereby changes the matrimonial domicile to the state of his new residence so that a divorce granted in that state on his complaint and upon constructive service only, may be valid in that state, as an adjudication of the res, the res being the marriage relation, but that he does not thereby carry the entire relation to that state so as to make the adjudication binding upon all the states as a judgment in rem, and that, notwithstanding the divorce in Connecticut, the courts of New York could proceed to adjudge another divorce and determine therein the property rights of the parties by a decree which could be enforced in New York with respect to parties and property situated therein. It would follow, of course, that if there was personal service in the action in New York, such decree would be binding everywhere, except perhaps in the state of Connecticut, where the previous decree had determined locally the rights of the parties.

Upon the principles thus established, it seems clear that the decree obtained by the husband in Nevada is not binding upon the courts of California, even if his residence there was bona fide. So far the facts stated by the plaintiff appear to establish a case in her favor. Notwithstanding that decree, if nothing more appeared, she would have the right to be considered here as the lawful wife of Bruguiere.

[3] The case presented, however, does not depend wholly upon the action or policy of the state of California with reference to decrees of divorce given in other states to citizens and residents of California. The wife herself, when informed of the Nevada decree, acquiesced therein and proceeded to act thereon by herself entering into another marriage contract and living with the new husband for several years in accordance therewith. The vital question in this case is whether she is estopped by her conduct from now questioning the validity of the Nevada decree, whether she has not, by her conduct, accepted it as a satisfactory solution of the controversies between herself and her husband, Bruguiere, and thereby ratified and affirmed the irregularities upon which the decree was obtained, and waived all right to attack it. She alleges that she was ignorant of the law governing such matters. But she does not allege that she was not aware of the decree purporting to dissolve the marriage relation and of the fact that after a divorce she was free to contract another marriage. She admits and declares that she was. The invalidity of the Nevada decree is not due to any vice apparent upon the record, but to the policy of the state of California which refuses faith and credit to such a decree. No reason suggests itself to us why the wife should consider herself bound by this state policy, or why she could not waive all questions of its effect upon her and accept the status given to her by the Nevada decree. We are of the opinion that, whether she had a right to do this or not, having done so and having, upon that theory, married another person, she is now precluded from setting up the invalidity of the Ne-

vada decree, and from claiming marital rights against her former husband.

The authorities are practically unanimous in favor of the proposition that a remarriage estops the party entering into it from denying the validity of the previous divorce. In Marvin v. Foster, 61 Minn. 154, 63 N. W. 484, 52 Am. St. Rep. 586, the decree of divorce showed want of jurisdiction on the face of the record and was, consequently, void, even on collateral attack. The husband afterward married another person and lived with her for 14 years. The court held that he was estopped to question the validity of the divorce. In Mohler v. Shank, 93 Iowa, 273, 61 N. W. 981, 34 L. R. A. 161, 57 Am. St. Rep. 274, where the facts were essentially the same, the wife, after a second marriage, attacked the decree. The court said:

"Having accepted the divorce as valid, in the way she did, she should be * * * estopped from maintaining any claim to any part of the estate of her former husband."

In Arthur v. Israel, 15 Colo. 147, 25 Pac. 81, 10 L. R. A. 693, 22 Am. St. Rep. 381, speaking of a similar case, the court said:

"We discover, upon principle, no sufficient reason why petitioner's conduct in the premises should not produce just as effective an estoppel as if she had received the proceeds of a void judgment for money. By her subsequent marriage with Israel during Arthur's lifetime, she accepted, so far as was within her power, the benefits or privileges of the divorce decrees. The fact that she did not then know that those decrees were void is a matter of no more consequence than is the ignorance in this respect of one who, knowingly in all other particulars, receives the fruits of an ordinary void judgment at law."

The following cases are to the same effect: Yorston v. Yorston, 32 N. J. Eq. 505; Richeson v. Simmons, 47 Mo. 20; Whittaker v. Whittaker, 51 Ill. App. 263; Sedlak v. Sedlak, 14 Or. 540, 13 Pac. 452; Richardson's Estate, 132 Pa. 292, 19 Atl. 82.

The appellant cites Norton v. Tufts, 19 Utah, 470, 57 Pac. 409, and Sammons v. Pike, 108 Minn. 291, 120 N. W. 540, 122 N. W. 168, 23 L. R. A. (N. S.) 1254, 133 Am. St. Rep. 425, in support of the opposite doctrine. In Norton v. Tufts there was no previous divorce, but only a so-called "church divorce," under the sanction of the Mormon Church. In point of law it was no more than an agreement of separation, but the parties supposed it to be a dissolution of the marriage. Both of them married again. It was held that she remained his wife and was not estopped to claim dower in his land against one who had taken a mortgage from the husband. Inasmuch as there was not even the semblance of legal proceedings for a divorce, to hold that an estoppel arose from the subsequent marriage would be the equivalent of saying that a divorce could be secured by contract. In Sammons v. Pike, there was no subsequent marriage by the wife, nor even acquiescence by her in the divorce, except so far as mere inaction constituted acquiescence. The cases do not apply to the facts here under consideration.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 226

JORDAN v. BEALE et al. (L. A. 3491.)

(Supreme Court of California. March 2, 1916.)

1. TAXATION ⟸679(7)—SALE BY STATE—VALIDITY—PRICE—STATUTE.

Under Pol. Code, § 3897, providing that no bid for land sold to the state for taxes shall be received or accepted at sale by the state for less than the amount of all taxes, all costs and penalties, and all expenses, where the notice of sale, published by the tax collector, stated that the taxes and interest due upon the land amounted to $35.22, while the cost of advertising was $5, a total of $40.22, the sale of the property for $35.22 was invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. ⟸679(7).]

2. TAXATION ⟸796(3) — SALE BY STATE — OWNER'S RIGHT TO OBJECT—STATUTE.

Under Pol. Code, §§ 3780, 3817, giving the owner of land sold for taxes the right to redeem until the state has disposed of the land, the person liable for a tax may complain of the invalidity of a sale by the state, as violative of section 3897, providing that no bid for the land shall be received or accepted for less than the amount of all taxes, costs and penalties, and expenses, since the owner may redeem by paying the amount due, with expenses and interest, while section 3897 informs him that his right will remain until some purchaser at least bids an equal amount.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1580; Dec. Dig. ⟸796(3).]

3. QUIETING TITLE ⟸35(1) — PLEADING DEFENSE—ADVERSE POSSESSION.

In a suit to quiet title, where defendants filed a cross-complaint alleging title in one of them as trustee, asking to have it quieted, which cross-complaint the plaintiff answered, going to trial on the issues so raised, defendants could rely on adverse possession as a source of title without specifically pleading it in their answer.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 73; Dec. Dig. ⟸35(1).]

4. ADVERSE POSSESSION ⟸114—SUFFICIENCY OF EVIDENCE.

In suit to quiet title, evidence *held* insufficient to establish actual adverse possession of the property by defendants.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. ⟸114.]

5. ADVERSE POSSESSION ⟸13—ESSENTIALS.

To be adverse, possession must be under a continuous claim of title, hostile to that of the opposing party, for the period prescribed by law.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67–76; Dec. Dig. ⟸13.]

In Bank. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit to quiet title by John C. Jordan against Truxtun Beale, trustee, and others. From a judgment for defendants, plaintiff appeals upon the judgment roll and a bill of exceptions. Reversed.

Watkins & Blodget, of Los Angeles, for appellant. Thomas Scott, of Bakersfield, for respondents.

SLOSS, J. The plaintiff filed a complaint in the usual form to quiet title to a tract of land situated in Kern county. The defendants answered, denying plaintiff's allegations, and filed a cross-complaint, in which they asserted ownership of the land and prayed to have their title quieted against plaintiff's claims. Plaintiff answer the cross-complaint. The court found that the plaintiff was not, and that the defendant Truxtun Beale, as trustee, was, the owner of the premises and entitled to their possession, and entered judgment accordingly. The plaintiff appeals upon the judgment roll and a bill of exceptions. He attacks the sufficiency of the evidence to support the findings of the court with regard to the ownership of the land.

Title was originally vested in the plaintiff under a United States patent. The defendant Beale, trustee, claims title under a sale for delinquent taxes. He also claims ownership by virtue of adverse possession. The property was sold to the state in 1895 for failure to pay taxes levied in 1894. The tax collector's deed to the state was made on August 1, 1901. Sale by the state to Beale as trustee was made on February 8, 1904, and a deed executed on February 9, 1904. A corrected deed was made on April 9, 1906.

[1, 2] The plaintiff attacks the validity of both the sale to the state and the subsequent sale by the state on a variety of grounds. It will be unnecessary to go into all of these, as we are satisfied that one, at least, of the points made, is fatal to the validity of the respondent's claim under the tax proceedings. The deeds from the state to Beale—both the original and the corrected deed—show that the property was sold for the sum of $35.22. The notice of sale published by the tax collector, as required by section 3897 of the Political Code, stated that the taxes and interest due upon the land amounted to "$35.22, advertising $5.00, total $40.22." It appears therefore, that the sale was made for less than the amount required by the section last quoted, which declares expressly that:

"No bid shall be received or accepted at such sale for less than the amount of all the taxes levied upon such property and all costs and penalties for every year delinquent as shown by the delinquent rolls for said years to the date of the execution of the deed to the state, and all expenses accrued to the date of the sale under this section, together with interest. * * *"

The section contains a proviso whereby, upon a resolution of the board of supervisors, the state controller may by written authorization direct the tax collector to sell the property for a smaller sum. It is not pretended, however, that this case comes within the exception. On the contrary, the controller's authorization, which is in the record, expressly declares that:

"No bid shall be received for less than the amount of all the taxes levied upon such property and all interest, penalties, and expenses up to the date of the sale. * * *"

The only answer made by the respondent to this point is that "the owner could not be injured by having the property sold for less than the amount of the taxes"; and it is sought to liken the case to that of a sale for an amount greater than the amount due. But there is no parallel between the two cases. The statute in terms provides for a sale by the state "to the highest bidder for cash" and clearly contemplates a sale for as large an amount as may be obtained. Fox v. Wright, 152 Cal. 59, 91 Pac. 1005. A sale for an amount less than that specified in the statute is, however, prohibited. This provision is not one in which the person liable for the tax has no interest. Until the state has disposed of the land under section 3897 the owner's right of redemption remains. Pol. Code, §§ 3780, 3817; Smith v. Furlong, 160 Cal. 522, 117 Pac. 527; Campbell v. Moran, 161 Cal. 325, 119 Pac. 89; Wright v. Anglo-Californian Bank, 161 Cal. 500, 119 Pac. 651. The owner is, therefore, clearly entitled to object to having his right of redemption cut off by any sale other than one made in accordance with the direct requirements of the law. He may redeem by paying the amount due, with expenses and interest, and is informed by the statute that this right will remain until some purchaser bids at least an equal amount. That his rights would be injuriously affected if it were held that his interest could be terminated by a sale to one bidding less than this amount is manifest.

[3] The respondents' other claim of title is based on adverse possession. Under the pleadings we think the defendants were entitled to rely on this source of title without specifically pleading it in their answer. They filed a cross-complaint, alleging title in Beale as trustee, and asking to have that title quieted. The plaintiff answered the cross-complaint, and went to trial upon the issues thus raised. Regardless of whether a cross-complaint was necessary, the fact remains that such a pleading was before the court, and under respondents' allegation of ownership he was entitled to prove title, however acquired.

[4, 5] We are of the opinion, however, that the evidence was insufficient to establish actual adverse possession of the property. The only testimony was that of Lopez, who was foreman of the Beale estate during and prior to the years in question. The land in controversy adjoined what is known as the Beale grant. The grant was inclosed, but this land and a large body of adjoining land was uninclosed during these years. The possession relied on consisted of grazing cattle belonging to the Beale estate on this land and on other uninclosed land in the vicinity. Lopez did not testify that this was done under any

claim of title hostile to plaintiff. Indeed, the evidence, so far as it goes, indicates the contrary, since the testimony of Lopez was that the Beale cattle had grazed on this land for 20 years. The alleged possession had begun long prior to the acquisition by Beale of the tax deed upon which he founds his claim of title. It was not hostile in its inception, and there is nothing to indicate that its character changed during the 20 years. In order to be adverse, possession must be under a continuous claim of title hostile to that of the opposing party for the period prescribed by law. Lovell v. Frost, 44 Cal. 474; Thompson v. Pioche, 44 Cal. 517; Thompson v. Felton, 54 Cal. 551; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100. For the reasons outlined, the defendant failed to make out a title by adverse possession. De Frieze v. Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

172 Cal. 215

In re STONE'S ESTATE.
GREEN v. STONE et al.
(L. A. 4134.)

(Supreme Court of California. Feb. 28, 1916.)

WILLS ⊂=166(1) — CONTESTS—UNDUE INFLUENCE.

In a daughter's contest against the probate of her father's will, which devised and bequeathed practically all of his estate to his wife, the daughter's mother, evidence *held* insufficient to show that the will was the result of the wife's undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 421; Dec. Dig. ⊂=166(1).]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Proceeding by Fannie E. Stone for the probate of the will of John Newton Stone, deceased, contested by Leo Stone Green and another. From a judgment denying probate to the will, and an order denying new trial, proponent appeals; two other beneficiaries joining. Judgment and order reversed.

Hartley Shaw and Kemp, Mitchell & Silberberg, all of Los Angeles, for appellants. Joseph Scott, of Los Angeles, for respondent.

HENSHAW, J. John Newton Stone died on January 3, 1914. By his will he left the greater part of his property to his widow, Fannie E. Stone, to whom he had been married and with whom he had lived for 39 years. The major portion of his estate consisted of the home, upon which they had lived for 24 years. Eight months before his death, and on the day before his departure with his wife for a visit to Eastern relatives, he had executed his will. Subsequent to its execution, and up to a very short time before his death, he had enjoyed fairly good health. His last illness was no more than a week in duration, and he died quite suddenly. Besides his widow, he left a married daughter, Leo Stone Green, who instituted her contest when her father's will was offered for probate by her mother. Leo Stone Green had been remembered in the will and left a legacy in the sum of $50. At the time of the institution of the contest she was 34 years of age, was living with her husband, and was the mother of one child, Margaret Green, who, through her guardian ad litem, joined the mother in the contest. The only issue submitted to the jury was whether or not the execution of the will had been procured by the undue influence exercised upon the testator by his wife, the mother of contestant, Fannie E. Stone. The jury's verdict was in favor of the contestant, and judgment followed denying probate to the will. Proponent moved for a new trial. The motion was denied. From the order denying it, and from the judgment the proponent appeals; two other beneficiaries under the will joining in her appeal.

Contestant charged upon two grounds of contest—insanity, as well as undue influence. Proponent moved for a nonsuit for the insufficiency of the evidence to support either ground. The court granted the motion as to the asserted ground of insanity, and withdrew that from the consideration of the jury, finding that the deceased was of sound and disposing mind, that he had no insane "delusion or prejudice as to the contestant's husband," that "his mind was not weak, debilitated or deranged," and that "he was not incompetent to make a will." The consideration of the asserted exercise of undue influence, therefore, is not complicated by evidence of enfeebled condition or senility. The testator was 61 years old at the time of his death.

The gravamen of proponent's complaint upon this appeal is that there is no evidence, not even a scintilla, justifying the verdict of the jury that the will was the product of undue influence exercised upon the testator by his wife. This proposition of necessity involves a presentation of the evidence offered and admitted on behalf of contestants. But preliminary to that presentation we are impelled to say that never within our experience or our reading have we known of a case where a will was overthrown upon evidence so baseless and unsubstantial as that here presented. The case affords a surprising illustration of the power with which some juries think they are clothed of remodeling the dispositions which a testator makes to conform with their own ideas of what he should have done.

What, then, is the evidence? In April, 1913, testator and his wife had planned a trip East to visit relatives. The date of their departure was fixed upon. The day before

leaving, on April 30th, Mr. Stone went to the office of Mr. Griffin, an attorney of Los Angeles, and requested Mr. Griffin to prepare for him his will, dictating to Mr. Griffin its terms. He went alone. Mr. Griffin caused the will to be drafted in accordance with the expressed intent of Mr. Stone, and when the draft had been prepared Mr. Stone, returning to the office, executed the will. Mr. Griffin was not present at the execution. The will was witnessed by two other men in the office. By its terms the will bequeathed, with the exception of minor legacies, all of the property to the widow. The daughter was given a legacy of but $50. After the execution of the will Mr. Stone stated to one of the witnesses that he would put the will in his safe deposit box. He took the will away, and in a short time returned and gave the key of the box to the witness, and this key remained in his possession until after Mr. Stone's death. He stated to Mr. Griffin, in explanation of the small legacy left to his daughter, that he was not pleased with her marriage, and that his wife would provide for her. His wife did not accompany him to the lawyer's office when the will was prepared, and testified that she did not know that the will had been executed until that evening, when her husband informed her of its execution and of its contents. After her husband's death she went for the first time to the office of Mr. Elijah, the witness, and asked him about her husband's will. The first time she ever saw the will was when it was taken from the safe deposit box after Mr. Stone's death. She had made no suggestions to Mr. Stone as to the disposition of his property.

The home of the family was a ranch, upon which the father, mother, and the contestant, Leo Stone Green, lived together until after her marriage. There was also an older bedridden daughter, who died before the execution of the will. The contestant had lived with her parents until she was 23 years of age. She had been educated by them in music, German, and French. In part she had been educated by her mother, who took her out of the public school, because she did not think the school children were fit for her child to associate with. Her parents were ambitious for her, and desired her to marry a rich man in their own social sphere. Her husband, Mr. Green, was a horse trainer, at times employed by her father to break his horses. He was without means, and was regarded by the family as inferior in education, breeding, and social standing. When about 23 years of age the contestant became unduly intimate with Green and was with child by him. This was a great blow to her parents, who assented to a marriage between them as the only solution of the problem. Her first child was born a month after her marriage. At the time of the birth of this child she was at her parents' home when overtaken by her labor pains. Her mother made light of her sickness. The daughter asked that Dr. Wise be summoned, and her father went to get him. Her husband was absent at the time. Her mother told her that she had "better pray that you and the baby both die." The doctor was slow in arriving, and her baby was born at 1 o'clock, without any attendance. Her mother covered her with a blanket, and told her that she did not know how to minister to her, and objected to a woman, a neighbor, being called in for the purpose. The doctor arrived about 4 o'clock. The baby lingered six days, never opening its eyes. Her father cried bitterly at the funeral, because it was the first death in the family. She was ill for some time after the birth of this child, and her father was willing that a nurse should be called in to attend her; but her mother objected.

Contestant by interrogation was carried back over the history of her early life, and testified that her mother insisted upon her aiding in the care of the bedridden sister, and frequently beat her for her remissness. When 13 years of age she refused to obey her mother's directions to attend to this sister, and the mother switched her with a rawhide riding whip until she was black and blue wherever the whip struck her. Upon another occasion when a little girl she had run away from home, and her mother tied her to a bedpost to keep her from running away. When at the age of 13 her mother had whipped her, as above described, she told her mother that she would never permit her to whip her again. Touching the conduct of her father toward her, she testified that when she was 13 years of age her father was angry because a neighbor who had purchased hay from him had not come at the appointed time to take it away. She expostulated, saying to her father that he would come, when her father began to curse her—"cursed me clear out into the yard." Upon another occasion, when she was attending school, she asked her father for 25 cents for car fare. He became angry, shook his fist in her face, and said, "Now, you cry, and spoil your pretty face; just cry." In this presentation of her home life thus given by contestant, if it appears that her parents were severe or harsh with her, it also appears that they were equally so, and that the father's conduct toward his daughter was not influenced by the mother.

With this outline of her home life, and with the brief comment which we have made upon it, we come to what is, after all, the one essential consideration—the evidence of undue influence exercised by the wife over the husband, which undue influence, to avoid the will, must have had a controlling effect upon its execution. The effort of contestant in this regard is not even remotely directed to any showing of undue influence exercised upon the testator at the time of the making of the will. Indeed, from the circumstances attending its making, and from the clear and abundant evidence in regard to it, the effort

would be futile. The evidence, however, is directed and designed to show such a continuous domination by the wife over her husband as to force the conclusion that he was a mere puppet in his wife's hands, and lived and had his being under her orders and directions. We will not attempt to set forth all of the paltry and trivial acts which it is contended show such a tremendous domination. Enough, however, will be set forth to illustrate their character: Mrs. Stone was not a good housewife—she did not wash the dishes or make the beds—and her husband, without avail, complained of her carelessness in this regard. Many husbands do the same. She objected to Mr. Stone making his Eastern trip alone, and insisted that he take her with him. Many wives do the same. She objected to Mr. Stone sending any considerable sum of money to his Eastern relatives, and insisted that the amount be small. Such a condition of things is not unusual between spouses. She objected to Mr. Stone selling the ranch. It cannot be said that a wife is not entitled to lift her voice in such a matter. She desired an automobile, and had Mr. Stone sell some horses that it might be purchased. Many husbands have done the same thing. She objected to her daughter accompanying them on their last Eastern visit. To get a bedstead into a room, he sawed off one of its legs, because his wife wanted it done. The leg was afterwards glued on, but the appearance of the piece of furniture was spoiled in the opinion of the contestant. When Mr. Stone thought his daughter should continue in the public school, Mrs. Stone took her out and taught her at home. She objected to Mr. Stone selling a certain horse, named Adelaide, and Mr. Stone did not sell it. She induced Mr. Stone to stop smoking, but, at his later request permitted him to resume the practice. He complained in the presence of a neighbor that the cat had killed the canary bird, and upon Mrs. Stone's intimation that he would better stop talking about it he did stop. Few husbands would have done differently. She was better educated than her husband, helped him with his letters and bills, and frequently made contracts about the ranch matters. When question arose about selling guinea hens' or ducks' eggs, he said that his wife was boss—to see her about it.

We submit with confidence that if this establishes the domination of the wife and the subjugation of the husband, if it proves anything more than a recognition that the wife's wish is entitled to be heard and her requests considered in domestic and business affairs, then necessarily it must be said that 99 husbands out of 100 are led about by their wives in chains of servitude and are thus incompetent to make wills. But let us proceed and present other evidence from the same source—evidence where the husband not only acted upon his own initiative, but even against the views of his wife. For many of the latter years of his life he was road overseer and had under his control sometimes over 100 men. Dealing with these men, at least, he was independent of his wife's domination. He was a superb man physically—over six feet tall and of a manner brusque and commanding with his employés. Upon the death of the invalid daughter, the mother told contestant that they would purchase a cemetery lot large enough to contain burial places for six. This was after the contestant's marriage. But when they reached the cemetery Mr. Stone refused to buy such a lot, and declared that he would buy a burial lot for three, as there were only three in his family—meaning, of course, thereby his wife and himself and his dead daughter. He proposed to consult and be treated by a Dr. Yoakum. Mrs. Stone objected, but he went. He had numerous business transactions with people and concluded his business without reference to his wife. He frequently bought her clothes. He refused to let her buy a buggy which she greatly desired. He sent her into the house to bring out a heavy dish of butter which he wished to show a neighbor. He would frequently interrupt her when she had commenced a narration, and say, "Let me tell it," and he did so. While there were differences and disagreements at times between the spouses, generally their relations were cordial and affectionate.

There is still another phase of the evidence meriting presentation—the attitude and feeling of Mr. Stone himself toward his daughter. He did not want his daughter to ride with him in the car returning from the invalid daughter's funeral. He did not want his daughter's flowers alongside of his on the grave of the invalid daughter. He frequently swore at her before as well as after her marriage. Upon one occasion when Mrs. Green criticized her father for taking another lady out in his carriage (though her mother did not object to it), he became very angry, cursed her, and did not come to see her for three years. When he did come, he abused her about the slack condition of her front porch, declaring it was dangerous for one to try and cross it. He was disappointed because Mrs. Green did not marry to better advantage. He disliked the daughter's husband, saying to one witness that he (the witness) was the only one whom he had ever heard speak well of him. He regretted bitterly to another that she had married this "scrub"; that they had spent a fortune upon the education of their daughter, "and she married this man, and my wife will never get over it." He said that, if she had married a rich man, he would have given her five or ten acres of land.

One final piece of evidence must be noted. The contestant testifies that several weeks before her parents' departure for the East, passing a bank with her mother, her mother

stated that in the vault was the father's will—he didn't want to make it, but she had him do so. As to the date, at least, it is demonstrated that the daughter's testimony is erroneous. The will, by all of the disinterested evidence, was not made until the day before the deceased's departure for the East. But, putting this aside, is it permissible to say that the wife's insistence that the husband shall make a will even remotely suggests that she unduly dominated him in the disposition of his property which he made by that will? Assuredly not.

What, then, is the picture held up to view by this evidence? It is that of a man and woman, who for the last 40 years had been husband and wife, living their lives together upon a farm. Into their lives came a not unusual amount of bickering and dispute and quite the usual amount of consideration and affection. Their hopes and ambitions were centered upon one daughter. If in her early years they treated her with harshness and severity, it appears that she was and must by her parents have been considered a somewhat unruly and headstrong child. She was carefully educated, and after reaching maturity bitterly disappointed them both by her conduct and her enforced marriage. When the husband and father died, this daughter had a husband of her own to protect and support her. The aged wife is left the property, which the husband is entitled to devise by will. She had been his helpmeet and companion for well-nigh 40 years. She had reached the time of life when her own earning capacity was negligible. The property which her husband left her was no more than an assurance of her physical well-being and comfort during her remaining years. It cannot be necessary to quote from the authorities upon so plain a proposition. Suffice it to cite In re McDevitt, 95 Cal. 33, 30 Pac. 101; In re Carriger, 104 Cal. 84, 37 Pac. 785; In re Wilson, 117 Cal. 270, 49 Pac. 172, 711; Estate of Tibbetts, 137 Cal. 128, 69 Pac. 978; Estate of Morey, 147 Cal. 495, 82 Pac. 57. If it be legal to overthrow such a will as this under such evidence as this, then it would be better for the Legislature to strike from the statute books the right to make any will at all, and leave the disposition of all property to its laws of succession.

The conclusion thus reached and declared necessitates a reversal of the judgment and order refusing to grant a new trial upon the indicated ground that the evidence is absolutely insufficient to sustain the verdict of the jury. This conclusion renders unnecessary the consideration of any of the other matters advanced for hearing by appellant.

The judgment and order appealed from are reversed.

We concur: MELVIN, J.; LORIGAN, J.

172 Cal. 182

McCOLGAN v. WALTER MAGEE, Inc., et al. (S. F. 6639.)

(Supreme Court of California. Feb. 28, 1916.)

1. TRUSTS ⟸12. 152—SPENDTHRIFT TRUSTS—RIGHTS OF CREDITORS.

By direct provision of Civ. Code, § 867, a spendthrift trust may be created in the rents and profits of realty if the beneficiary is restrained from disposing of his interest only during life or a term of years; but, by section 859, where a trust is created to receive rents and profits, and no valid direction for accumulation is given, the surplus, beyond what is necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of his creditors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 10, 196; Dec. Dig. ⟸12, 152.]

2. TRUSTS ⟸12—SPENDTHRIFT TRUSTS.

The general doctrine that spendthrift trusts, inalienable by the beneficiary, and inaccessible to his creditors during his life or for a term of years, are valid in California, is well established.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 10; Dec. Dig. ⟸12.]

3. TRUSTS ⟸12—SPENDTHRIFT TRUSTS—VALIDITY—STATUTES—"PROPERTY."

In view of Civ. Code, §§ 669, 688, 693, providing that a future contingent interest is property, where a father executed a deed of trust conveying property to two sons as trustees for themselves and two others, providing that at any time after his death any three of the beneficiaries might terminate the trust by acknowledging and recording a declaration to that effect, and that on such termination the property should belong to the beneficiaries, share and share alike, one-fourth each, and after the father's death the four beneficiaries executed an agreement whereby the trust was to be terminated and a distribution of the property made according to its appraised value, giving each beneficiary one-fourth, except that there should be set aside as the fourth share of one son certain shares of stock and cash, equaling one-fourth of the trust property, which share should not go directly to the particular beneficiary, but be transferred to two of his brothers, to be held in trust for him, the agreement further declaring that the beneficiary's interest was inalienable, nontransferable, and exempt from the claims of his creditors, such second trust was invalid, and the property subject to the claims of creditors as in effect an attempt to create a spendthrift trust by the beneficiary in his own favor, which is contrary to the policy of the law, since the beneficiary's interest in the original trust, though a future and not a vested interest, was his disposable property, subject to the demands of creditors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 10; Dec. Dig. ⟸12.]

4. TRUSTS ⟸12—SPENDTHRIFT TRUSTS—INVALIDITY—FRAUDULENT INTENT.

A spendthrift trust attempted to be created in the settlor's own favor is invalid, though he has no fraudulent intent toward his creditors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 10; Dec. Dig. ⟸12.]

5. PARTIES ⟸32—NECESSARY PARTIES.

In suit by the judgment creditor of the beneficiary of an invalid spendthrift trust to compel a corporation to transfer to him stock in it, the corpus of the trust, which had been sold to him on execution sale, a party who had an interest in the trust by its terms to the extent of a debt owed her by the beneficiary, though a proper party, was not a necessary party, since whether the creditor took the stock absolutely, by transfer on the books, or otherwise, he would

take it subject to the interest of the party interested in the trust; she not being made a party to the suit.

[Ed. Note.—For other cases, see Parties, Dec. Dig. ⊂=32.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by D. A. McColgan against Walter Magee, Incorporated, and others. From a judgment for defendants on demurrer to the complaint, plaintiff appeals. Reversed.

Coogan & O'Connor and E. J. Talbott, all of San Francisco, for appellant. Charles S. Wheeler and John F. Bowie, both of San Francisco (Nathan Moran, of San Francisco, of counsel), for respondents.

SHAW, J. The court below sustained a demurrer to the complaint and thereupon entered judgment in favor of the defendants and against the plaintiff, from which the plaintiff appeals.

On April 9, 1908, one James Nolan recovered judgment against Walter Magee for $3,957.43. Execution was duly issued thereon and levied upon 4,179 shares of the capital stock of the corporation known as Walter Magee, Incorporated. The plaintiff purchased the same at the execution sale, and the sheriff thereafter executed to him a regular certificate of sale therefor. The shares referred to stand severally in the names of the defendants William A. Magee, Thomas Magee, Charles S. Wheeler, Frederick E. Magee, Charles W. Brock, each holding one share, and William A. Magee and Thomas Magee as trustees, the said two trustees holding 4,173 shares thereof. Who owns the remaining share is not stated. The plaintiff demanded of said defendants the possession of said shares and demanded of the corporation the transfer thereof on the corporation books to the plaintiff, all of which was refused. Thereupon the plaintiff began this action to compel the corporation to transfer the said shares to him. The case presents for consideration the single question whether or not the said shares, or any interest therein, were the property of the said Walter Magee and subject to execution under the judgment against him. To a discussion of this question it is necessary to state the facts in some detail.

On December 2, 1896, Thomas Magee, Sr., executed a deed of trust conveying a large amount of property to William A. Magee and Thomas Magee, Jr., as trustees for William A. Magee, Thomas Magee, Frederick E. Magee, and Walter Magee. The terms of the trust were that the trustees should receive the rents, issues, and profits of the property and pay over the net income thereof monthly to each of said beneficiaries share and share alike; that the said trust should in no event extend beyond the lives of the beneficiaries; but that at any time after the death of Thomas Magee, Sr., any three of the beneficiaries might terminate the trust by acknowledging and recording a declaration in writing to that effect; and that upon such termination of the trust the property embraced therein should belong to said beneficiaries share and share alike—that is, one-fourth to each. It further provided that upon any determination of said trust all the property should belong to the beneficiaries share and share alike, and declared that the donor, Thomas Magee, Sr., granted the remainder, after any determination of the trust, and after his death, to the beneficiaries share and share alike.

Thomas Magee, Sr., died on September 30, 1902, and his property was duly distributed in accordance with the trust. Thereupon the trustees named in the deed accepted the trust, took possession of the property, and proceeded to administer it in accordance with the trust. In February, 1905, Walter Magee, Incorporated, was created as a corporation, and the trustees aforesaid received from said corporation the said 4,179 shares of its capital stock, the same thereupon becoming a part of the property held by them in trust under said trust deed, which, it may be added, expressly gave them power to exchange the original property for other property and provided that the property received should be held under the same trust. On August 29, 1905, the four beneficiaries executed an agreement whereby the said trust was to be terminated and closed in the following manner: Appraisers were to be appointed to fix the value of the properties held by the trustees, and thereupon a segregation and distribution of the property was to be made according to the appraised value, giving to each beneficiary one-fourth thereof in severalty, but that "there should be segregated and set apart, as the one-fourth share of the said Walter Magee, and his successors in interest," the shares of stock aforesaid and cash sufficient, when added to the appraised value of said stock, to equal one-fourth of all the trust property; and further that said shares should not go directly to said Walter Magee, but should be transferred to Thomas Magee, Jr., and William A. Magee, as trustees, to be held by them in trust as follows: "To collect the income and dividends of said stock and to apply one hundred dollars per month of the said income to the use of said Walter Magee, during his life," and to pay the rest and residue of the income, if any, to Eva J. Shaw upon debts due to her from said Walter Magee, and upon the satisfaction of such debts, to pay the entire income to said Walter Magee during his life, and that upon his death said property should vest in his wife, Flora D. Magee. The agreement further declared that the interest of Walter Magee under the same "is hereby created inalienable, and it is particularly provided that the said Walter Magee

cannot alienate, transfer or assign his interest thereunder, and the said moneys hereby directed to be applied to the use of the said Walter Magee and the interest of the said Walter Magee in this trust shall be exempt from the claims of creditors to the fullest extent permissible by law." This agreement was not recorded.

In pursuance of this agreement, the property was appraised, and in an action between the beneficiaries a judgment was duly given on September 14, 1906, declaring that each of the trusts created by said deed were terminated and closed, "by the consent and agreement of the beneficiaries thereunder, that the giving of said consent by said beneficiaries and the termination and closing of said trusts was thereby ratified, confirmed, and approved," and that there be set apart as the share of the said Walter Magee in said property the said shares of stock and $7,073.71 in cash, that said stock be transferred to Thomas Magee and William A. Magee to be held by them in trust in accordance with the terms of said agreement of August 29, 1905. The remaining portions were divided among the other beneficiaries in fee.

The contention of the plaintiff is that the declaration in said agreement of August 29, 1905, that the interest of Walter Magee in the said shares of stock and the income therefrom was inalienable and exempt from the claims of creditors, was wholly ineffectual to accomplish that purpose, and that the same is subject to execution notwithstanding the said provision of said agreement.

[1, 2] Section 867 of the Civil Code provides that such trusts may be created in the rents and profits of real property, provided the beneficiary is restrained from disposing of his interest therein only during his life or for a term of years. Such trusts in real property are further qualified by the provisions of section 859 of the Civil Code. Magner v. Crooks, 139 Cal. 640, 73 Pac. 585. It has also been held that trusts of similar character may be created in the income of personal property. Cutter v. Hardy, 48 Cal. 568. The general doctrine that spendthrift trusts, inalienable by the beneficiary and inaccessible to his creditors during his life or for a term of years, are valid in this state, is well established. Seymour v. McAvoy, 121 Cal. 442, 53 Pac. 946, 41 L. R. A. 544.

[3] The doctrine that property may be made inalienable by such declaration of trust rests upon the theory that a donor has the right to give his property to another upon any conditions which he sees fit to impose, and that, inasmuch as such a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had the right to look for payment, they cannot complain that the donor has provided that the property or income shall go or be paid personally to the beneficiary and shall not be subject to the claims of creditors. For this reason and upon grounds of public policy, it is further held that one cannot by any disposition of his own property put the same or the income thereof beyond the reach of his creditors, so long as he himself retains the right to receive and use it. This qualification of the doctrine is as well settled as the doctrine itself. In Seymour v. McAvoy, supra, referring to the first branch of the proposition above stated, the court said:

"There is nothing in the policy of the law prohibiting a donor from providing that his bounty shall be enjoyed only by those to whom he intends to extend it, and that the property devoted by him to a trust otherwise valid shall not be diverted from its appointed destination."

In Pacific Bank v. Windram, 133 Mass. 175, the court said:

"Creditors of the beneficiary have no right to complain that the founder did not give his property for their benefit, or that they cannot reach a greater interest in the property than the debtor has, or ever had. But when a man settles his property upon a trust in his own favor, with a clause restraining his power of alienating the income, he undertakes to put his own property out of the reach of his creditors, while he retains the beneficial use of it. The practical operation of the transaction is that he transfers a portion only of his interest, retaining in himself a beneficial interest, which he attempts by his own act to render inalienable by himself and exempt from liability for his debts. To permit a man thus to attach to a valuable interest in property retained by himself the quality of inalienability and of exemption from his debts, seems to us to be going further than a sound public policy will justify."

In Ghormley v. Smith, 139 Pa. 584, 21 Atl. 135, 11 L. R. A. 565, 23 Am. St. Rep. 215, the court said:

"It is as well settled in Pennsylvania that it is a lawful purpose, upon the part of a father, to protect his bounty to a spendthrift son, both principal and interest, not only against his son's improvidence, but also against his creditors. * * * But it has never been held by this court that a person sui juris could settle his entire estate upon himself, free from liability for debts."

In Brown v. Macgill, 87 Md. 161, 39 Atl. 613, 39 L. R. A. 806, 67 Am. St. Rep. 334, the court said:

"The theory upon which courts have held restraints upon alienation, etc., valid, is that the cestui que trust only has what the donor has given him—is the recipient of his bounty—and therefore if the donor has not given him the right to alienate the property, or made it subject to the payment of his debts, no one has the right to complain. * * * But it is going too far and is too violently assaulting the policy of the law of this state, as indicated above, to permit a person to convey property owned by him to a trustee, and still retain full enjoyment of the income and revenues from it through the instrumentality of the trustees, and yet have the interest he retains for himself, worth it may be thousands or tens of thousands of dollars per annum, so fettered by his own act that it cannot be disposed of or be reached by his creditors. * * * To hold that a grantor can retain all the use and enjoyment of his property for life 'free from the incidents of property and not subject to his debts, would be a dangerous and startling proposition to sanction.' We do not think it can be sustained by reason or authority."

In Missouri it is said:

"Here is an attempt of a man, apparently, to tie up his own property under a trust in such a manner that himself, as owner, may be enabled to enjoy the income and set his creditors at defiance. This is a thing which the law does not allow. A man cannot own property or money and not own it at the same time." McIlvaine v. Smith, 42 Mo. 58, 97 Am. Dec. 295.

It follows from these authorities that if, upon the facts we have stated, the effect is that Walter Magee transferred, or caused to be transferred, his interest in the original trust property, or his segregated share thereof, to the last-named trustees upon a trust which provides that the income therefrom shall be paid to himself free from all claims of creditors, it would be contrary to the policy of the law, the property would remain his own notwithstanding said disposition and would be subject to execution against him in the same manner as any other property interest.

The respondents concede that the qualifications to the doctrine exists as above stated, but claim that the transaction in question was not simply a disposition by Walter himself of his own property. The argument is that the original trust deed vested the property in the trustees for the life of the beneficiaries subject to the contingency that the trust might be sooner terminated, and thereby created contingent remainders in the property from the time of the happening of such contingency until the death of the beneficiaries, or some of them, that the contingent remainder of Walter is the property which constitutes the corpus of the new trust, that being a contingent remainder it was not a vested estate in Walter (Civ. Code, §§ 693–697), and could not become vested, during the lives of the beneficiaries, until the termination of the trust, that this could not be accomplished except by the voluntary act of persons other than Walter, that is, by three of the beneficiaries acting under the provision of the deed, or by all parties having any interest, that any of the other persons "might withhold consent to any unanimous arrangement, except upon conditions which he elected to impose," that the agreement and judgment carrying it out was made upon the condition that Walter's segregated rights and interest should be free from claims of his creditors, and that this condition imposed by them, and which they had a right to exact, constituted a consideration moving from them for the arrangement and settlement, a consideration of a substantial character and sufficient to uphold the new trust as one created by persons other than the spendthrift beneficiary, and to make it valid and free from the claims of his creditors.

The doctrine that one cannot by any device make his own property free from the claims of his own creditors is based, not upon technical grounds, but upon sound reasons of public policy. The cases go so far to declare that, if the donee or grantee of such property pays a consideration therefor out of his own estate or property, he cannot claim the benefit of a declaration of trust making it free from the claims of his creditors. Whatever may be the consideration moving from others, the trust cannot be allowed to free the property from the claims of creditors, where the consideration for the conveyance to the trustee or, as in this case, the entire trust property constituting the source of the income, is contributed by the beneficiary himself. Thus in Missouri, a husband surrendered his estate by curtesy in his wife's land in order to take under the provision of his wife's will giving her real and personal property in trust for the payment of the income to the husband, the same to be free from the claims of his creditors. The court said that the doctrine of spendthrift trusts prevails because a creditor is not defrauded where the owner of property "so disposes of it that the object of his bounty, who parts with nothing in return," has an income therefrom free from liability for his debts, and added:

"In the case at bar the beneficiary did part with something in return. But for his compliance with the express condition in the will, by the surrender of his curtesy in his wife's estate by deed, as the petition recites, duly recorded, the income provided for his use would never have become his. This stands confessed by the demurrer. He therefore occupies the attitude of a purchaser of that income. * * * Regarding, then, the defendant in the light of a purchaser of the income bestowed upon him by the will of his wife, and not as the mere recipient of her bounty, it must be ruled that such income is subject to the claims of his creditors, and subject in this proceeding." Bank of Commerce v. Chambers, 96 Mo. 459, 10 S. W. 38.

Here the contribution of Walter was more than a mere consideration for the creation of the trust in his favor; it constituted the entire subject-matter. It is true that the other parties might have refused to consent and could have prevented the creation of the trust. But they had no interest whatever in the share of Walter under the original trust. Under that trust such share was subject to the claims of Walter's creditors. They gave nothing to him by the termination of the trust except to cause his contingent interest to vest immediately. The transaction took nothing from them. In the Missouri case last mentioned, the wife created the trust voluntarily out of her own property, real and personal, and the surrender by the husband of his curtesy right in her land was essential to enable him to avail himself of her bounty, yet it was held that this constituted a consideration which took the case out of the rule allowing spendthrift trusts. In this case more was necessary, both the consent of the others and the devolution of the interest of Walter upon the new trustees were essential; but it is true here, as there, that he gave a valuable consideration for the benefits of the trust, a consideration which, at the time he gave it, was subject to his debts, and he is therefore in the attitude of a purchaser of the income and of the property from

which it is derived. The fact that his interest in the original trust was a future and not a vested interest is not material to the doctrine. It was his property (Civ. Code, §§ 669, 688, 693), it was not free from the demands of creditors, and it was disposable by him (Civ. Code, §§ 699, 1044). Public policy does not permit him to put it beyond reach of his creditors while he has the beneficial use of it himself.

[4] The contention of the respondents that the complaint is defective because it does not allege that there was any intent on the part of any of the parties to defraud the creditors of Walter cannot be sustained. The doctrine we are enforcing does not depend upon fraudulent intent. The liability of the property to the claims of creditors comes from the fact that the disposition was ineffectual so far as it attempted to exempt the property from liability for his debts, and because, as to creditors, it remained his own property, so far as his creditors are concerned, and not because of any intent to defraud in the creation of the trust.

[5] Lastly, it is asserted that the demurrer was properly sustained because of a defect of parties, in that Eva J. Shaw, who, it appears, has an interest in the trust to the extent of the debt owing to her, which is not shown to have been discharged, is not made a party. We do not consider this a sufficient cause for the sustaining of the demurrer. If the plaintiff, by the execution sale, obtained any interest whatever in the property, he was entitled to have it transferred to him or protected in some manner, by the judgment of the court. In any event, whether he took it absolutely by transfer on the books, or otherwise, inasmuch as Eva J. Shaw was not made a party to the suit, he would take it subject to her interest, and the judgment would in no manner prejudice her. In such cases, although she is a proper party, she is in no sense a necessary party, and the court could proceed to judgment without her presence. We are therefore of the opinion that the demurrer was improperly sustained.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

(172 Cal. 174)

EAST SHORE CO. v. RICHMOND BELT RY. et al. (S. F. 6781.)

(Supreme Court of California. Feb. 28, 1916. Rehearing Denied March 27, 1916.)

1. PARTITION ⟸78—MODE OF PARTITION—ALLOTMENT.

Under Code Civ. Proc. § 764, declaring that in making partition the referees shall allot the share of each of the parties so as to embrace as far as practicable the improvements made by such cotenant, the referees should not only allot to a cotenant that part of the common land on which he has made valuable improvements, but should also set apart a specific tract to the share of a cotenant who has undertaken to convey the title in fee to such land in severalty when such disposition can be made without material injury to the rights and interests of other tenants.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 265–273; Dec. Dig. ⟸78.]

2. TENANCY IN COMMON ⟸41, 45—CONVEYANCES BY TENANT—EFFECT.

A grantee of a specific parcel of land from tenant in common acquires all the interest of his grantor in the special tract, but the conveyance does not sever the special tract so far as other tenants in common are concerned; hence one tenant in common cannot convey an easement in the common land which is good against any other than himself.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 121, 135–137; Dec. Dig. ⟸41, 45.]

3. APPEAL AND ERROR ⟸877(2) — PERSONS ENTITLED TO ALLEGE ERROR.

A tenant in common, who did not join in conveyances by his cotenants, and whose share was unaffected, cannot complain of errors on partition with relation to the conveyance of such special tracts; his rights not being affected, and it being immaterial whether the conveyances carried the fee or only an easement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3563, 3564; Dec. Dig. ⟸877(2).]

4. APPEAL AND ERROR ⟸877(2)—PERSONS ENTITLED TO ALLEGE ERROR.

A tenant in common cannot, where the action for partition was not delayed, complain of the opening of the case and the admission of proof of conveyances of special locations, made after suit was begun and which were not mentioned in any pleading on file; such tenant's rights not being affected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3563, 3564; Dec. Dig. ⟸877(2).]

5. ABATEMENT AND REVIVAL ⟸47 — TRANSFER OF SUBJECT-MATTER—REOPENING CASE.

Under Code Civ. Proc. § 385, declaring that in case of transfer of interest the action may be continued in the name of the original party, a tenant in common who, pending an action for partition, conveyed his interest, may move to reopen the case for the benefit of his grantees.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 239–244; Dec. Dig. ⟸47.]

6. PARTITION ⟸71—ACTIONS—FINDINGS.

In partition, where some of the tenants had conveyed specific parcels, findings that the grantees owned contiguous lands on which they had made improvements, and that the specific parcels conveyed were convenient to the enjoyment of such contiguous land, are immaterial and cannot be made the basis of objection by a tenant not joining in such conveyances, where there was nothing in the judgment requiring the referee to consider such facts in making the partition, for such facts are immaterial; the grantee of a special parcel being entitled to have the same set off to him out of the share of his grantor if it can be done without injury to the other tenants.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 194; Dec. Dig. ⟸71.]

7. PARTITION ⟸79—OBJECTIONS—TIME FOR MAKING.

Where a party to a partition suit desires to object to findings of immaterial facts, such objections should be made on the report of the referee.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 224, 225; Dec. Dig. ⟸79.]

8. PARTITION ⊂⊃77(4)—MODE OF PARTITION —SALE.

Under Code Civ. Proc. § 763, declaring that, if it appears that the property or any part of it is so situated that partition cannot be made without great prejudice, the court may order a sale thereof, there is a presumption that land held in common can be equitably divided, and a tenant contending for a sale has the burden of showing that allotment would prejudice the interest of the owners.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 223; Dec. Dig. ⊂⊃77(4).]

9. APPEAL AND ERROR ⊂⊃1011(1)—REVIEW—FINDINGS.

A finding on conflicting evidence that land was subject to partition will be upheld on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⊂⊃1011(1).]

10. PARTITION ⊂⊃77(3) — RIGHT TO MAKE — ALLOTMENT.

That lands held in common were tidelands useful to the adjacent highland as a means of access to navigable waters, but that parts were more valuable than others, does not show that such lands were incapable of partition by allotment.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 219–222; Dec. Dig. ⊂⊃77(3).]

Department 1. Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by the East Shore Company for partition of lands against the Richmond Belt Railway Company and others and J. Goodwin Thompson. From a judgment of partition, the defendant last named appeals. Affirmed.

Nowlin & Fassett and Morrison, Dunne & Brobeck, all of San Francisco (Ernest K. Little, of San Francisco, of counsel), for appellant. Richard Bayne, of San Francisco, for respondent Richmond Belt Ry. Cushing & Cushing, of San Francisco, for respondent Joseph G. Hooper. Johnson & Shaw, of Oakland, for respondent San Pablo Quarry Co. E. B. Taylor, of Martinez, for respondent Frances C. Barker. Platt Kent, of San Francisco, for respondent Standard Oil Co. E. W. Camp, of Los Angeles, for respondent Atchison, T. & S. F. Ry. Co. Alfred Sutro, of San Francisco, for respondent California Wine Ass'n. H. A. Mosher, in pro. per. M. R. Jones and Pillsbury, Madison & Sutro, all of San Francisco (A. D. Plaw, of San Francisco, of counsel), for respondent East Shore Co.

SHAW, J. The action was for partition of lands. The Richmond Belt Railway had obtained from the East Shore Company, before the action was begun, a deed purporting to convey to it, in severalty and entirety, certain strips or parcels of the common land. The deed stated that the strips were conveyed "as and for a right of way" for a railroad "to have and to hold all and singular the said premises, right and privilege unto" the said grantee "so long as the same shall be used for railroad or terminal purposes." During the progress of the suit, and before the decision in the court below, some of the common owners made deeds purporting to convey to third persons, in severalty, the whole title to other specific parcels of the common land. After the evidence was closed and the cause was submitted, the court, on motion of plaintiff, opened the case and allowed proof to be made of these conveyances. This was done over the objection of the appellant. The court found as a fact that the land was susceptible of division between the common owners without material injury to their interests. Thereupon it made an interlocutory judgment of partition, declaring the interests of the respective tenants in common, setting forth also the said several conveyances of entire parcels thereof to third persons, and describing said parcels, and appointing three persons as referees to make the partition. With respect to the specific parcels conveyed in whole title, the judgment directed that each such parcel be charged against and deducted from the share of the common owner who made the conveyance, that such common owner should be allotted only the interest remaining in him after such deduction, and that each person so receiving a conveyance of a parcel in whole title should have such parcel set apart to him, provided the same could be done without material injury to the rights and interests of other tenants in common who did not join in such conveyance. From this interlocutory judgment, the defendant J. Goodwin Thompson appeals.

[1] Certain principles have been established in this state concerning the rights of the parties where one tenant in common has conveyed, in whole title, a part of the common land, which principles control the decision in this case. They are well stated in the following extracts from our decisions:

"A suit in partition under our Code is, in its nature and essence, equitable, * * * and the court in its decree, proceeding to do what is 'equitable, just, and proper,' will not only allot to a cotenant that part of the common land upon which he has valuable improvements, but will also set apart a specific tract to the share of a copartner who has undertaken to convey the title in fee to such tract in severalty, so that the grantee may have that which is justly his, when such disposition of the land can be made 'without material injury to the rights and interests of the other cotenants.'" Emeric v. Alvarado, 90 Cal. 456, 27 Pac. 360.

Substantially the same doctrine is stated in each of the two decisions in Gates v. Salmon, the first reported in 35 Cal. 576, 95 Am. Dec. 139, and the other in 46 Cal. 361, and in section 764, Code of Civil Procedure.

[2] Another rule is stated in the first case, at page 588, where the court says, with respect to a conveyance of such special tract:

"The grantor, before his conveyance of the special tract, held his undivided interest therein subject to the contingency of the loss of it, if on the partition of the general tract the special tract should be allotted to one of his co-

tenants. The grantee, then, acquires all the interest of his grantor in the special tract, and that interest is a tenancy in the special tract in common with the cotenants of his grantor, but his conveyance did not sever the special tract from the general tract, so far as the cotenants are concerned, and the general tract is therefore liable to a partition so far as the cotenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made."

In pursuance of this doctrine, it was held in Pfeiffer v. Regents, 74 Cal. 156, 15 Pac. 622, that one tenant in common could not by his conveyance create an easement in the common land which would be good against any of the tenants other than himself.

[3] A large portion of the brief of the appellant is devoted to an endeavor to show errors with relation to the conveyances of special tracts located within the common land by tenants other than himself. With respect to all of these, it need only be said that the appellant, since he did not join in the conveyances, and since his share cannot be affected in any injurious manner by anything done under the decree with respect to these specific parcels, has no interest in the question, and the errors, if any, are immaterial to him and insufficient to authorize the reversal of the judgment, upon his appeal. This was decided in Gates v. Salmon, 46 Cal. 375. Referring to a conveyance by Theodocia, one of the tenants, of a specific parcel of the common land, the court said:

"The other original tenants in common, and their grantees, whether of undivided interest or of special locations, are unaffected, either in the amount of their interests, or their rights or equities, in respect to the partition, by the question whether Theodocia did or did not convey any of the special locations. The question concerns only those who claim under her."

The same rule renders it immaterial whether or not the deed above mentioned to the Richmond Belt Railway conveyed the title in fee, or only an easement. Whether it was a fee or an easement, it affected only the interest of the grantor, the East Shore Company, in the common land, and no partition could justly be made under the decree herein which would make any disposition to the grantee of that easement that would be prejudicial to the interests of the other tenants in common.

[4] The appellant objects to the action of the court in opening the case and permitting proof of some conveyances of special locations, which were made after the suit was begun and which were not mentioned in any pleading on file. The same principle applies to this objection. None of these conveyances was made by the appellant, and as they involve only the relative rights of the grantees and grantors in the share set apart by the partition to the grantors and cannot, under the decree, in any respect injure the appellant, the ruling of the court thereon is one which he cannot question. It is immaterial to him whether the causes of action of these grantees, with respect to their respective grantors, existed when the action was begun or not. Perhaps if the procedure resorted to had resulted in a delay of the decision of the case which worked injury to the appellant in its practical operation, he might be allowed to make an objection; but no injury of this kind is suggested or claimed. The opening of the case caused a delay of only a few weeks, and it does not appear that the appellant was at all prejudiced thereby.

[5] In this behalf it is urged that the motion to reopen the case was made by the East Shore Company, originally one of the tenants in common, and he claims that by its conveyances it had parted with its entire interest. From this he argues that a motion made by one not having any interest should not have been entertained. But our Code specially provides that, where the right of action is transferred during the pendency of an action thereon, such action may be continued in the name of the original party or in the name of the transferee, in the discretion of the court. Code Civ. Proc. § 385. It follows therefore that the East Shore Company had the authority to make the motion, if not in its own interest, then in the interest of its grantees. It may be added that the respondents dispute the statement that the East Shore Company had transferred its entire interest.

[6, 7] The court, among other things, made findings that certain of the grantees of specific parcels above referred to owned other lands contiguous to such specific parcels, not within the land to be partitioned, upon which contiguous tracts they had made valuable improvements, and that the special parcels conveyed by the tenants in common to them, respectively, were convenient to the enjoyment of the contiguous lands and for the use and protection thereof. The appellant claims that the evidence is insufficient to support these findings. We think this is an inquiry upon which we need not enter. There is nothing in the judgment that requires the referees to consider these facts in making the partition. The facts are not mentioned in the judgment. They are wholly immaterial to the judgment and should not be considered by the referees. The grantee of each parcel is entitled to have the same set off to him out of the share of his grantor, if it can be done without injury to the other tenants in common. The fact that he owns contiguous land which will make his ownership of the specific parcel more advantageous to him cannot justify the allotment thereof to him, if to do so would in fact materially injure another tenant in common. If it does not injure such other tenant, then he has no reason to complain of such finding. In any event, the time for objection because of the consideration of such facts, if they are considered, is when the report of the referees is made to the court. It will not be presumed that the referees will take such fact into consideration to the in-

jury of any other tenant in common, in view of the declaration in the judgment that no partition respecting such special parcels can be made to the injury of another tenant in common.

[8, 9] The remaining contention of the appellant is that the finding of the court that the land is susceptible of partition without prejudice to the owners is not supported by the evidence. The provision of the Code on the subject is that:

"If it appears by the evidence, whether alleged in the complaint or not, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court." Code Civ. Proc. § 763.

The presumption is that land held in common tenancy can be equitably divided between the parties by allotting to each a tract in severalty, equal to his interest in the whole, measured by value. It is only where the contrary "appears by the evidence" that a sale may be ordered. Hence, a tenant who, upon appeal, contends for a sale, instead of a partition as ordered by the court below, must show that it appears by the evidence that a partition would prejudice the owners. The burden of proof to show such prejudice rests on him. This was expressly decided in Mitchell v. Cline, 84 Cal. 418, 24 Pac. 164. A finding on the subject is governed by the well-established rule that, where it is given upon a substantial conflict in the evidence, it is conclusive on appeal.

[10] The appellant admits that competent witnesses testified that an equitable partition of the land among the parties could be made. He relies on other testimony to the effect that the land consisted of a series of tideland lots and was useful to the adjacent higher land as a means of access therefrom to navigable water, and that it was worth more to them for that purpose than to any one else. We are at a loss to perceive how this renders the lots incapable of an equitable division by allotment. Even if it is true, as argued by appellant, that owing to its proximity to centers of population or commerce, or to the different uses to which the adjacent higher land is devoted, some portions of the common land would be of far more value than other portions for this purpose, no reason appears why the referees cannot as well take account of this, as of other elements of value, in making the partition. The decision in McGillivray v. Evans, 27 Cal. 96, and subsequent cases regarding the same property, that water used for mining purposes, running in a ditch and owned by several persons as tenants in common, in differing interests, one party having the first right to 20 inches in times of high water, and to only one-fourth of the flow in low water, not exceeding 20 inches, the remainder being owned by plaintiff and defendants, respectively, in the proportion of two-fifths to three-fifths, was not susceptible of a just mechanical division, has no application to this case. It lays down no rule applying to all easements, not even to all rights to the flow of water. And even if it did, the circumstances bear no resemblance to those here appearing. We find no cause in the circumstances shown which would justify this court in overthrowing the finding.

The interlocutory judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 191

In re CUTTING'S ESTATE.
CUTTING v. CUTTING et al.

(S. F. 7242.)

(Supreme Court of California. Feb. 28, 1916. Rehearing Denied March 27, 1916.)

1. WILLS ⇐191—REVOCATION—MARRIAGE OF TESTATOR.

Under Civ. Code, § 1299, providing that if, after making a will, the testator marries and the wife survives him, the will is revoked, unless provision has been made for her by marriage contract or by the will, or she is mentioned in such way therein as to show an intention not to make such provision, an antenuptial will standing alone containing no provision for, nor mention of, testator's wife, is revoked by his marriage and death leaving her surviving him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 469–478; Dec. Dig. ⇐191.]

2. WILLS ⇐201—PUBLICATION—EFFECT OF CODICIL.

Under Civ. Code, § 1287, providing that the execution of a codicil referring to a previous will republishes the will as modified by the codicil, an antenuptial will may be republished by the execution of a codicil, notwithstanding section 1299, providing that an antenuptial will making no mention of testator's wife is revoked by his marriage and death leaving her surviving, and that no other evidence to rebut the presumption of revocation must be received.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 500; Dec. Dig. ⇐201.]

3. WILLS ⇐201—PUBLICATION—EFFECT OF CODICIL.

An instrument "hereby affirming my will," except as herein modified, and declaring the following to be a codicil to testator's last will, followed by the provisions modifying the will, republishes the will, though it was an antenuptial will making no provision for testator's wife, and he died leaving his wife surviving.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 500; Dec. Dig. ⇐201.]

4. WILLS ⇐202 — REPUBLICATION — CONSTRUCTION—WILL AND CODICIL.

An antenuptial will, as modified by a postnuptial codicil, stands as if it were but one testamentary intention expressed in a single will made after marriage as of the date of the codicil.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 501; Dec. Dig. ⇐202.]

5. WILLS ⇐201 — REPUBLICATION — EFFECT OF CODICIL.

Under Civ. Code, § 1321, providing that all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole, an instrument executed by a testator affirming his will, except as there-

in modified, and declaring the following to be a codicil, followed by the provisions modifying the will, but not again referring to the will, is sufficient as a republication of the antenuptial will, notwithstanding the designation in the instrument of the latter part thereof as a codicil.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 500; Dec. Dig. ⟸201.]

6. WILLS ⟸99—REQUISITES—CODICIL—TESTAMENTARY DISPOSITION.

A provision in a codicil directing the executors to provide for testator's wife from the remainder of his estate an annual income of $3,000, payable monthly, in accordance with an antenuptial contract whereby he promised to cause her to be paid $250 per month if they married and she survived him, is a testamentary disposition of property, and not merely a direction to pay a debt under an antenuptial agreement.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 237; Dec. Dig. ⟸99.]

7. WILLS ⟸66—REQUISITES—CODICIL.

An antenuptial agreement to cause to be paid to a woman $250 per month if the parties married and she survived, is not abridged by a codicil providing the annuity out of the remainder of the estate after the provisions of three paragraphs of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 173, 174; Dec. Dig. ⟸66.]

Department 1. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Petition by Alice M. Cutting against Frederick P. Cutting and others to set aside the probate of the will of Francis Cutting. From a judgment entered on an order sustaining demurrers to the petition, the petitioner appeals. Affirmed.

A. J. Treat and L. Horwitz, both of San Francisco (Henry Conlin, of San Francisco, of counsel), for appellant. Warren Gregory, Allen L. Chickering, and William H. Gorrill, all of San Francisco, for respondents.

LAWLOR, J. The petitioner, as the widow of the decedent, appeals from a judgment entered upon an order sustaining the two demurrers of the respondents to the petition, in which she asserts that within the meaning of section 1299 of the Civil Code, the will of the decedent, dated October 22, 1912, was revoked, and that therefore he died intestate. The respondents are the below-mentioned executors and the Pacific Unitarian School for the Ministry at Berkeley, Cal., a legatee under the said will.

Stated in chronological order, the record on appeal discloses that on October 22, 1912, the decedent, Francis Cutting, executed a holographic will wherein he named his son, Frederick Page Cutting, William H. Chickering, and Alfred D. Cutler as his executors; that on April 19, 1913, the testator and petitioner executed an "antenuptial agreement"; that on May 10, 1913, they were married; that on July 18, 1913, the testator executed a holographic codicil to his said will; that on October 1, 1913, the testator died, without making any further testamentary disposition of his property; and that there was no issue of said marriage. The will of October 22, 1912, was the only antenuptial will left by the testator, and the petitioner was not mentioned nor referred to therein. At the date of the execution of the said will the testator was a widower and the father of two adult children—the said son, Frederick Page Cutting, and a daughter, Isabella S. Cutting—both of whom survived him.

The will and codicil were admitted to probate on October 20, 1913, and letters testamentary were issued to the said executors. On June 24, 1914, petitioner filed her petition for revocation of the probate of the will and codicil. The petition prays that the court decree that the testator died intestate; that the letters testamentary issued to the said executors be revoked and set aside; and that letters of administration be issued to petitioner, as the widow of the testator. The said demurrers to the petition followed and on September 16, 1914, were sustained without leave to amend. Judgment was entered in favor of the respondents on September 28, 1914.

The codicil of July 18, 1913, and the antenuptial agreement of April 19, 1913, heretofore referred to, are here set out in full:

"Oakland, California. July 18, 1913.

"I, Francis Cutting, hereby affirming my will bearing date Oct. 22nd, 1912, except as herein modified, do hereby declare the following as and to be a codicil to my said will being my last will and testament. After paragraphs numbered 2, 3, 4 having reference to devises benefiting my daughter, also Miss Paterson, also my son Frederick P. Cutting, I direct that my executors provide from the remainder of my estate an income for my wife Alice M. Cutting and pay the same to her monthly of two hundred and fifty ($250) dollars per month as long as she lives, in accordance with an ante-nuptial agreement with my said wife and myself of April, 1913.

"[Signed] Francis Cutting.

"Antenuptial Agreement between Francis Cutting and Alice M. Duren.

"The undersigned, in contemplation of marriage hereby agree that in consideration thereof Francis Cutting will give Alice M. Duren proper support during their married life and should said Francis Cutting die before said Alice M. Duren after their marriage he will cause her to be paid two hundred and fifty ($250) dollars per month during her life which said Alice M. Duren agrees shall be in lieu of any and all claims against the property or estate of said Francis Cutting whether community or any other property or interest of said Francis Cutting and will marry said Cutting at any convenient time requested by said Cutting who also agrees to pay said Alice M. Duren one hundred dollars per month during the time that may elapse prior to marriage and continue during her life should he die before their marriage.

"In witness whereof we have set our hands this nineteenth day of April, 1913.

"[Signed] Alice M. Duren
"Francis Cutting."

[1] 1. As already stated, the appellant contends that the will of October 22, 1912, was revoked on the death of the testator, by virtue of section 1299 of the Civil Code, which reads:

"If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received."

We do not find it necessary to construe the clause in section 1299 relating to a marriage contract. Excluding that clause, the section contemplates these conditions: (1) An antenuptial will; (2) a subsequent marriage; (3) the death of the testator; (4) the survival of the wife; and (5) either provision for the wife in the antenuptial will, or a mention of her therein in such way as to show an intention not to make such provision. We have here an antenuptial will which neither provided for the petitioner nor mentioned her in such way as to show an intention not to provide for her; a subsequent marriage between the testator and the petitioner; his death and her survival. It is plain from its terms that section 1299 has application only to an antenuptial will, and does not contemplate wills made after marriage. Therefore, if the antenuptial will of October 22, 1912, stood alone, it would have been revoked upon the death of the husband according to the provisions of the section. Sanders v. Simcich, 65 Cal. 50, 2 Pac. 741; Corker v. Corker, 87 Cal. 643, 25 Pac. 922; In re Larsen's Estate, 18 S. D. 335, 100 N. W. 738 [5 Ann. Cas. 794].

[2, 3] 2. But the antenuptial will was republished by the codicil of July 18, 1913, in accordance with section 1287 of the Civil Code, and hence the will was taken out of the operation of section 1299. Section 1287 declares:

"The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil."

The appellant contends, however, that the said will was not republished for these reasons: First, that under section 1299, an antenuptial will cannot be republished at all, but that an entirely new will must be made after marriage; and second, that even if it can be republished by a postnuptial codicil, the instrument of July 18, 1913, was not a codicil.

Was it necessary to the republication of the will of October 22, 1913, that the testator should have made an entirely new will following the marriage? Upon this question the position of petitioner is that on the death of the testator the antenuptial will was ipso facto revoked. It is not claimed by petitioner that the antenuptial will, in and of itself, was invalid, or that it was revoked by the marriage alone. "On the contrary," it is admitted, "if the wife did not survive the testator the will not only was not revoked, but it was of full force and effect." But it is further contended that from the date of the marriage the will was liable to revocation, that when death came to the testator the will was thereby revoked, and, having ceased to be a will, it could not be revived or republished even by an otherwise valid postnuptial codicil. Discussing the meaning of section 1299 it is urged by petitioner that:

"If a testator desires to dispose of his property by will after marriage, he must make an entirely new will, which cannot embody by reference, or otherwise, a will made before marriage."

In other words, if the antenuptial will is invalid under section 1299, then it is invalid for every purpose so far as the testamentary claims of the widow are concerned. This contention cannot be supported. If the antenuptial will does not conform to section 1299, then as to that section such will is without force. But the husband may nevertheless make a postnuptial will providing for the wife, either by a will made originally after marriage, or, as here, by the republication of an antenuptial will as modified by a codicil. It does not follow that because an antenuptial will, standing alone, is rendered invalid by virtue of section 1299, it may not have testamentary force in the making of a postnuptial will.

[4] The postnuptial will—the antenuptial will as modified by the codicil—stands as if it were but one testamentary intention expressed in a single will made after marriage as of the date of the codicil,

"The codicil refers to the will, and operates as its republication, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil." Payne v. Payne, 18 Cal. 292.

See, also, In re Ladd, 94 Cal. 670, 30 Pac. 99; Estate of McCauley, 138 Cal. 432, 71 Pac. 512; Estate of Hayne, 165 Cal. 568, 133 Pac. 277, Ann. Cas. 1915A, 926.

It is clear, therefore, that if the testator had not continued the antenuptial will in force by the postnuptial codicil it would have stood revoked on the death of the testator. But by virtue of the postnuptial codicil the antenuptial will was republished and became a postnuptial will from the date of the codicil. There is nothing in section 1299 which precludes the republication of an antenuptial will in accordance with section 1287 of the Civil Code, nor is it to be held that under the latter section an antenuptial will may not, in contemplation of section 1299, be republished and become a part of a postnuptial will.

By reference, the testator republished the former will. Language more expressive of the purpose could hardly have been chosen. The testator said:

"I * * * hereby affirming my will bearing date Oct. 22nd, 1912, except as herein modified, do hereby declare the following as and to be a codicil to my said will being my last will and testament."

The terms of the codicil plainly indicate that the requirements of section 1287 have been studiously followed by the testator in order to make testamentary provision for petitioner in accordance with the antenuptial

promise. And by affirming the will, except "as herein modified," and declaring "the following as and to be a codicil to my said will," the antenuptial will does not come within the purview of section 1299.

[5] 3. The objections to the codicil are twofold: First, that it lacks in testamentary form; and, second, that apart from the question of its form, the instrument is, in substance, not a codicil. The first point that the codicil is lacking in form is thus expressed in the brief for the petitioner:

"It will be observed that the decedent has himself declared what portion of it is to be regarded as a codicil, for he does not declare it in its entirety to be a codicil, but limits his testamentary intention to that part beginning 'after paragraphs,' etc. The testator declares 'the following as and to be a codicil.' * * * The two distinct parts of the attempted codicil must be kept in view. The testator first uses the word 'affirming' and then declares the 'following to be a codicil to my said will, being my last will and testament.' The second part of the attempted codicil is that which he declares shall be his codicil, nothing more."

It is further declared that section 1287 of the Civil Code—

"calls for more than a codicil to republish the will. The codicil must refer to the previous will. That part of the writing declared by the testator to be the codicil does not refer to the previous will at all."

It is sufficient to say on this point that the entire instrument must be read and construed together and thus considered, the declaration that the instrument is a codicil refers to its entirety and affirms the will as modified by the provision for the petitioner.

"All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole. * * *" Civ. Code, § 1321.

The point made by the petitioner is therefore without merit. See Payne v. Payne, supra; Estate of McCauley, supra; In re Ladd, supra.

[6] 4. We will now consider the objections to the substance of the codicil. It is asserted in this behalf that the codicil is neither a will nor a codicil to a will in that it is not dispositive. It will be conceded that a codicil to be effective as such must be either dispositive or appointive. Page on Wills, p. 39, § 45. The codicil, in this case, is not appointive, but it is dispositive. The testator directs the executors to provide for his wife "from the remainder" of his estate an annual income of $3,000, payable monthly as long as she lives, in accordance with the antenuptial agreement. This is clearly the testamentary disposition of property. But it is urged that the codicil does not dispose of property; that it was merely "a direction to pay what he owed under the contract, which contract would have to be carried out whether or not he made a will." In other words, it is argued by petitioner that the codicil only provided for the payment of a "debt" under the antenuptial agreement.

The testator made three distinct and related promises in the antenuptial agreement: First, to give proper support to petitioner during coverture; second, to "cause her to be paid" $250 per month during the remainder of her life if they married and she survived him; and, third, to pay petitioner "one hundred dollars per month during the time that may elapse prior to marriage and continue during her life should he die before their marriage." The contingency touching their failure to marry was thus fully covered by the express promise to pay $100 per month as long as she lived. This promise would have been enforceable. But the first and third promises need not be further considered here.

It is to the second promise that the codicil refers. What was that promise? It was not a promise that the testator would pay petitioner anything. The promise was that he would "cause her to be paid" $250 per month if they married and she survived him. But the executory agreement did not provide in what manner the testator was to cause her to be paid the sum of $250 per month. The mode selected by him, after their marriage, was the making of testamentary provision for her.

The codicil did something more than provide for the payment of a "debt"—it gave property to the petitioner by directing his executors to provide from the remainder of his estate an income for her after his death if she survived him. This is the meaning and purpose of the codicil. It seems clear that when the testator made the promise to cause her to be paid he intended to do precisely what he did do through the medium of the codicil. The codicil furnishes informing evidence that it was executed on account of the marriage, and in order to perform the promise contained in the antenuptial agreement that he would cause her to be paid the annuity of $3,000 after his death. The codicil, and the promise in the antenuptial agreement to cause her to be paid, must be considered together as representing a common purpose to provide for her as his widow as long as she lived. Thus by the codicil the promise in the executory agreement was executed. In other words, the codicil had for its sole object the execution of the promise contained in the executory agreement. It is plainly apparent that with respect to the petitioner the intention of the testator from the date of the antenuptial agreement was to provide $100 per month during her lifetime, if they did not marry, and $250 per month as long as she lived if they did marry and she became his widow. It is made clear, both by the executory agreement and the codicil, that the testator intended that after his death, if his wife survived him, she should receive $250 per month, and no more, and this purpose is accomplished by the codicil when

read in connection with the clause in the antenuptial agreement that such sum "shall be in lieu of any and all claims against the property or estate of said Francis Cutting whether community or any other property or interest of said Francis Cutting."

[7] 5. It is further contended that by the codicil the testator attempts to abridge the rights of the petitioner under the antenuptial agreement by subordinating the annuity to paragraphs 2, 3, and 4 of the will, and that "this could not have been a lawful intention if its object, either express or implied, was to deny, or contravene, or obstruct some other person's clear legal right." But the promise to provide for the petitioner was executory and the testator was not restricted in the antenuptial agreement to any particular mode in causing her to be paid the annuity of $3,000.

In view of the conclusions herein, it is not necessary to pass on the question whether the antenuptial agreement is a "marriage contract" (Civ. Code, § 1299), or a "marriage settlement contract" (Civ. Code, §§ 178–181), or whether the said terms are identical in their meaning.

No other points require notice. The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

29 Cal. App. 414

HERRICK v. OAKLAND MOTOR CO. et al.

(Civ. 1585.)

(District Court of Appeal, First District, California. Jan. 21, 1916. Rehearing Denied by Supreme Court March 20, 1916.)

MUNICIPAL CORPORATIONS ⟸706(1)—CROSSING ACCIDENTS—PLEADING—NEGLIGENCE—SUFFICIENCY.

Where the complaint alleged that the plaintiff was proceeding at a reasonable rate of speed on the proper side of the street past an intersection, and that the defendants' automobile was proceeding in the opposite direction on the proper side of the street, but subsequently and without warning in a rapid curve crossed the street and struck the plaintiff, specific allegation of negligence was not necessary; the acts of the defendants in such case necessarily giving rise to an inference of negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⟸706(1).]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by Wainard G. Herrick against the Oakland Motor Company and others. Judgment for plaintiff, and defendants appeal on the judgment roll. Affirmed.

John Ralph Wilson, of San Francisco, for appellants. Sullivan & Sullivan and Theo J. Roche, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in plaintiff's favor in an action for damages arising out of a collision between the defendants' automobile and the plaintiffs' motorcycle. The appeal is upon the judgment roll, and the only question presented for determination is as to whether the complaint states a cause of action.

The complaint alleges that upon the 16th day of August, 1913, the plaintiff was riding and operating a motorcycle in a southerly direction along the westerly side of Van Ness avenue in the city and county of San Francisco, and that the defendants were operating an automobile in a northerly direction along the easterly side of Van Ness avenue; and that—

"when said plaintiff, riding and operating said motorcycle as aforesaid, reached a point on said southerly side of Van Ness avenue near the southwest corner of Van Ness avenue and Jackson street, said defendants, without any notice or warning of any kind to said plaintiff, with great speed and rapidity altered the course of said automobile, proceeding in a northerly direction along the easterly side of said Van Ness avenue, from said easterly side of said Van Ness avenue towards the westerly side of said Van Ness avenue, and drove said automobile into and against said plaintiff, riding and operating said motorcycle as aforesaid, then and there throwing him to the ground and inflicting upon him severe personal injuries."

It is the defendants' contention that the foregoing averments of the plaintiff's complaint do not state a case of actionable negligence, for the reason that it is nowhere set forth therein or elsewhere in said complaint that the alleged acts of defendants were negligently done, nor that they constituted such negligence on their part as to give rise to a cause of action. It is further contended by the appellants that the inference of negligence does not arise from the facts which are set forth in said complaint.

We are of the opinion that neither of these contentions is to be sustained. It is quite a well-settled rule of pleading in this state that in actions for negligence, while it is permissible to plead negligence in general terms, specifying the particular act or acts upon which the pleader relies as constituting such negligence, this rule applies only to cases where the acts as alleged might or might not have been negligently done, and has no necessary application to a case wherein the acts complained of and specifically set forth are such that the inference of negligence necessarily arises from their enumeration. Silveira v. Iverson, 125 Cal. 266, 269, 57 Pac. 996. Such, in our opinion, is the case at bar. The plaintiff was riding southward along the westerly side of Van Ness avenue and near the southerly side of Jackson street where he had a right to be and to ride. The defendants, operating an automobile, were proceeding northerly along the easterly side of Van Ness avenue. Suddenly, without warning, the course of their machine is altered, and it is driven with high speed and without any warning or notice across said avenue to the westerly side thereof, near the southerly side of Jackson street, where the plaintiff

rightfully was, and there struck and injured him.

The inference of negligence from the foregoing facts is logical and irresistible. O'Connor v. United Railroads, 168 Cal. 43, 47, 141 Pac. 809. It was not necessary therefore to aver that they were negligently done.

Judgment affirmed.

29 Cal. App. 417

SALFIELD v. COHN (Civ. 1593.)

(District Court of Appeal, First District, California. Jan. 21, 1916.)

CONTRACTS ⊂=350(1)—SUFFICIENCY TO SUPPORT VERDICT FOR FINDING.

In an action by an architect to recover payment for plans furnished the defendant, evidence *held* sufficient to support a verdict for the plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1819, 1822, 1823; Dec. Dig. ⊂= 350(1).]

Appeal from Superior Court, City and County of San Francisco; G. E. Crothers, Judge.

Action by David Salfield against Herman Cohn. From a judgment for the plaintiff and from an order denying a new trial, the defendant appeals. Affirmed.

J. P. Sweeney, of San Francisco, for appellant. Tum Suden & Tum Suden, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of plaintiff and from an order denying a new trial. The only question involved is the question as to whether the evidence sustains the findings and judgment of the court.

Mr. Sweeney (for appellant): That is the only question.

The Court: This was an action brought by an architect to recover certain sums alleged to be due for a number of plans which he had drawn for the defendant, who was the owner of a lot upon which, apparently, he desired to build a house. Upon the trial of the case, the two chief witnesses presented were the plaintiff and the defendant; and the question to which their testimony was directed was as to the oral agreements which had been made between them with reference to these several plans, and the understandings at the time this, that, or the other plan was found to be insufficient or impracticable for the uses of the defendant. The testimony is radically conflicting as to what the agreement was between the parties. The court apparently saw fit to adopt the version which the plaintiff gave of the understanding between the parties, and based its findings and judgment upon its acceptance of the plaintiff's testimony. Will it not be conceded by you that the plaintiff's testimony went to the extent of supporting his claim for the amount which he claimed to be due in case the court believed it?

Mr. Sweeney: Yes, in a way. If the court had believed his testimony, it should have given him a great many thousand dollars more than it did; but it is the contention of the defendant that he always told the plaintiff that he wanted plans for a $25,000 building or a $25,500 building. There is absolutely no conflict upon that pivotal point throughout the entire case.

The Court: We think that the record discloses that the plaintiff testified that, at the time these several plans were drawn and examined, there were various directions given him by the defendant as to the kind of plans he wished, and as to the cost of the building which was to be constructed. We recall, for example, that when the second set of plans was prepared—which showed a building worth something like $26,000 or $27,000—the defendant thereupon directed the plaintiff to make certain additions and changes in the plans, which brought the cost up to something like $35,000; and that he prepared a set of plans in accordance with the suggestions of the defendant; and that after they were prepared the defendant found that he was unable to borrow the money to erect the building according to this plan, and thereupon other plans were directed to be drawn.

Mr. Sweeney: Yes.

The Court: In other words, isn't this the situation, that repeated plans were drawn by the plaintiff at the request of the defendant, and repeatedly modified because the defendant did not feel that he had money enough to meet the requirements of the plans as prepared by the plaintiff?

Mr. Sweeney: Yes.

The Court: The plans were prepared in the first instance at the suggestion of the defendant?

Mr. Sweeney: Yes.

The Court: And they were modified from time to time at the suggestion of the defendant?

Mr. Sweeney: Yes.

The Court: And certain features of the building were eliminated so as to bring the cost within the means of the defendant?

Mr. Sweeney: Yes, but the first set of plans were a $50,000, the second $35,000, and the third was I think the $19,000, which set did not cover the entire lot, and the fourth set was the $25,500, which is the set of plans which the defendant should be mulcted for and the only set.

The Court: That, of course, is only upon the theory that the court did not in all respects believe the testimony of the plaintiff, because the testimony of the plaintiff as we read it is to the effect that in the preparation of all of these plans he was acting under the direction of the defendant, and that he was changing his plans from time to time to meet the latter's views.

Mr. Sweeney: If the court gets that idea out of the case, well and good.

The Court: We are satisfied from the facts of the case and the statement of the facts appearing upon this discussion, and for the reasons stated therein, that the judgment and order appealed from should be affirmed, and that will be the order.

29 Cal. App. 427

RICHMOND CONST. CO. v. GROWNEY et al. (Civ. 1588.)

(District Court of Appeal, First District, California. Jan. 21, 1916.)

1. MUNICIPAL CORPORATIONS ⟸293(1)—PUBLIC IMPROVEMENTS—PROCEEDINGS—REQUISITES.

The resolution of intention to do proposed work is an essential prerequisite to the jurisdiction of the municipality to inaugurate the work, and if it is deficient it will not support the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 773; Dec. Dig. ⟸293(1).]

2. MUNICIPAL CORPORATIONS ⟸293(2)—PUBLIC IMPROVEMENTS — PROCEEDINGS — REQUISITES.

The resolution of intention to do work of public improvement need not in detail describe the work to be done, but may incorporate such description by reference to plans and specifications contemporaneously created and adopted.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. ⟸293(2).]

3. MUNICIPAL CORPORATIONS ⟸567(1)—PUBLIC IMPROVEMENTS—PROCEEDINGS—ACTIONS —PLEADING—SUFFICIENCY.

A complaint, alleging the adoption of a resolution of intention resolving that gutters be three feet wide, grouted, constructed on both sides of a roadway, and that wooden bridges four feet by five feet be constructed over gutters at each end of each crosswalk space, is good, in the absence of special demurrer for uncertainty and ambiguity, and will support a judgment foreclosing the assessment lien.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1276; Dec. Dig. ⟸567(1).]

4. PLEADING ⟸34(3)—PRESUMPTIONS.

In the absence of proof to the contrary, it will be presumed that paragraphs of a complaint containing allegations making reference to other portions of the complaint refer only to prior sections, and not to subsequent ones.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 69; Dec. Dig. ⟸34(3).]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by the Richmond Construction Company against Sam Growney and others. From a judgment on Growney's failure to answer after his demurrer to the complaint was overruled, he appeals on the judgment roll. Affirmed.

L. G. Harrier, of Vallejo, for appellant. Johnson & Shaw, of Oakland, for respondent.

PER CURIAM. This is an action to foreclose a street assessment lien, the complaint in the case alleging that the city trustees of the city of Richmond by a resolution of intention had determined to do certain street work upon a designated street, consisting of the grading of that street from curb to curb, and the construction of gutters on either side of the street and bridges at the crosswalks. The defendant Growney demurred to the complaint only upon the ground of the insufficiency of the facts stated to constitute a cause of action. The demurrer was overruled. The defendant failing to answer, judgment was rendered against him, and the appeal is upon the judgment roll alone.

The point made in the lower court and made here in support of the demurrer is that the construction of the gutters and of the bridges was a material part of the whole work proposed to be done under the resolution of intention, and that the description therein of the work to be done upon the gutters and upon the bridges was inadequate and insufficient to give notice to the property owners affected by the resolution of intention, or to insure fair competition among bidders for the work. The complaint is assailed upon the ground that it does not allege that the resolution of intention designated the material of which the gutters were to be constructed, nor the kind of wood to be used in the construction of the bridges. In this behalf the complaint alleges the passage of a resolution of intention, wherein it was resolved:

"That gutters three feet wide, grouted, be constructed on both sides of the roadway, * * * and that wooden bridges four feet by five feet be constructed over the gutters at each end of each crosswalk space. * * *"

[1, 2] It is insisted on behalf of appellant that the word "grouted" does not convey any idea of the kind of material to be used in the construction of the gutters, and that the kind of wood to be used in the bridges should have been specified; that is to say, whether they were to be constructed of redwood, pine or oak. The resolution of intention to do the proposed work was an essential prerequisite to the jurisdiction of the governing body of the municipality to inaugurate such work, and, consequently, if it was deficient in its description of a material part of the work to be done thereunder, it would not suffice to support a cause of action for the foreclosure of the assessment lien. The law, however, does not require that the resolution of intention shall in terms describe in detail the work to be done thereunder, but provides that the resolution may give that description by reference to plans and specifications contemporaneously created and adopted. It is the contention of the appellant that the allegation of the complaint purporting to describe the proposed work upon the gutters and bridges is not aided by an allegation that the resolution of intention referred to plans and specifications; but, to the contrary, it is claimed the complaint shows affirmatively and unequivocally that no plans and specifications of the proposed work, or any part

thereof, were adopted until after the passage of the resolution of intention.

Mr. Harrier (counsel for appellant): My understanding of the situation is that, if the resolution of intention refers to plans and specifications which are already on file, that according to very recent cases (Chase v. Trout, 146 Cal. 350, 367, 80 Pac. 81; McQuiddy v. Worswick, etc., 160 Cal. 9, 14, 116 Pac. 67) is sufficient, and would make a perfectly good resolution of intention.

[3] The Court: Well, that being so, it may be conceded that the gutters and bridges constituted a material part of the whole work to be done; and assuming for argument sake that the allegation of the complaint standing alone, which purported to describe the work to be done upon the gutters and bridges, was deficient in the particulars previously stated, still we are of the opinion that, in the absence of a special demurrer for uncertainty and ambiguity, the complaint as a whole states a cause of action which will support the judgment. Paragraph 7 of the complaint, as set out on page 5 of the transcript, alleges that:

"Before passing the resolution for the construction of said work or improvement, plans and specifications and careful estimates of the costs and expenses thereof had been required by it to be furnished to said board or the city engineer of said city, and special specifications therefor had been furnished by him."

That allegation, we think, must be construed to refer to the resolution of intention referred to in paragraph 4 of the complaint, and, if that be true, then it follows that the complaint does allege that the resolution of intention did refer to plans and specifications; and said allegation may be further construed to mean that such plans and specifications were on file at the time of the passage of the resolution of intention.

Mr. Harrier: I do not think that construction possible, because the next paragraph mentions a resolution to do the work which was passed September 16, 1907. My idea is that there is a difference between a resolution of intention and a resolution for the construction of the work. The resolution of intention is not the resolution for the construction of the work. That is a different resolution.

[4] The Court: It is true paragraph 8 of the complaint alleges that:

"Afterward, to wit, on the 16th day of September, 1907, * * * the said board of trustees passed a resolution * * * ordering and providing for said street work to be done. * * *"

But the resolution referred to in paragraph 7 of the complaint is neither expressly nor by necessary implication related to the resolution referred to in paragraph 8. Moreover, the latter paragraph expressly alleges that the resolution referred to therein was passed after the resolution referred to in paragraph 7. Chronologically considered, the allegations of paragraph 7 must be read as relating solely to the matters alleged in the preceding paragraphs of the complaint, and, the complaint not having theretofore referred to any resolution other than the resolution of intention, we are of the opinion that the allegations of paragraph 7 should be construed as having reference to the original resolution of intention.

Mr. Harrier: I see that it is possible for it to be construed that previous to the passage of the resolution of intention these plans and specifications may have been adopted.

The Court: The complaint may be ambiguous and uncertain in the particulars immediately under discussion; but, in the absence of a special demurrer, we feel constrained to construe the complaint as stating a cause of action sufficient to support the judgment.

The judgment appealed from is affirmed.

(29 Cal. App. 463)

BULLOCK v. BULLOCK. (Civ. 1480.)

(District Court of Appeal, Third District, California. Jan. 24, 1916.)

APPEAL AND ERROR ⟸773(5)—DISPOSITION—REVERSAL FOR FAILURE TO FILE BRIEFS.

On appeal, where respondent files no brief in the Supreme Court or the Court of Appeals, and does not appear at oral argument, having been regularly served with notice that appellant would move for an order reversing the order appealed from without consideration of the cause on the ground that respondent had not filed his points and authorities, the order appealed from will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108, 3110; Dec. Dig. ⟸773(5).]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Joseph J. Bullock against May E. Bullock. From an order, defendant appeals. Reversed.

Stanislaus A. Riley, of San Francisco, for appellant. C. W. Eastin, of San Francisco, for respondent.

BURNETT, J. Appellant filed her brief in the Supreme Court on the 31st day of August, 1914. The cause was thereafter transferred to this court, and came on regularly for hearing on the 19th day of this month. Respondent has never filed any brief, either in the Supreme or this court, nor did he appear at the oral argument. He was regularly served with notice that on said 19th day of January, 1916, appellant would move this court "for an order reversing the order appealed from without consideration of the cause upon its merits * * * upon the ground that respondent has not filed his points and authorities herein." As stated, there was no appearance by respondent.

The order appealed from is therefore reversed on the authority of Richter v. Fresno Canal & Irrigation Co., 101 Cal. 582, 36 Pac.

96; Davis v. Hart, 103 Cal. 530, 37 Pac. 486; Kelly v. Bradbury, 104 Cal. 237, 37 Pac. 872.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 419

PEOPLE v. COX. (Cr. 616.)

(District Court of Appeal, First District, California. Jan. 21, 1916.)

1. CRIMINAL LAW ⟸351(5) — EVIDENCE — FALSE NAME.

The fact that accused assumed a false name justifies the jury in inferring that it was to conceal his identity, and tends to show a consciousness of guilt, and thereby strengthens any inference of guilt arising from other evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 778; Dec. Dig. ⟸351(5).]

2. LARCENY ⟸65—EVIDENCE—SUFFICIENCY.

Evidence *held* sufficient to sustain a conviction of defendant, in whose possession a stolen horse was found, of grand larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 160; Dec. Dig. ⟸65.]

3. CRIMINAL LAW ⟸720(8) — ARGUMENT OF PROSECUTOR—COMMENT ON EVIDENCE.

Where accused had introduced without restriction subpœnas for several witnesses in his behalf, among them one for the person from whom he claimed to have bought the stolen horse, which were returned not found, the district attorney could properly argue therefrom that the seller of the horse was a mythical person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. ⟸720(8).]

4. CRIMINAL LAW ⟸720(8) — ARGUMENT OF PROSECUTOR—COMMENT ON EVIDENCE.

Where defendant had brought out in evidence his refusal to return the money paid him for the stolen property, it was not improper for the district attorney to comment on that fact in his argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. ⟸720(8).]

5. CRIMINAL LAW ⟸730(13)—ARGUMENT OF PROSECUTOR—CURE BY COURT.

Improper argument by the district attorney in urging jury to consider that defendant had defrauded the person to whom he sold the stolen horse was cured where the court checked the argument at its inception and admonished the jury not to consider that fact in determining defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. ⟸730(13).]

6. CRIMINAL LAW ⟸834(2) — TRIAL — REQUESTED INSTRUCTIONS—MODIFICATION.

Accused is not entitled to have his requested instructions given as drawn, and cannot complain of their modification where the modified instructions correctly stated the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. ⟸834(2).]

7. CRIMINAL LAW ⟸829(1) — TRIAL — REQUESTED INSTRUCTIONS — REPETITION OF GIVEN CHARGE.

It is not error to refuse requested instructions which were covered by the charge of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⟸829(1).]

8. CRIMINAL LAW ⟸809 — REQUESTED INSTRUCTIONS—UNCERTAINTY.

Instructions requested by accused which were uncertain in whole or in part in their statement of the law were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961–1967; Dec. Dig. ⟸809.]

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Merton Cox was convicted of grand larceny, and he appeals. Affirmed.

Lucas F. Smith and Lucas F. Smith, Jr., both of Santa Cruz, for appellant. U. S. Webb, Atty. Gen., Frank L. Guerena, Deputy Atty. Gen., and George W. Smith, Dist. Atty., of Santa Cruz, for the People.

PER CURIAM. As we understand this case from an inspection of the record and the briefs, the facts are substantially these: The defendant was charged with the crime of grand larceny. The alleged subject-matter of the larceny was a horse charged in the information to have been stolen in the city and county of San Francisco, and driven through San Mateo and other counties into the county of Santa Cruz. The defendant was found in the latter county in the possession of the horse. He there sold the horse under the name of J. Geary. He requested that the check for the payment of the horse be made out in that name, gave a receipt in that name, and when he cashed the check he indorsed the name of J. Geary thereon. When arrested he was asked by the party making the arrest if his name was J. Geary, and he said it was. It is an admitted fact in the case that the true name of the defendant is Merton Cox. There is some evidence in the record as to his conduct and his statements on the night that he arrived in San Jose, and on another night when he arrived at Rockaway Beach in San Mateo county, and that when asked whence he had come and where he was going he said he had been traveling over the greater part of the state for the greater part of six months; that he had had the horse shod in Oakland, that he had come down by the coast route in a certain number of hours. When he was in jail the party to whom he had sold the horse visited him, and asked him to return the $100 which he paid defendant for the horse, and the defendant then said:

"Well, you are entitled to the money, but I won't give you a written order for the money."

The defendant claimed that he bought the horse from a man by the name of John O'Brien in San Francisco; that he had known O'Brien since 1902; that O'Brien had worked for him at odd times since 1902; but that he did not know where he lived in San Francisco. Foreign subpœnas were issued in the case at the request of the defendant for O'Brien and several other witnesses. The return upon the foreign subpœnas showed that

none of the witnesses, and particularly John O'Brien, the person from whom the defendant claimed to have bought the horse, could be found, and during the course of the trial counsel for the defendant offered these subpœnas and the return thereof in evidence. Counsel for the defendant claims that there is no evidence showing that he committed the larceny or participated therein, save and except the recent possession of the stolen property.

Mr. Lucas F. Smith (counsel for defendant): That is exactly it.

The Court: You don't make the point that the evidence is insufficient to show that the horse was, in fact, stolen by somebody?

Mr. Smith: We concede it is sufficient in that particular.

The Court: It is claimed, in addition to the point of the insufficiency of the evidence connecting the defendant with the commission of the crime, that the district attorney was guilty of misconduct in commenting upon the fact that the return upon one of the foreign subpœnas showed that O'Brien could not be found, and in stating that that was some evidence of the fact that John O'Brien was a mythical person. The district attorney is also charged with misconduct in commenting upon the refusal of the defendant to return the money which he received from the sale of the horse, and in attempting to argue that the defendant had defrauded the purchaser. Other points are that the court erred in modifying certain requested instructions, and erred in the charge given of its own motion. Have we stated in substance all the facts in the case, and are those all the points made in support of the appeal?

Mr. Smith: Yes, your honor.

By the Court (after argument): The court is of the opinion that there is no merit in the appeal.

[1] The jury were not compelled to accept the defendant's explanation of why he assumed a false name when traveling with the horse and at the time of the sale and when he was arrested. They were justified in finding from all of the evidence adduced in the case that, as the verdict implies, his assumption of a false name was for the purpose of concealing his identity and thereby warding off suspicion; and, when a person suspected of and charged with crime resorts to deception and falsehood, that is a circumstance which, like flight and concealment, tends to show a consciousness of guilt, and thereby strengthen any inference of guilt arising from other established facts. People v. Cole, 141 Cal. 88, 74 Pac. 547.

[2] The defendant's story concerning the circumstances under which he claimed to have purchased the horse was far from being satisfactory; and it is of peculiar significance that, although he claimed to have been intimately acquainted with the Mr. O'Brien from whom he said he purchased the horse since the year 1902, and had employed O'Brien on and off from that time until the year 1915, yet he did not know where O'Brien resided. We are satisfied that the circumstances above narrated relative to the defendant's sale of the horse, the manner of his possession, and his conduct when arrested, considered in conjunction with the defendant's recent possession of the stolen property, are sufficient to warrant and support the verdict. People v. Vidal, 121 Cal. 221, 53 Pac. 558.

[3, 4] The foreign subpœnas and the returns thereon having been offered and received in evidence without limitation upon their purpose, the district attorney was well within his rights in arguing to the jury the fact that the return showed that John O'Brien could not be found should be considered in connection with other evidence in determining whether or not O'Brien was a person in being, or merely a creature of the defendant's imagination. Inasmuch as counsel for the defendant developed in evidence the fact that the defendant had refused to return the money which he had received upon the sale of the horse, the district attorney was justified in assuming that he was privileged, in his argument to the jury, to comment upon that phase of the case.

[5] He did, however, overstep the bounds of legitimate argument when he attempted to urge upon the jury a consideration of the fact that the defendant had defrauded the purchaser of the horse. But this misconduct was checked almost at its inception by the intervention of the trial court, coupled with an admonition to the jury that such fact must not be considered in determining the guilt or innocence of the defendant of the crime of larceny. This, we think, sufficed in the present case to protect the defendant from any prejudice which otherwise would have resulted.

[6] Our investigation of the record discloses that many of the numerous instructions requested on behalf of the defendant were properly modified and then given to the jury. The trial court was not bound to give any particular instruction in the language requested by the defendant; and, if the instruction, as modified and then given, correctly states the law, the defendant cannot be heard to complain.

[7, 8] Other instructions were properly refused, either because they were covered by the charge of the court, or were uncertain in whole or in part in their statement of the law. We are satisfied that the charge of the court in its entirety clearly and correctly stated the law of the case.

The judgment and order appealed from are affirmed.

(29 Cal. App. 347)

GRENFELL LUMBER CO. v. PECK.

(Civ. 1424.)

(District Court of Appeal, Third District, California. Jan. 10, 1916. Rehearing Denied by Supreme Court March 9, 1916.)

1. PLEADING ⟸248(16) — COMPLAINT — AMENDMENT—MECHANICS' LIENS.

Code Civ. Proc. § 1183, provides that persons performing labor or furnishing materials for the construction of any building shall have a lien on the property for the value of the labor done or materials furnished at the instance of the owner or any other person acting by his authority or under him as a contractor or otherwise. Section 1192 provides that buildings mentioned in section 1183 shall be held to have been constructed and the labor performed thereon and the materials used therein furnished at the instance of the owner, and that his interest shall be subject to any lien filed under that chapter unless within 10 days after he shall obtain knowledge of the construction he shall give notice that he will not be responsible, by posting a notice in writing. In an action to foreclose a lien the complaint was drawn on the theory that plaintiff was entitled to a lien under section 1183, but at the trial plaintiff amended the complaint by adding an allegation that defendant obtained knowledge of the construction of the building at the time it was commenced. *Held* that, whether or not this stated a new cause of action barred by section 1190, requiring actions to foreclose liens to be brought within 90 days, it did not change the cause of action stated in the complaint as originally drafted, and the complaint stated a cause of action for the lien authorized by section 1183.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. ⟸248(16).]

2. MECHANICS' LIENS ⟸290(2) — SUITS TO ENFORCE—FINDINGS.

In an action to foreclose a materialman's lien, findings that plaintiff furnished to defendant, on the order of P. and at his special instance and request, and P. bought, certain lumber, that P. was the duly authorized and acting agent of defendant, that the lumber was bought and ordered by him acting for and as agent for defendant, and that the lumber was furnished by plaintiff to defendant to be used and was used in the erection of a barn, supported a judgment for plaintiff under Code Civ. Proc. § 1183.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 592, 593; Dec. Dig. ⟸290(2).]

3. MECHANICS' LIENS ⟸281(3)—SUITS TO ENFORCE—SUFFICIENCY OF EVIDENCE.

In an action to foreclose a lien for lumber furnished defendant's tenant and used in the construction of a barn, evidence *held* sufficient to support findings that defendant's son, if not actually authorized by defendant to act for him in the matter, was ostensibly defendant's agent, or had been sufficiently held out as his agent to warrant plaintiff in so regarding him and dealing with him, and that the son gave plaintiff general instructions to let the tenant have such lumber as he might require.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 570; Dec. Dig. ⟸281(3).]

4. MECHANICS' LIENS ⟸73(1)—LIEN FOR MATERIALS—RIGHT TO LIEN.

Where defendant's agent instructed plaintiff, without restriction, condition, or qualification, to let defendant's tenant have lumber necessary for the construction of a barn, and lumber so furnished the tenant was used in the erection of the barn, it did not defeat defendant's liability that the tenant had been instructed by defendant and his agent to use lumber from an old building for the barn.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 87; Dec. Dig. ⟸73(1).]

Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by the Grenfell Lumber Company against James F. Peck. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry C. McPike, of Oakland, Ernest Weyand, of Colusa, and Frank R. Wehe, of San Francisco, for appellant. Thomas Rutledge and Alva A. King, both of Colusa, for respondent.

HART, J. The court below rendered and caused to be entered judgment foreclosing a materialman's lien on the real property described in the complaint for the sum of $445.05 for materials furnished by the plaintiff for use in the construction of a barn on said real property, which property was owned by the defendant. This appeal is by the defendant from said judgment, and is supported by a bill of exceptions. The general point urged against the judgment is that the findings upon which it is predicated are not supported by the evidence.

The theory upon which the plaintiff originally drafted its complaint was that it was entitled to the benefit of the lien provided for by section 1183 of the Code of Civil Procedure, which, among other things, provides that mechanics, materialmen, etc., and all persons and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, wharf, bridge, etc., shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done or materials furnished, whether at the instance of the owner, or of any other person acting by his authority or under him, as a contractor or otherwise. Upon the day set for the trial of the cause, and upon the opening thereof, counsel for the plaintiff asked and was granted leave by the court to amend the complaint by adding thereto the following:

"That said defendant, James F. Peck, had and obtained knowledge of the construction of said barn on said premises at the time the construction of the same was commenced."

This amendment is based upon section 1192 of the Code of Civil Procedure, which provides that, where there is constructed any of the buildings mentioned in 1183, supra, upon any lands with the knowledge of the owner of such lands, or of the person having or claiming any interest therein, such building shall be held to have been constructed and the labor performed thereon and the materials used therein furnished at the instance of such owner or person having or claiming any interest therein—

"and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming any interest therein shall, within ten days after he shall obtain knowledge of the construction, alteration, repair, or work or labor, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon the said land * * * or upon the building or other improvements situated thereon. * * *"

[1, 2] The point is made that by the amendment thus allowed a new cause of action was stated, and that said new cause is barred by the terms of section 1190 of the Code of Civil Procedure. But, whether this be true or not —whether, in other words, a resort to or the pleading of another and different lien from that originally relied upon would amount, strictly speaking, to the introduction of a new cause of action, where the ultimate object of the action in either case is precisely the same or for precisely the same relief as to the same transaction—it is certainly true that the provisions of said section 1190 affect the remedial rights of lien claimants. The point is an important one, but we do not feel compelled to consider and decide it here. There is no claim, nor can there be, that the cause of action stated in the complaint as it was originally drafted and filed was changed by the amendment. The complaint therefore states a cause of action for the lien authorized by section 1183 of the Code of Civil Procedure, and we have been persuaded, after a careful examination of the record, that the judgment is supported by the findings as to the lien authorized by said section. And in the outset we may further say that we are of the opinion that the findings so referred to derive sufficient support from the proofs.

The court, among other facts, found:

That "between the 31st day of October, 1911, and the 12th day of January, 1912, inclusive, the plaintiff furnished to the defendant, on the order of C. M. Peck, and at his special instance and request, and said C. M. Peck bought all that certain lumber, all for the use and benefit of said defendant, of the total value of $445.-05, as hereinafter set out; that the said C. M. Peck was then and there and for a long time prior thereto the duly authorized and acting agent of said defendant, and said lumber was so bought and ordered by said C. M. Peck, acting for and as the agent for and in behalf of said defendant, James F. Peck, * * * and that said lumber was so furnished by said plaintiff to defendant to be used, and the same was actually used, by him in the erection of a structure, to wit, a barn, upon a certain tract of land then and now owned by him," describing said land.

[3] These facts were admitted at the trial: That C. M. Peck, a son of the defendant, in the year 1909 purchased the land described in the complaint and upon which the barn in question was erected; that, although the money paid by C. M. Peck for the land was furnished by the defendant, who resided in the city of San Francisco, the former took the title deed in his own name; that the defendant was the real owner of the land, and C. M. Peck held title thereto as trustee for the benefit of the defendant; that C. M. Peck, after purchasing the land, managed and personally controlled it and all the business connected therewith; that C. M. Peck left Colusa in the month of November, 1910, and in the month of August, 1911, went to Lexington, Va., to attend a law school; that one M. V. Santos became a tenant of the land by virtue of the terms of a certain lease; and that thereafter, and on the 10th day of February, 1910, C. M. Peck conveyed the premises to the defendant by deed duly recorded in the office of the county recorder of Colusa county on the date of its execution. It was further admitted that C. M. Peck had previously to the transaction from which this controversy arises purchased lumber from the plaintiff and paid for the same by means of a draft drawn by him upon the defendant. It was also admitted that all the lumber or materials furnished for the ranch or land described in the complaint while the same was standing in the name of C. M. Peck, and subsequently, was paid for by the defendant; that the lumber or material referred to in the complaint and described in the lien filed by the plaintiff was actually used in the erection of the barn on the land described in the complaint.

As to the controverted facts Le Roy Grenfell, secretary of the plaintiff corporation, testified:

"Between the year 1909 and the selling of the lumber referred to in the complaint C. M. Peck had come to the yard and brought parties with him, and gave me verbal orders, and also to men in the yard. I had an oral order at all times. One bill was sent to C. M. Peck in the East, and he sent me a draft on defendant. * * * I know Santos. He has been residing on this land. Mr. C. M. Peck brought Santos into the office and instructed me to deliver lumber to Santos for the ranch at any time he should call for it. The first bill was paid for; the last has not yet been paid for. The first bill was paid by a draft on the defendant. In connection with this last bill, I delivered the lumber referred to in the complaint to Mr. Santos. The lumber was delivered on the orders, as in all previous cases, orders received from C. M. Peck. All lumber ordered by Mr. Santos was delivered to Mr. Santos on C. M. Peck's orders. Mr. C. M. Peck visited the office and left these orders there—to deliver to Mr. Santos at any time that he called for lumber, and charge it to the ranch account. That was the final orders. * * * During this time Mr. Santos was in possession of the premises as tenant. Santos was present with C. M. Peck when directions were given to deliver the lumber to Santos. * * * Mr. Peck did not say anything as to how this lumber would be paid for, or who would pay for it. I presumed it would be treated as previous bills. * * * All bills were charged to 'C. M. Peck, ranch account.' C. M. Peck had some other accounts there, but this particular lumber was to be charged to the ranch account. At that time I had learned and knew of the transfer of the ranch from C. M. Peck to the defendant. Had no conversation with C. M. Peck in regard to that matter. There was a bill paid by James F. Peck after the ranch was transferred. Mr. C. M. Peck was personally in charge of the ranch at that time [the time the orders above mentioned were given]. I had very little to do with James F. Peck. I met him once. * * * At the time

these orders were given C. M. Peck was residing in Colusa, but this lumber was not furnished until after C. M. Peck had left here for the East, but it was furnished upon the order that he had given before he left for the East. Q. Now was there any change in the control or management of the ranch that you know of actually subsequent to the time C. M. Peck made his deed to James F. Peck? A. There was not. When Santos came for the lumber, he stated that it was to build a barn on the ranch. He visited the office, gave me the size of the barn, and wanted to know what it would cost. I figured it up for him, and gave him the figures; also wrote a letter to defendant, which Santos signed, and Santos received the answer. I did not."

The letter written by the witness and addressed to the defendant at San Francisco read as follows:

"Mr. Santos wishes to explain the following regarding a barn on the ranch."

Here follows a description of the barn proposed to be erected, the dimensions, kind of roof, and cost of the material necessary to its construction. The letter then continued:

"He would like to hear from you by early mail if you will allow him the barn, as he has considerable hay out, and would like to commence building the barn at once, to get the hay in before it rains."

Here it may parenthetically be explained that it was shown by the testimony of Santos that the defendant, in reply to a letter previously written by the former to the latter, addressed the following letter to Santos, the same being dated at San Francisco September 25, 1911, and to which the letter above quoted was an answer:

"Yours of the 23d received. Before my son went East he said something about building a barn. I think he said he was to purchase the material and you were to build the barn. Please write me what the material would cost and I will see what can be done. If you write as soon as you receive this I will get it next Saturday."

The witness Grenfell, continuing, testified:

"After I had written this letter [the one first above quoted] Santos came to the lumber company and got the lumber for this barn."

A. H. Walworth, yard manager or foreman of the plaintiff when the transactions involved here were had, testified:

"I remember that C. M. Peck and Santos were in the yard of the lumber company when they discussed the question of furnishing lumber to M. V. Santos. Santos drove up there after some lumber and while Mr. Grenfell came out with the order to me Mr. Peck came along and said: 'Let Mr. Santos have anything he wants and charge it to the ranch.' That was in 1911 or 1910, I don't just remember. Santos got lumber to put up a barn out there. Prior to that time a great many posts and fence lumber of various kinds. I remember the circumstance of Santos coming to the lumber yard for lumber for the barn. When he first started Santos hauled out a few loads and then Mr. Green hauled out the bulk, and a while afterwards Mr. Santos came back and hauled several more loads."

Santos, testifying for the plaintiff, said that Mr. C. M. Peck told Mr. Grenfell: "Let him have the posts and lumber for the place." He further said that Mr. C. M. Peck did not "say anything to Mr. Grenfell about getting any other lumber." It appears that Santos received a letter from C. M. Peck, dated at Lexington, Va., October 24, 1911, which read as follows:

"In regard to the lumber, I wish to state that I have bought it, and also all the iron that is in the little shed in front of the house where the lumber is. Now, I want you to haul it at once, and get it all down there on the ranch or the mound before the high water comes. Don't neglect this at all. You can then build the barn as we agreed. I will furnish the nails for the same. Now, don't put this off one day, but get at it, and get the barn up before the winter sets in. I shall insist that you attend to this feature at once, as it is getting late."

Here it should be explained that the lumber and iron which C. M. Peck, in the foregoing letter spoke of having bought were from an old warehouse, which had stood on other land of which said Peck had once been in control for a corporation, and which had been destroyed for practical uses by the force of winter storms and floods.

Santos, continuing his testimony, said:

"I remember the building of a barn down there. I got the lumber just spoken of [posts, etc.] quite a little while before the barn was built. I never came after any more lumber but at the time I got the letter [above quoted] from C. M. Peck to build this barn. I had some conversation with Mr. C. M. Peck before he went back East about building this barn on this place, He told me he was going down to the city and see that C. C. I. Company and see about that lumber on that knoll [the lumber from the old warehouse above mentioned]. I never heard anything about it for some time, but later in the fall Mr. Peck wrote me a letter [the one last above quoted herein] from Virginia. * * * I showed it [the last-mentioned letter] to Mr. Grenfell, and I told him to write Mr. Peck [the defendant]. * * * We wrote to Mr. Peck [defendant] about the cost of the building, you see, and then after that I waited, I guess about a week, or more than a week, for the letter. And the time the letter came back I took it to Mr. Grenfell, and he told me I can have the lumber. * * * All the dealings I had in regard to the ranch was with Mr. C. M. Peck—young Mr. Peck."

The above synopsis of the testimony presented by the plaintiff is sufficient to show that the court was warranted in finding that C. M. Peck, in the transaction with the plaintiff, was acting for and as the agent, either actual or ostensible, of the defendant. To recapitulate: C. M. Peck had been in personal charge of the ranch, and had during that time bought lumber from the plaintiff and had the same charged to "the ranch account." After his departure for the East, having received a bill from the plaintiff for lumber used on the ranch he drew a draft on the defendant for the payment of the bill, and sent the same to plaintiff, and it was subsequently honored by payment by the defendant. C. M. Peck, as seen, wrote to Santos from Lexington, Va., directing him to proceed at once to the erection of the barn. The defendant's letters, inquiring of Santos as to the arrangements between the latter and C. M. Peck with regard to the building of a barn on the ranch in effect recognized the au-

thority of C. M. Peck to act for the defendant in the matter of the construction of said barn.

As to the arrangement for the procuring of the material from which the barn was to be constructed, the positive testimony of the secretary of the plaintiff, corroborated by Walworth, the plaintiff's yard foreman, is to the effect that C. M. Peck brought Santos to the office, and the lumber yard of the company and unqualifiedly instructed them to let Santos have such lumber as he might find necessary to be used upon the ranch, and that (so Grenfell testified) it was upon the instructions so given by C. M. Peck that Santos was furnished with the lumber with which the barn was built. This testimony, we repeat, is sufficient to support the finding that C. M. Peck, if not actually authorized by the defendant to act for him in the matter of the building of the barn and in directing the plaintiff to deliver to Santos the lumber necessary therefor, was, notwithstanding, ostensibly the agent of the defendant, or by the latter's acts and conduct had been sufficiently held out to be his agent in the business concerned here to warrant the plaintiff in so regarding him and dealing with him accordingly (Robinson v. American Fish, etc., Co., 17 Cal. App. 212, 219, 119 Pac. 388, and authorities therein referred to), and the further finding that C. M. Peck gave general instructions to the plaintiff to let Santos have such lumber for use on the ranch as he might require.

There is, it is true, a direct conflict in the evidence upon the vital facts of the controversy. C. M. Peck positively testified that the only directions he ever gave the plaintiff with regard to the delivery of lumber to Santos had relation to certain posts and other material to be used in the erection or repair of a fence upon the land in question. As to the barn, he testified that he gave Santos specific orders to construct the same entirely from the old lumber obtained from the wrecked warehouse purchased by him before he left for the East. His letter to Santos from the state of Virginia would indicate that he intended that the old lumber referred to was to be used in the construction of the barn. It is also true that the letters from the defendant would indicate that whether the building of the barn should be proceeded with was to depend upon the consent of the defendant thereto to be given Santos. But all this testimony is, as stated, only in contradiction of that produced by the plaintiff to the effect that C. M. Peck directed it to let Santos have whatever lumber he might require for the purposes of the ranch, the result of which was obviously to raise a substantial conflict, and the effect thereof solely a matter for determination by the trial court

[4] Assuming, as is the contention, that it was true that the intention of both C. M. Peck and the defendant was that the barn should be built from the lumber obtained from the warehouse, nevertheless these facts remain, having been found upon sufficient evidence by the court: That both C. M. Peck and the defendant desired that a barn be erected upon the ranch; that Santos had been instructed to build it; that there is testimony that C. M. Peck, having the authority to do so, gave instructions, unhampered by restrictions, conditions, or qualifications of any kind or character, to the plaintiff to let Santos have whatever lumber he needed on the ranch, and to charge the same to the ranch account; that, acting under such instructions, the lumber company did let Santos have the lumber necessary for the construction of the barn; and that the lumber so furnished Santos was actually used in the erection of the barn upon said ranch. Under these circumstances we fail to perceive how it could change or affect the legal effect of the transaction or remove the legal obligation of the defendant to pay for the materials so obtained by Santos, even if it be true that Santos did not use, in the construction of the building, the particular lumber it was the wish and the intention of C. M. Peck or of the defendant that he should have used for that purpose. Santos might have acted in bad faith with the defendant and the latter's agent, C. M. Peck, by failing to obey the directions of his superior to use the materials specified by the latter in the construction of the barn. This fact, however, constitutes no reason for holding that the plaintiff has no basis for a just and legal claim for materials furnished Santos by express directions of the owner of the land, for which they were to be used, or, as the court found upon sufficient evidence, under directions of an agent of the owner.

Our conclusion is, as before declared, that the judgment in favor of the plaintiff upon the theory upon which we have here considered it is supported by the facts as found and the conclusions of law following therefrom.

The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(29 Cal. App. 379)

GHISELLI v. THORSTENSEN et al.

(Civ. 1749.)

(District Court of Appeal, First District, California. Jan. 13, 1916. Rehearing Denied Feb. 11, 1916.)

1. QUIETING TITLE ⇐36 — COMPLAINT — DESCRIPTION OF PROPERTY.

In an action to quiet title, a description of the property contained in the complaint describing all the courses as running either northeasterly or southeasterly, and which could not be made to describe a rectangular piece of land or to include more than a small triangular fraction of the land to which the documentary evidence related, and which the finding and

judgment described, was radically defective, and the complaint was insufficient to justify the introduction of such documentary evidence.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 75; Dec. Dig. ⟸36.]

2. Appeal and Error ⟸193(9)—Reservation of Grounds of Review — Insufficiency of Complaint.

Where in an action to quiet title the description in the complaint could not be made to include more than a small triangular fraction of the land to which the documentary evidence related and which the finding and judgment described, an objection to the admission of such documentary evidence presented the point as to the insufficiency of the complaint, and such point was not, as claimed, urged for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1232–1236; Dec. Dig. ⟸193(9); Pleading, Cent. Dig. §§ 1355, 1362, 1363, 1365, 1366.]

3. Pleading ⟸403(5)—Complaint—Cure of Defects by Answer.

In an action to quiet title, the papers in which were destroyed in the conflagration in April, 1906, and subsequently restored upon a proper application for that purpose, a correct description of the land contained in answers filed shortly after the loss of the original papers, and before their attempted restoration, which answers were subsequently superseded by the filing of an amended answer, could not cure a defect in the description in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344–1347; Dec. Dig. ⟸403(5).]

Appeal from Superior Court, City and County of San Francisco; George L. Jones, Judge.

Action by F. J. Ghiselli against Alexander Thorstensen and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

Hiram E. Casey and Chas. F. Blandin, both of San Francisco, and L. A. Kottinger and Milton Shepardson, both of Oakland, for appellants. H. M. Anthony, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying a new trial.

[1-3] The action is in form an action to quiet title to a tract of land, the plaintiff's alleged title to which rests upon a tax deed. The first contention of the appellants to be considered is that relating to the sufficiency of the description of the land in question as set forth in the complaint to justify the admission of the documentary evidence upon which the title of the plaintiff must rest. The action was commenced prior to the 18th day of April, 1906, and the complaint and whatever other papers in the case were then on file were destroyed in the conflagration of that date. In the month of June of the following year the plaintiff upon proper application obtained an order for the restoration of the records in the case, and thereupon filed what purported to be a copy of the original complaint in the action. The description of the property contained in this restored complaint is as follows:

"Commencing at a point on the southeasterly of Jessie street distant thereon 203 feet northeasterly from New Anthony street; thence running northeasterly along the said southerly line of Jessie street 15 feet; thence at a right angle southeasterly 87 feet and 6 inches; thence at a right angle southeasterly 15 feet; and thence at a right angle northeasterly 87 feet and 6 inches to the point of beginning."

It is obvious that this description with all of its courses running either northeasterly or southeasterly is radically defective, in that it cannot be made to describe a rectangular piece of land or to include more than a small triangular fraction of the lot of land to which the documentary evidence in the case relates, and which the findings and judgment of the court describe. This being so, the objections which the defendant Blandin urged to the admission in evidence of the essential proofs upon which the plaintiff relied to sustain his title presented this point to the trial court at all stages of the trial when such proofs were offered; and it cannot therefore be said, as the respondent now contends, that the point of the insufficiency of the complaint in the matter of this description is being for the first time urged in this court; nor does the record before us sustain the respondent's further contention that the description in the original complaint which was destroyed in the conflagration was correct. On the contrary, every inference which arises from the proceedings attending the restoration of the lost record leads to the conclusion that the error is one which existed from the inception of the case. The only crumb of comfort which the respondent can find in this record consists in the fact that in two of the several answers which the defendants filed in the case, and in connection with denials therein of the plaintiff's title, a correct description of the lot appears. The record discloses, however, that these answers were filed shortly after the loss of the original papers and before their attempted restoration; and it further appears that the cause did not go to trial upon these answers, but upon a second amended answer filed long after the restoration of the record in which no description of the property appears. In this state of the record in this case we are constrained to hold the plaintiff's complaint herein insufficient to justify the introduction of the documentary proofs of the assessment, sale, and tax deed which the plaintiff proffered in support of his title, and to sustain the judgment of the court based upon such proofs.

In view of the fact that the appeal must be sustained and the cause returned to the trial court for such further proceedings therein as may be requisite for the preparation of a proper record for the retrial of the cause, we do not deem it necessary at

this time to pass upon the other points in the case, involving, as they do, the sufficiency of the assessment, sale, and conveyance of a lot other than that described in the plaintiff's complaint.

Judgment and order reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

29 Cal. App. 374

SPRAGUE CANNING MACHINERY CO. v. WESTERN RANCHING CORP.

(Civ. 1512.)

(District Court of Appeal, First District, California. Jan. 12, 1916. Rehearing Denied Feb. 11, 1916; Denied by Supreme Court March 9, 1916.)

1. BILLS AND NOTES ⟸468 — ACTIONS — PLEADING—COMPLAINT.

Plaintiff furnished advances to an agent disposing of defendant's land until they amounted to the sum of $2,000, whereupon, plaintiff demanding settlement, defendant agreed that as it owed the salesman several thousand dollars in commissions, but was unable to reimburse plaintiff for the advances in cash, it should pay the same in installments. The salesman drew an order on defendant, authorizing it to pay plaintiff stated amounts at given intervals on account of commissions due him. This order was accepted by defendant. *Held*, that as the dates and amounts referred not to commissions earned or to be earned, but to the installments that were to be paid, plaintiff in its action on such order need not aver whether any commissions had become due and payable at the time suit was brought.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1462, 1463; Dec. Dig. ⟸468.]

2. NOVATION ⟸5—EFFECT.

In such case there was a complete novation, defendant becoming liable to reimburse plaintiff for advances made to the salesman to the amount of the order, regardless of whether the salesman had earned any commissions.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5; Dec. Dig. ⟸5.]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Sprague Canning Machinery Company against the Western Ranching Corporation. From a judgment for plaintiff, and an order denying new trial as well as an order denying defendant's motion to vacate judgment and enter judgment for it, defendant appeals. Affirmed.

T. T. C. Gregory, of San Francisco, Theo. W. Chester, of Sacramento, and Thos. A. Allan, of San Francisco, for appellant. Dan Hadsell, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor and from an order denying a new trial. There is also an appeal from an order of the trial court denying defendant's motion made under section 663 of the Code of Civil Procedure to vacate the judgment and enter a judgment in favor of the defendant upon the findings.

As to the latter appeal, the respondent urges that it must be denied for the reason that the defendant's motion for another judgment under said section of the Code was made after it had taken and perfected its appeal from the judgment, and had thereby removed the cause from the jurisdiction of the trial court for every other purpose than that of the hearing and determination of a motion for a new trial; in other words, that the defendant, by first taking its appeal from the judgment, had deprived itself of recourse to the remedy provided by section 663, Code of Civil Procedure. The conclusions we have reached respecting the merits of the case render unnecessary a decision of this question at the present time.

The action is one brought to recover the sum of $800 alleged to be payable and unpaid upon a certain order which was in words and figures as follows:

"Chicago, 2/17/11.

"Western Ranching Corporation, Chicago, Ill. Gentlemen: Please pay to the Sprague Canning Machinery Co. commissions due me as follows:

100.00	March	15,	1911
100.00	April	15,	"
200.00	May	15,	"
200.00	June	15,	"
100.00	July	15,	"
100.00	Aug.	15,	"
200.00	Sept.	15,	"
100.00	Oct.	15,	"
100.00	Nov.	15,	"
100.00	Dec.	15,	"
700.00	Jany.	15,	1912

—and charge same to my account.

"W. J. Latchford."

—which said order was accepted by the defendant at the time it was drawn and as a part of the transaction.

The first contention of the appellant is that its general and special demurrer to the complaint herein should have been sustained for the reason that it is nowhere alleged in said complaint that the commissions to be paid to said W. J. Latchford by the defendant, and upon the basis of which this order was given and accepted, ever became due or payable from the defendant to Latchford, and that in the absence of such averment the complaint does not state a cause of action. The decision of this point, however, depends upon the construction to be placed upon the terms of the above order in the light of the facts of the case. These, as developed by the evidence and found by the court, are substantially as follows: It appears that about the middle of the year 1910 the defendant, being desirous of employing W. J. Latchford to act as its sales agent upon commissions in the disposition of certain lands, went, through its president, to the plaintiff and suggested that the latter make advances to Latchford of the moneys necessary for him to go ahead with this work, at the rate of $250 a month for an indefinite period. Acting upon the assurance of the president of

the defendant that the risk would be nominal and the returns certain, the plaintiff made the suggested advances to Latchford for some time and until they had aggregated a sum in excess of $2,000. Receiving no return the plaintiff, through its president, Mr. Trench, and its secretary, Mr. Babcock, had a meeting with Mr. Latchford and with Mr. Crane, president of the defendant, at which it was stated by Latchford and acquiesced in by Crane that the defendant owed Latchford several thousand dollars in commissions, upon which the officers of the plaintiff demanded a present settlement of its advances, and were insistent that its account with Latchford be then and there closed up and settled in cash, but when Mr. Crane said that his company could not pay cash at that time but would be able to make installment payments, the order above set forth was suggested and drawn, the president of the plaintiff stating that:

"If the Western Ranching Company will accept this draft on them for the amount stated to be paid on the dates mentioned it will serve the purpose of the Sprague Canning Company as well as cash, and enable us to dismiss W. J. Latchford's account on our books."

The defendant's president, Mr. Crane, indorsed its acceptance upon the order, and apparently acquiesced in the above statement as to its purpose and effect, which being done, the plaintiff at once credited the account of W. J. Latchford upon its books with the sum of $2,000, and charged the defendant as its debtor with said sum.

The court found in substance the foregoing facts, and also found substantially, although not in express words, that a novation was thereby and then and there accomplished by which the plaintiff accepted the defendant as its debtor in the place and stead of Latchford, and released the latter from further liability for said advances. The evidence in the case sufficiently sustains these findings, although it also discloses, and the court found, that after the making and acceptance of the order difficulties arose between Latchford and the defendant as a result of which only a comparatively small amount of commissions ever became due from the defendant to Latchford, and hence, as the defendant claims, only the sum of $68 became due and payable by the defendant to the plaintiff upon the aforesaid order.

[1] From the foregoing statement of the facts as developed by the evidence and found by the court, two conclusions are to be drawn, which are determinative of every material point in the case: The first is that as to the dates set after the several installments which are to be paid by the terms of the accepted order, those refer not to the times when commissions would be due and payable from the defendant to Latchford, but they refer to the dates whereon the several sums set before them will be due and payable by the defendant to the plaintiff without respect to when or whether any particular amount of commissions was earned or payable. This being so, it was not necessary for the plaintiff to make any averment in its complaint with respect to whether any such commissions had become due or payable at the time this suit was brought. All that it had to aver was that the sums due to it by the terms and at the times specified in said order were unpaid. The defendant's demurrer was properly overruled.

[2] The next conclusion to be drawn from the findings of the court is that on the date of the drawing and acceptance of the order in question a novation was agreed to and accomplished between the parties thereto, and that whatever contingencies there might be as to the amount of commissions then or thereafter to be chargeable to the defendant as between itself and Latchford, were assumed by the defendant and were not to affect or qualify the terms of its said acceptance or the amounts to become due the plaintiff thereon. So far as the latter was concerned, the transaction which took form and expression in this order was the equivalent of a cash transaction, and was to serve as a reimbursement to it of the sums of money advanced to Latchford at the defendant's suggestion and for the mutual benefit of them both.

The authorities fully sustain the legal conclusion that the facts as shown in the evidence and found by the court were sufficient to create and constitute a novation between the parties within the meaning and intent of the Code. Civ. Code, § 1530; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820; Bank of Montreal v. Potts, 93 Mich. 342, 53 N. W. 522.

From these views it follows that the findings of the court—which the evidence in the case supports in their turn—sustain the judgment; that the motion of the defendant for another and different judgment under section 663 of the Code of Civil Procedure was therefore properly denied; and that the order of the court denying the same, and also the judgment and order denying a new trial, should be and they are hereby affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

29 Cal. App. 342

WHYTE v. IDORA PARK CO. (Civ. 1741.)

(District Court of Appeal, First District, California. Jan. 10, 1916. Rehearing Denied by Supreme Court March 9, 1916.)

1. THEATERS AND SHOWS ⇐6 — AMUSEMENT PARKS—LIABILITY FOR INJURIES.

The proprietor of an amusement park, who permitted the installation of various devices and attractions under arrangements whereby it received a share of the gross receipts, was not relieved of liability for injuries to one visiting the park sustained on a slideway or chute,

by reason of the fact that the accident was caused by the negligence of the concessioners or their employés.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. ⟸6.]

2. THEATERS AND SHOWS ⟸6 — AMUSEMENT PARKS—LIABILITY FOR INJURIES.

Assuming that such proprietor was liable only in case the injury resulted from defective construction or from a device of a character likely to cause injury in operation, a judgment in favor of the injured person would not be reversed, where there was evidence to support a finding that the slideway was built at such a steep angle and with the bottom thereof so close to a wall of the building inclosing it that one using the slideway was very likely to be injured.

[Ed. Note.—For other case, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. ⟸6.]

3. THEATERS AND SHOWS ⟸6 — AMUSEMENT PARKS—LIABILITY FOR INJURIES.

Whether a visitor at an amusement park, who objected to leaving a building by means of a slideway or chute, but was assured by an attendant in charge that this was the only way out, that there was no danger, and that he was stationed there to catch her, assumed the risk of injury, was a question of fact for the trial court.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. ⟸6.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Bertha C. Whyte against the Idora Park Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Denson, Cooley & Denson and George Martinson, all of San Francisco, for appellant. Samuel M. Shortridge, of San Francisco, for respondent.

KERRIGAN, J. This is an action for damages for personal injuries in which judgment went for the plaintiff, and from which judgment and an order denying defendant's motion for a new trial this appeal is prosecuted.

The facts out of which the action arose are, briefly, the following: On the 15th day of May, 1910, the plaintiff and six friends went for a day's outing to Idora Park, a place of amusement conducted by the defendant in Oakland and to which a charge for admission was made. Within the inclosed park there were various devices and attractions for the amusement of visitors. Among these was a structure known as the "Joy Laundry." This had been installed by Charles Hoffman and A. E. Drake at their expense and with the consent of the defendant, and was operated under a verbal contract between said Hoffman and Drake and the defendant, whereby the concessioners agreed to pay to the defendant 40 per cent. of the gross receipts for the year 1910. So far as necessary to be noted here, the operators and attendants necessary to run the device were hired and paid by Hoffman and Drake, and, with the exception that the defendant reserved the right to object to any employé of the concessioners "who was not conducting the business in a proper way," such employés were under the control and direction of the concessioners. On the mentioned day, the plaintiff, having paid the general entrance fee to the park, and a further charge for admittance to the "Joy Laundry," with her companions passed into and through the same to the exit, where they were required to go upon and slide down a slideway or chute. Upon plaintiff objecting to this means of leaving the building, she was assured by an attendant in charge that this was the only way out, that there was no danger, and that he was stationed there to catch her. Upon this assurance she got upon the chute and slid down rapidly. The attendant making no effort to catch her, she was precipitated against a closed door facing the bottom of the slide, and received the injuries set forth in the complaint. The record also contains evidence which tends to show that, from the standpoint of safety, the slideway was maintained at too steep an angle of descent, and that the doorway in question was situated too close to the bottom of the chute.

[1] In support of its appeal, it is the claim of the defendant that the concessioners Hoffman and Drake were independent contractors, that the accident was caused through the negligence of their employé—the attendant who failed to arrest the speed of the plaintiff as she neared the bottom of the slide—and that consequently the defendant is not responsible for the injuries sustained by her.

There are some cases which support this theory advanced by the appellant; but we think the weight of authority sustains the proposition that one conducting a place of amusement will not be relieved from liability for injury to a patron merely because it was caused by the negligence of a concessioner or his employé. In the case of Stickel v. Riverside Sharpshooters Park Co., 250 Ill. 452, 95 N. E. 446, 34 L. R. A. (N. S.) 659, Ann. Cas. 1912B, 412, where the facts are strikingly similar to those in this case, the appellant contended, as here, that its only duty with reference to the building in which the injury occurred was to use ordinary care to keep the structures and devices operated by the concessioners in a reasonably safe condition for the purposes for which they were constructed, and that it could not be held liable for the negligence of its concessioners or their employés in operating the structures and devices. The court, after making a reference to cases where the owner of premises turned them over to an independent contractor, who had the sole right to hire and discharge servants, and in which cases the doctrine of respondeat superior does not apply to the owner, says:

"But in amusement places where space is granted for conducting attractions for the amusement of the public, and for which an admission

fee is charged by the concessioner and divided with the owner, there is unanimity of authority that the owner assumes an obligation that the devices and attractions operated by the concessioners are reasonably safe for the purposes for which the public is invited to use them. While there are some decisions to the contrary, the greater weight of authority is that the owner will not be relieved from responsibility because the exhibition is provided and conducted by the concessioner, provided it is of a character that would probably cause injury unless due precautions are taken to guard against it; and this duty applies not to construction alone, but to management and operation where the device is of a character likely to produce injury unless due care is observed in its operation."

In the case of Wodnik v. Luna Park Amusement Co., 69 Wash. 638, 125 Pac. 941, 42 L. R. A. (N. S.) 1070, the head of a mallet used in operating a striking machine in an amusement park flew off while being used by a patron, resulting in his injury; and it was held that, where an individual or corporation operated an amusement park open to the public on the payment of an admission fee, the fact that such person or corporation let space on the grounds to another to operate a striking machine, in consideration of receiving part of the gross receipts of the concessioner, the lessor was not relieved of liability for injury caused by a defect in the mallet used in operating the machine.

In the case of Thornton v. Maine State Agricultural Society, 97 Me. 108, 53 Atl. 979, 94 Am. St. Rep. 488, it is held that an association conducting a fair is liable for injury through a defect in apparatus employed by a concessioner for the amusement of patrons when it receives a portion of the sums paid for the use of the apparatus, has general charge of the grounds, and takes an active part in advertising the amusements. In the course of the opinion the court said:

"Some of the cases cited are those where the injuries resulted from the negligence of independent contractors, and not lessees. But we can perceive no tenable distinction in a case like this. In either case the offending thing is where it is by the license and permission of the owners of the premises, and upon ground which the owners, by virtue of their invitation to the public, hold out as safe. This is the ground of their liability. By inviting patrons to their fair, they make themselves bound to use reasonable care to see that the fair in all its parts is safe, and is conducted safely, whether the various parts of the fair are conducted and managed by the owners themselves, or, with their permission, by licensees, independent contractors, or lessees. Such is the conclusion which rests upon good sense, and which seems to be clearly established by all the authorities upon the subject."

In Texas State Fair v. Brittain, 118 Fed. 713, 56 C. C. A. 499, and in Texas State Fair v. Marti, 30 Tex. Civ. App. 132, 69 S. W. 432, a street fair association which by contract gave the exclusive use of a portion of its grounds to an exhibitor, and advertised such exhibit as one of the attractions of the fair, was held liable for injuries to a spectator caused by the falling of seats negligently constructed by the exhibitor. See, also, Graffam v. Saco Grange, etc., 112 Me. 508, 92 Atl. 649, L. R. A. 1915C, 632; Sebeck v. Plattdeutsche, 64 N. J. Law, 624, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512.

[2] Defendant further contends that under the authorities on which plaintiff relies, and to some of which reference has just been made, an amusement company in cases like the present is liable to a patron, not for the negligence of a concessioner or his employés, but only where the injury is the result of defective construction, or where the device is of a character which in operation is likely to cause injury. But even if this were so, the judgment here could not be reversed, because there is evidence in the record which supports a finding of the court that the slideway was built at such a steep angle, and with the bottom thereof so close to a wall of the building which inclosed the contrivance, that one using the slideway was very likely to be injured. Or, if it can be said from the evidence and findings that the accident was due partly to defective construction, and partly to negligent operation, we still cannot interfere with the conclusion of the judgment.

[3] On the point as to whether there was an assumption of risk on the part of the plaintiff, we think under the pleadings and evidence in the case this was a question of fact for the trial court, and the finding of the court upon that issue must be upheld. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513; Johnson v. Southern Pac. Co., 154 Cal. 285, 97 Pac. 520; Seller v. Market St. Ry. Co., 139 Cal. 268, 72 Pac. 1006; Waniorek v. United R. R., 17 Cal. App. 121, 118 Pac. 947; Canon v. Chicago, etc., 101 Iowa, 613, 70 N. W. 755; Haley v. Case, 142 Mass. 316, 7 N. E. 877; Keegan v. Kavanaugh, 62 Mo. 231.

It is also clear that the allegations of the complaint support the findings of the court.

Counsel for the appellant in his oral argument raised the point that there is an error in the amount of the judgment arising from a mistake in computation. We think that this point is without merit, for it does not appear, as suggested by counsel, that the sum of $3,700 included in the judgment was arrived at as the result of a calculation of plaintiff's loss of time. The finding of the court is:

"That by reason of the injuries to the plaintiff she has been damaged in the sum of $3,700; that the plaintiff has also sustained loss and been damaged in the sum of $800, as alleged in paragraph 8 of the complaint. * * *"

It is paragraph 8 that charges damage to plaintiff through loss of time from her customary labor, and the amount thereof is found in accordance with her claim.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

29 Cal. App. 424

PEOPLE v. BERNON. (Cr. 613.)

(District Court of Appeal, First District, California. Jan. 21, 1916.)

1. CRIMINAL LAW ⊂⊃507(7)—EVIDENCE—"ACCOMPLICE."

A girl 14 years of age is not an accomplice to a rape committed with her consent, so as to render invalid a conviction based on her uncorroborated testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1090; Dec. Dig. ⊂⊃507(7).

For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. CRIMINAL LAW ⊂⊃730(1)—TRIAL—MISCONDUCT OF PROSECUTOR—CURE BY COURT.

The misconduct of the district attorney in asking a question, on cross-examination of a witness for defendant, which referred to a subject excluded from evidence during the examination of a witness for the people, was cured, where the court sustained the objection thereto and by its own motion charged the jury to disregard the statements of counsel and all evidence not presented in a legal way.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. ⊂⊃730(1).]

Appeal from Superior Court, City and County of San Francisco; William H. Langdon, Judge.

Joseph Bernon was convicted of rape, and he appeals. Affirmed.

E. B. Mering and M. J. Gillespie, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction of the defendant upon a charge of rape alleged to have been committed by the defendant upon his daughter Leona Bernon, a girl of the age of 14 years, and from an order denying a new trial.

[1] Mr. Mering (for the appellant): Your honors, our contention is that the defendant was convicted on the uncorroborated testimony of an accomplice; the girl herself was an accomplice under People v. Robbins (Sup.) 154 Pac. 317, which was a case of the unmentionable crime on a boy 16 years of age, and the Supreme Court said he was an accomplice. It would be exactly the same as with a boy—

The Court: If this girl was below the age of consent, she could not have consented to this crime.

Mr. Mering: But the boy was below the age of consent.

The Court: Our statute does not make the rule of consent applicable to a boy as well as to a girl. The only application of the rule as to the age of consent is as to females. There is no doubt about that.

Mr. Mering: She cannot give consent to the crime. The girl herself testified that she had had intercourse with another young man. This shows the corruption of her mind. There is certainly a distinction between the weight of testimony of a girl who resists and is outraged, and the girl who says: "Yes, it is so; it is all right: I consented to it." Isn't the testimony of a girl that is outraged stronger than that of a girl who is not?

The Court: That may be true, but that is a question for the jury. We know of no law, and are cited to no case which holds, that a female below the age of consent is an accomplice in the crime of rape committed upon her, or that requires that her testimony should be supported by corroboration in order to sustain a conviction.

Nor do we think that the testimony of the prosecuting witness in this case is either so weak because of her intellectual or moral infirmities, or is so inherently improbable, as to be insufficient of itself to support a conviction.

These contentions on the part of the appellant we hold therefore to be without merit.

[2] Is that the only point you make in the case?

Mr. Mering: No. We also urge the misconduct of the district attorney.

The Court: We find from the record that the alleged misconduct of the district attorney arose from the following state of facts: While the witness Leona Bernon was upon the stand, the prosecuting officer asked her the following questions:

"Q. Well, did your sister live home at one time with yourself and your father? A. Yes. Q. Where did she sleep when she was at home?"

To this latter question counsel for the defendant objected upon the ground that it was irrelevant, and some cross-fire arose between counsel as to the proper way to conduct the trial, which continued for some moments after the court had sustained the defendant's objection but during which no assignment of misconduct was made. Later, however, and during the cross-examination of one of the defendant's witnesses, the prosecuting officer asked the following question:

"Q. When you were talking to this girl about the time you said they were telling you different things upon which you were basing your statements about them, did Josephine tell you that her father did the same things to her too?"

To this question the defendant offered the proper objection that it was incompetent, irrelevant, and immaterial, and was misconduct on the part of the district attorney, and proceeded to arraign the latter severely for his improper action. The court promptly sustained the defendant's objection, and at once and of its own motion proceeded to charge the jury that they were to disregard and put out of their minds the statements of counsel and all evidence not presented in a legal way. The matter was immediately dropped, and was not adverted to again during the trial.

While the action of the prosecuting officer in asking this improper question, and in thus referring to a subject hinted at and properly excluded in connection with his former question, is to be reprobated, and the too frequent

practice of prosecuting officers to press similar questions and insinuations beyond the point of propriety and fairness is to be rebuked and discouraged, still we think that in the present case the prompt instruction of the court to the jury of its own motion to disregard and put from their minds the offending matter, attended as it was by the district attorney's coincidence in the views of the court evinced by his abandonment of the subject, takes this case outside of the case of People v. Derwae, 155 Cal. 592, 102 Pac. 266, and within the rule laid down in the following cases: People v. Smith, 23 Cal. App. 382, 138 Pac. 107; People v. Bradbury, 151 Cal. 675, 91 Pac. 497; People v. Salas, 2 Cal. App. 537, 84 Pac. 295; People v. Amer, 8 Cal. App. 137, 96 Pac. 401; People v. Ho Kim You, 24 Cal. App. 451, 141 Pac. 950; People v. Ong Git, 23 Cal. App. 148, 137 Pac. 283.

No other error appearing in the record of sufficient consequence to merit review, the judgment and order denying a new trial are affirmed.

29 Cal. App. 460

PEOPLE v. FORESTER. (Cr. 319.)

(District Court of Appeal, Third District, California. Jan. 22, 1916.)

1. PARENT AND CHILD ⟸17(2) — MAINTENANCE—DUTY TO MAINTAIN.

A father charged with violating Pen. Code, § 270, making it an offense to willfully omit, without lawful excuse, to furnish necessary food, clothing, shelter, and medical attendance for minor children may excuse his failure by showing his inability to furnish such support not due to his misconduct or extravagance.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 176; Dec. Dig. ⟸17(2).]

2. PARENT AND CHILD ⟸17(6) — MAINTENANCE—PROSECUTION—EVIDENCE.

In a prosecution under Pen. Code, § 270, for father's failure to support and maintain his minor children, evidence *held* to show inability to support and maintain them.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 181; Dec. Dig. ⟸17(6).]

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Carl Otto Forester was convicted of failing to support his children, and, from the judgment and an order denying new trial, he appeals. Reversed.

Carr & Kennedy, of Redding, and Charles Tupper King, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was convicted of a violation of section 270 of the Penal Code, in that he "willfully omitted without lawful excuse to furnish necessary food, clothing, shelter and medical attendance for his three minor children by his divorced wife."

Many points are made by appellant; but, as we are satisfied that the cause must be reversed for a failure of proof as to a vital element of the crime charged, it is probable that the other questions will not arise again, and we therefore forego any discussion of them.

[1] It is admitted by the Attorney General that it should be made to appear that the father has the ability to supply what is needed or else a conviction is not supported. Indeed, it is apparent that inability without fault is a "lawful excuse" for the failure to discharge this parental duty.

"While it is the duty of a parent to support his children of tender years, yet, in order that he be imprisoned for failure to obey an order of the court in connection therewith, it must affirmatively appear that he has the ability to comply with the order of the court." In re McCandless, 17 Cal. App. 222, 119 Pac. 199.

In that case the petitioner had been committed to the custody of the sheriff on account of his failure to make certain monthly payments directed by the superior court for the support and maintenance of his minor children. As to the question involved, though, the principle is the same. Therein is cited In re Cowden, 139 Cal. 244, 73 Pac. 156; Ex parte Cohen, 6 Cal. 319; Ex parte Rowe, 7 Cal. 175; Ex parte Silvia, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58—which are to the same effect.

In State v. Garrison, 129 Minn. 389, 152 N. W. 762, the Supreme Court of Minnesota set aside a verdict in a prosecution for nonsupport for the reason that the proof failed to show the ability of the defendant to meet his obligation; the court saying:

"The only defense to this prosecution is his inability to perform this duty. That such inability caused by illness is a legal excuse for the failure to furnish support to a wife or children is not open to doubt."

In State v. Bess, 44 Utah, 39, 137 Pac. 829, in a prosecution under a statute similar to our own, the judgment was reversed for the same reason; it being said:

"We think the evidence wholly fails to show willful neglect on his part as contemplated by the statute to provide for and support the children mentioned in the information. True, evidence was introduced showing that he failed to contribute anything for their support; but the evidence also shows that the current and necessary expenses of himself and two boys far exceeded his earnings during the time covered by the information, hence his neglect in that regard was not without 'just excuse.'"

In Goddard v. State, 73 Neb. 739, 103 N. W. 443, the prosecution was under a statute penalizing wife desertion and willful neglect to provide for her or for the minor children, and the Supreme Court of Nebraska held that:

"In such a case, in order to sustain a conviction, the state must prove that the accused is possessed of money, property, or other means available for the support of his wife, or, if he is without such means, that he has at least some earning capacity, and his refusal, without good cause, to maintain or provide for her."

[2] The showing here was without conflict that the defendant did not have the ability to support his children. This was due in

part to business reverses, and in part to a disability arising from an injury to his hand. It is true that he was and is a skilled dentist, but he had few patients, and was unable to serve those. He could not even pay his rent. His former wife was unable to find any property upon which to levy to satisfy a judgment in her favor. There is no evidence that defendant was willfully idle, or that he was prodigal in his expenditures. There is no just ground for the inference that his financial embarrassment was the result of artifice or any design to deprive his children of the attention and support to which they were entitled. Deliberate and fraudulent inability would, of course, be considered unavailing as a defense to the charge. We are not, however, at liberty to infer that appellant was not acting in good faith. True, another marriage and the birth of another child added to his burdens; but this consideration involves nothing culpable or even immoral. It rather suggests a reason why care should be exercised in applying the severe penalty of a statute which, as suggested by appellant, is "intended to prevent destitution and not to produce hardship in or destruction of the home." In this connection, it is deemed appropriate to quote from the concurring opinion of Mr. Justice Frick in the Bess Case, supra, as follows:

"In view of this, it would be a somewhat peculiar administration of the law in question, to say the least, if it should be held that Mr. Bess should be punished for what he was utterly unable to prevent. Moreover, to imprison him could result only in depriving the little boys of their means of support. Such a result would be more or less tragic for them, to say the least. * * * While the law in question is salutary, it nevertheless is of that character which requires it to be administered with some care so as to not produce more mischief by its enforcement in certain cases than can be prevented thereby."

Before concluding, it is not deemed amiss to say that the evidence shows that said children have been cared for and all their wants supplied by their grandparents. While we are not called upon to hold, as held by the courts of some jurisdictions, that this constitutes a complete defense to the charge, yet we may remark that this beneficent circumstance naturally tends to obviate any reluctance to accord to appellant the full benefit of his impecunious condition.

We think the judgment and order should be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 464

HAMMOND v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 1764.)

(District Court of Appeal, Second District, California. Jan. 26, 1916.)

1. APPEAL AND ERROR ⟸1234(1)—STAY BOND —LIABILITY OF SURETY.

Where a husband and wife died, and the administrator of the husband, suing the administrator of the wife, recovered judgment for the return of certain personalty or its value, and also judgment for the sum of $4,687.63, the wife's administrator appealing and giving a bond in the sum of $20,000 to stay execution pending appeal, and where, upon affirmance, the wife's administrator turned over to the administrator of the husband all the property in his hands, which was a part of the community estate, also paying cash to the amount of $12,383.21, which payments left a balance due on the judgment entered in the action of the sum of $3,274.34, the surety on the stay bond was liable for such amount, since the estate of the husband had the right to apply the property and money received so as to extinguish any indebtedness due and leave any deficiency secured by the undertaking of the surety.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761–4764, 4771; Dec. Dig. ⟸1234(1).]

2. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDING.

A determination of the trial court on a matter of fact as to which the testimony is conflicting is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸1011(1).]

3. EXECUTORS AND ADMINISTRATORS ⟸86(4) —POWER TO POSTPONE PAYMENT OF DEBT—POWER TO REIMBURSE.

Where a husband's administrator was entitled as a matter of law to certain property in the hands of the wife's administrator, he could not make any agreement postponing the time for the payment of the debt, or provide by any agreement for a reimbursement to the wife's estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 375; Dec. Dig. ⟸86(4).]

4. APPEAL AND ERROR ⟸465(2)—STAY BOND —STIPULATION AS TO AMOUNT.

In lieu of having the amount of the undertaking given to stay execution pending appeal fixed by the court, the parties can stipulate as to what the amount shall be, the sureties being bound by the statements in the contract and being unable to question the truth of the recitals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2239, 2240; Dec. Dig. ⟸465(2).]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by W. T. S. Hammond, as administrator of the estate of Merrill A. Weir, deceased, against the United States Fidelity & Guaranty Company, a corporation. From a judgment for plaintiff, and an order denying defendant's motion for new trial, the latter appeals. Judgment and order affirmed.

Gray, Barker & Bowen and Flint, Gray & Barker, all of Los Angeles (William A. Bowen, of Los Angeles, of counsel), for appellant. Hunsaker & Britt and W. N. Goodwin, all of Los Angeles, for respondent.

JAMES, J. An appeal has been taken from the judgment entered in this action in favor of the plaintiff and against the defendant, and from an order denying a motion made by the defendant for a new trial. The suit is upon an undertaking given on appeal to stay execution.

At a time prior to the institution of this action, Merrill A. Weir died, and prior to the conclusion of probate proceedings in his estate, his wife, Nancy A. Weir, died. Administrators were appointed in both estates, and the administrator of the estate of Nancy A. Weir took into his possession property of considerable value which he claimed belonged to that estate and which, on the other hand, the administrator of the estate of Merrill A. Weir claimed was property upon which he was entitled to administer as belonging to the estate of Merrill A. Weir. Upon the refusal of the administrator in the wife's estate to deliver the property to the administrator of the estate of Merrill A. Weir, the latter brought an action to recover a money judgment and certain securities and corporate stocks. In that action he obtained judgment for the return of the personal property or its value, and also judgment for the sum of $4,687.63, with costs. An appeal was taken from that judgment to the Supreme Court, and thereafter the judgment was affirmed. In order to stay execution pending appeal an undertaking was given, with the appellant here as sole surety. That undertaking recited in part that the surety bound itself in the sum of $20,000 (we here quote from the language of the bond):

"(That being the amount agreed upon by the parties for the staying of the execution of said judgment), that if the said judgment or any part thereof be affirmed, or the appeal be dismissed, the appellant will deliver to the plaintiff the personal property described in the judgment or its value as therein fixed, and will pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal."

The undertaking further provided that upon the going down of the remittitur the court from which the appeal was taken might enter judgment against the surety. It appeared in evidence that pending the proceedings in the action referred to, the administrator of the estate of Nancy A. Weir disposed of some of the personal property described in the judgment, and also made use of other property which came into his hands as a part of the alleged estate of Nancy A. Weir. After the affirmance of the judgment was made, the administrator of the estate of Nancy A. Weir turned over to the administrator of the estate of Merrill A. Weir all of the property in his hands. This included property other than that mentioned in the judgment; it being conceded as between the administrators that this additional property was a part of the community estate of the two decedents. In other words, we find no question made but that, in so far as property additional to that described in the first judgment was delivered to the administrator of the estate of Merrill A. Weir, that was property to which the administrator of the latter estate was legally entitled. The attorney for the administrator in the Nancy A. Weir estate, referring to this additional property, testified as follows:

"I had long ago had a talk with Judge Britt substantially to the effect that we might as well consider all those things as being a part of the entire community property, and let it be determined by the judgment in the cases that were then pending, without the necessity of Judge Britt bringing new suit to recover those other amounts."

According to the computation made by the respective administrators at the time this property was turned over, while a total amount in cash of $12,383.21 was paid, applying this money upon the several demands held by the administrator of the estate of Merrill A. Weir, left a balance due on the judgment entered in the action in which this surety gave the stay bond, of the sum of $3,274.34.

[1-3] It is the contention of the appellant that, inasmuch as an amount in cash in excess of the total amount of the money judgment was paid over, the money judgment, which was a part of that for the payment of which it became surety, should be treated as extinguished. We have already noted that it appears that all of the money and property turned over was money and property to which the administrator of the estate of Merrill A. Weir was entitled. The estate of Merrill A. Weir certainly had the right to apply the property and money received in such a way as would extinguish such indebtedness due it and leave whatever deficiency there was owing secured by the undertaking which this appellant gave. We mean by this that the administrator of the estate of Nancy A. Weir, having paid only a part of his obligations and those obligations not being the total of the obligation guaranteed by the appeal bond given by appellant, it must result that there was a liability for the deficiency which might be enforced against the surety. As to some of the personal property of which the judgment appealed from in the action of the one administrator against the other required a delivery, either of the property itself or its value, which latter was fixed, a sale had been made in the Nancy A. Weir estate. Some of this property, it is said, was sold for a price in excess of that fixed as representing its value in the judgment. The accounting made by the administrator of the Nancy A. Weir estate to the other administrator included amounts representing the proceeds of such sales. It cannot be told from the examination which we have made of the testimony whether the overplus represented by such sales was credited on the amount of the money judgment secured by appellant's bond. However, it seems immaterial, for had the administrator of the estate of Nancy A. Weir disposed of such property and satisfied the money judgment entered against him, retaining in his hands the excess of money derived from the sale of such property, there seems to be no reason why this excess might

not have been recovered from him in a separate action. A great deal of the argument on the part of appellant refers to a certain memorandum of agreement which it is claimed was made between the administrators at the time of the alleged accounting, in which it was agreed that the administrator of the estate of Nancy A. Weir might offset the deficiency against the share in the property of the estate of Merrill A. Weir to which the former estate might be entitled. There is some conflict in the testimony as to whether this agreement was executed, and as to the fact, the determination of the trial court adverse to appellant's contention in that regard should be sustained. But even though it might be said that this conclusion was contrary to the evidence and that the agreement was made as asserted by appellant, in our view it would be of no avail as pointing an argument in favor of appellant. Conceding, as we must, that the administrator of the estate of Merrill A. Weir was entitled as a matter of law to all of the property, then he would be powerless to make any agreement which would postpone the time for the payment of that debt, or to provide by any agreement for a reimbursement to the estate of Nancy A. Weir. The law would either effectuate such a reimbursement or not regardless of the agreement of the administrator.

[4] We have to consider further certain questions relating to the validity of the undertaking given by the appellant, as the contention is advanced that no obligation was created thereby because the contract of suretyship was void. The main contentions in that regard may be discussed briefly. It is said: First, that as the judgment appealed from was in part for the recovery of personal property, the court should have fixed the amount of the undertaking, which is shown not to have been done. Second, that the undertaking is in a "lump" amount of $20,000, and that, assuming it insufficient as a security for the delivery of the property required to be returned by the judgment, there is no legal way by which the amount may be divided so as to furnish a certain definite security for the money judgment. And, generally, that in other matters of form the undertaking is not sufficient. In the first place, it is true that the statute does require a bond to be given, where a delivery of property is called for by the judgment, in such an amount as may be directed by the court; whereas in the case of a money judgment the amount for which the sureties are bound shall be double the amount named in the judgment. However, as to the first contention, that the court should have fixed the amount of the undertaking, it will be noted that the undertaking in its phraseology recites that the amount was agreed upon by the parties. It would seem hardly open to question that in lieu of having the amount of the undertaking fixed by the court, the parties may be permitted to stipulate as to what that amount shall be. The sureties are bound by the statements in their contract and cannot question the truth of such recitals. Ogden v. Davis, 116 Cal. 32, 47 Pac. 772; Smith v. Fargo, 57 Cal. 157. It has been further held that undertakings such as that considered here need not be in precise conformity with the statutory rules, which requirements may be waived. Murdock v. Brooks, 38 Cal. 596; Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296. In the latter case, citing Murdock v. Brooks, supra, it is said:

"When the party in whose favor the undertaking was executed had had the benefit of a stay of execution, the sureties could not be heard to say that the undertaking was void because all the forms of the statute, through their omission, were not complied with."

The Supreme Court has further held that, even though the conditions mentioned in an undertaking are more onerous than those required by the statute, the bond may be valid as creating a common-law obligation. Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072. We should remember that the judgment for the return of the specific personal property was completely satisfied; hence there is no occasion to apportion any part of the amount named in the obligation of the surety to that account. Had the undertaking been given to secure the money judgment only and the requirement of the statute been observed, the amount for which the surety would have become bound would have been twice that of the money judgment. The deficiency for which this action required the surety to account was less than the full amount of the money judgment. We may assume, we think properly, that the parties, in so far as the money judgment was concerned, agreed upon an amount sufficient to cover that sum. If the terms of the statute were considered affecting the amount of undertakings to stay execution from money judgments, then the sureties were bound in that behalf in a sum double the amount of the judgment. In any event, no reason appears to us why it should not be said that the undertaking was in the sum of the obligation made of ample amount to cover the judgment for $4,687.63.

A careful examination has been made of other contentions advanced on behalf of appellant, but we find no sufficient ground upon which to enter an order of reversal.

The judgment and order are affirmed.

We concur: CONREY, P. J., and SHAW, J.

29 Cal. App. 430

PEOPLE v. CORNELL. (Cr. 330.)

(District Court of Appeal, Third District, California. Jan. 21, 1916. On Petition for Rehearing, Feb. 19, 1916. Rehearing Denied by Supreme Court March 20, 1916.)

1. CRIMINAL LAW ⟸365(1)—EVIDENCE—OTHER OFFENSES—RES GESTÆ.

Defendant embezzled money received from J. for investment, and in a conversation with J. and her uncle on October 7th, admitted that he had used the money in furtherance of a scheme he was promoting and offered to give his note for the money signed by his father and C. J. consented, and the note was given the following morning. Defendant was charged with forging the names of his father and C. to the note. *Held*, that the conversations between defendant, J., and her uncle on October 6th, which led to the giving of the note and was consummated by the delivery thereof the following morning, was a part of the res gestæ and admissible in evidence, though it tended to show that defendant was also guilty of embezzlement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. ⟸365(1).]

2. CRIMINAL LAW ⟸1169(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

As the circumstances occurring on October 6th upon which the note was based showed the prior embezzlement, the admission of evidence as to the leaving of the money with defendant for investment was not prejudicial, even if not admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138; Dec. Dig. ⟸1169(2).]

3. CRIMINAL LAW ⟸371(12) — EVIDENCE — OTHER OFFENSES—MOTIVE OR PURPOSE.

Whenever the question of motive or purpose or reason for an act is involved, testimony showing such motive, reason, or purpose is always admissible, though it may establish the commission of other offenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 832; Dec. Dig. ⟸371(12).]

4. CRIMINAL LAW ⟸1170½(5) — HARMLESS ERROR—EXAMINATION OF WITNESSES.

On a trial for forging the names of defendant's father and C. to a note, where the evidence showed that defendant had no authority to sign C.'s name and that his claim of authority was little more than a mere pretext, the technical error in permitting the district attorney to cross-examine defendant's father, the prosecution's own witness, as to whether defendant had authority to sign his name, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. ⟸1170½(5).]

5. CRIMINAL LAW ⟸1171(1) — CONDUCT OF TRIAL—MISCONDUCT OF DISTRICT ATTORNEY.

Defendant used money left with him by J. for investment upon mortgaged securities, in a scheme which he was promoting and thereafter gave J. his note for the amount, also purporting to be signed by his father and C. On a trial for forging the names of his father and C., the district attorney asked him if he had spent a great deal of money in the scheme mentioned, and when he answered in the affirmative, further asked him if he had spent a great deal of money that he got from other people. In an ensuing colloquy the court stated that the question was improper so far as persons other than J. were concerned, and after an apology by the district attorney, the court instructed the jury to pay no attention to the question. *Held*, that the defendant was not materially prejudiced, as the question did not of itself directly assume that defendant had improperly spent money belonging to others.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. ⟸1171(1).]

6. CRIMINAL LAW ⟸1036(1)—APPEAL—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS.

A question asked defendant on cross-examination, which was not objected to, need not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631–1640, 2639; Dec. Dig. ⟸1036(1).]

7. CRIMINAL LAW ⟸829(12)—INSTRUCTIONS COVERED BY THOSE GIVEN.

On a trial for forging the names of defendant's father and C. to a note, the case was tried, under an admission by defendant, on the one question as to defendant's authority to sign the names of such persons. The court charged that the jury were the sole judges as to whether defendant had authority to sign C.'s name or believed he had such authority, and that unless they felt an abiding conviction to a moral certainty that he did not have such authority and did not so believe, they must find him not guilty, that if upon consideration of evidence, they entertained a reasonable doubt as to whether defendant and C. became partners and defendant signed C.'s name, believing that he had the right to sign his name as his business associate or partner, they must find him not guilty, and that if he believed he had the right to sign such name by reason of his claim that they were associated in business, such belief destroyed all criminal intent and they must find him not guilty. *Held*, that as the theories upon which the case was tried were covered in substance by the instructions given, no prejudice was occasioned by the refusal to charge that when a man's conduct might be as consistently and reasonably referred to two motives, one criminal and the other not, the law would ascribe it to that which was innocent, and that if the evidence was such that two conclusions could be reasonably drawn from it, the one favoring innocence and the other tending to establish guilt, the jury should adopt the first and find defendant not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⟸829(12).]

8. CRIMINAL LAW ⟸806(1)—INSTRUCTIONS—REPETITION.

The trial court, after once instructing the jury clearly upon the points involved in a case, is not required to repeat the instructions with all the variableness and shadows of turning possible to skillful and learned attorneys.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1973; Dec. Dig. ⟸806(1).]

9. CRIMINAL LAW ⟸882—VERDICT—GENERAL OR "SPECIAL VERDICT."

Pen. Code, § 1150, provides that the jury may render a general verdict or when in doubt as to the legal effect of the facts proved, except upon a trial for libel, find a special verdict. Section 1152 defines a "special verdict" as one by which the jury finds the facts only leaving the judgment to the court. On a trial for forging the names of defendant's father and C. to a note, the jury returned a verdict finding the defendant guilty of forgery, as charged in the indictment, and further finding that he forged the name of C. as so charged, and further finding him guilty of uttering and passing the forged instrument, as charged in the indictment. *Held*, that this was not a "special verdict," as a special verdict is one which simply finds the facts and to have made the verdict special, it

must have set forth the facts regarding the signing of the name without authority.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2092; Dec. Dig. ⊂⊃882.

For other definitions, see Words and Phrases, First and Second Series, Special Verdict.]

10. Forgery ⊂⊃49—Verdict—Sufficiency.

The verdict was sufficient to show that the jury intended to find defendant guilty in that he forged the name of C. to the note, and thereafter uttered and passed it.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 129; Dec. Dig. ⊂⊃49.]

11. Forgery ⊂⊃34(1) — Indictment—Issues, Proof, and Variance.

On a trial under an indictment charging defendant with signing the names of two persons to a note, the crime was established by proof of the forgery of one of such names.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 85–88; Dec. Dig. ⊂⊃34(1).]

On Petition for Rehearing.

12. Criminal Law ⊂⊃1133 — Appeal — Rehearing—Grounds.

An appellate court's mistaken belief that no question was raised at the time of the return of a verdict as to its form was not ground for a rehearing where the form and sufficiency of the verdict were carefully and fully considered as though properly presented.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2984; Dec. Dig. ⊂⊃1133.]

13. Criminal Law ⊂⊃814(1)—Instructions —Applicability to Issues.

Instructions which, though correct statements of the law, were not applicable to the offense for which defendant was on trial, were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1980; Dec. Dig. ⊂⊃814(1).]

14. Criminal Law ⊂⊃829(1)—Instructions Covered by Those Given.

An instruction, which so far as it had any bearing on the case was included in an instruction given, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂⊃829(1).]

15. Forgery ⊂⊃48—Instructions—Authority to Sign Another's Name.

On a trial for forging C.'s name to a note where defendant claimed that he and C. were associated in business, and that he had authority to sign C.'s name, an instruction that a general partner was agent for the partnership in the transaction of its business and had authority to do whatever was necessary to carry on such business in the ordinary manner and for this purpose, might bind his copartner by an instrument in writing, necessarily included promissory notes as an instrument in writing.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 124–128; Dec. Dig. ⊂⊃48.]

16. Criminal Law ⊂⊃814(3)—Instructions —Applicability to Evidence.

An instruction based upon no testimony was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1985; Dec. Dig. ⊂⊃814(3).]

17. Criminal Law ⊂⊃1186(4) — Appeal — Harmless Error.

In 1910 money was left with defendant by J. to be loaned upon real estate mortgages and was used by defendant for the purposes of a tire company of which he was sole manager and which was exploiting and developing a patented tire. In 1911 he had a conversation with C. about becoming associated with him in foreign patents concerning such tire, which were not being handled by the company. In October, 1913, he gave J. a note for the money embezzled purporting to be signed by C. In 1915, when tried for forging C.'s name thereto, he did not testify that C. had any interest whatever in the corporation, and it appeared that partnership relations had not even then been established between him and C., but it was his claim that he had authority by reason of their business association to sign C.'s name. *Held*, that technical errors at the trial, or the holding on appeal that the claim of authority was a mere pretext, caused no miscarriage of justice within Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted for misdirection of the jury or the improper admission or rejection of evidence, or for any error in manner or procedure, unless the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ⊂⊃1186(4).]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Joseph D. Cornell was convicted of forgery, and he appeals. Affirmed.

See, also, 153 Pac. 726.

Theodore A. Bell, of San Francisco, and A. L. Hart and R. L. Shinn, both of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Dep. Atty. Gen., for the People.

PLUMMER, Judge pro tem. The defendant was convicted of the crime of forgery, appeals from the judgment of conviction, also from the order denying his motion for new trial, and assigns as reasons therefor the following grounds, to wit: First, Errors in the admission of testimony tending to show the commission of a prior offense; second, misdirection of the jury in matters of law, including the refusal to give certain instructions requested by the defendant; and, third, that the verdict returned by the jury is insufficient, both in form and substance, to sustain the judgment.

It appears from the testimony set forth in the transcript that some time during the year 1910, while the defendant, among other things, was engaged in loaning money for clients, one Maria Jansen called upon the defendant and left with him the sum of $7,600 to be loaned out upon mortgage securities. Not having received any notes or mortgages from the defendant, Mrs. Jansen, in company with her uncle, Lauridson, called upon the defendant at his office in Sacramento the 6th day of October, 1913, and asked the defendant for the mortgage, or mortgages, upon the security of which her money had been loaned. The defendant replied that the mortgages were in the recorder's office. Mrs. Jansen and her uncle, Lauridson, repaired to the recorder's office, and, failing to find any such instrument, or instruments, of mortgage, returned to the defendant's office and stated such fact to him. After some conversation then had, the defendant told Mrs. Jansen

and her uncle that he had lied about the mortgages, that the money had not been loaned, that he had used it himself in furthering a certain resilient tire scheme which he was promoting, and promised to give Mrs. Jansen a note for the amount of money which he had used, signed by himself, his father and one Dr. C. O. Cartwright. To this arrangement Mrs. Jansen consented. The defendant further stated that if Mrs. Jansen would return on the following morning he would have the note signed and ready for delivery. Upon the return of Mrs. Jansen on the following morning the defendant delivered to her a note dated October 7, 1913, for the sum of $7,600, to which was attached the names of the defendant, James Cornell, and C. O. Cartwright.

The indictment alleges that the names James Cornell and C. O. Cartwright were forged, and upon such charge the defendant went to trial and was found guilty.

The opening statement of the district attorney included, in substance, what has heretofore been recited, and was objected to in so far as it referred to the placing of the sum in the hands of the defendant by the witness Jansen, and also as to the conversation or relation of matters which took place between the defendant and the witnesses Jansen and Lauridson on the 6th day of October, 1913, by reason of an admission made by counsel for the defendant preceding such opening statement, and the introduction of any testimony, such statement being as follows:

"Mr. Bell: May it please the court, before any statement is made by the district attorney in this case, and before the testimony or evidence is introduced on behalf of the prosecution, the defendant desires that it be made a matter of record in this court that his sole defense to this charge is that he had authority from James Cornell and C. O. Cartwright to sign their names to the note in question, and the defendant will rest upon that as his sole defense."

And, further, when the witness Jansen was placed upon the witness stand, the further admission:

"Mr. Bell: Now, we can save a good deal of time, I think, and clear up the atmosphere. There will be no dispute that this note was given by the defendant to the witness upon the stand on October 7, 1913, as evidence of an antecedent debt, and I claim that any evidence prior to that time could not be admitted upon any other theory than to show that there was an antecedent debt of $7,600, for which the note was made, thereby showing that the note was given for the full consideration."

It is apparent from this statement that the testimony of the witnesses Jansen and Lauridson that $7,600 was prior to the execution of the note in question placed in the hands of the defendant, in and of itself would be no more than simply a confirmation of the admission by the defendant of the creation, and therefore existence, of an antecedent debt in the event that the defendant used such money for his own purposes. The existence of the debt being admitted, it is not very easy to perceive why the circumstances of the creation of that debt could be harmful to the defendant, or upon what theory the prosecution would be excluded from proving the facts just admitted by the defendant, in the event it did not wish to rely entirely upon such admission.

The testimony of the witnesses that the sum of $7,600 was placed in the hands of the defendant in 1910 for the purpose of being loaned out on mortgage securities did not, of itself, prove any embezzlement; it simply established the naked fact of the money having been placed in the defendant's possession for a particular purpose.

[1] On the 6th day of October, 1913, when the witnesses Jansen and Lauridson called upon the defendant and asked for the mortgages upon which such money was to be loaned, a conversation was had between the defendant and said witnesses, in which all the facts, practically, stated by the district attorney in his opening statement were gone over, and the defendant then and there promised to give, and did thereafter give, the note in question. This conversation did tend to show that the defendant had embezzled the money theretofore left with him by the witness Jansen. Such conversation, and the occurrences then and there had, constituted the reason and the inducing cause for the execution and delivery of the note which the defendant then and there stated he would have signed and ready for delivery to the witness Jansen on the following morning. It is clear that all that took place between the defendant and the witnesses Jansen and Lauridson on the 6th day of October, which led to the giving of the note and was consummated by the delivery of the note on the following morning, constituted but one transaction, and, irrespective of whether it tended to show the defendant guilty of a prior offense, was a part of the res gestæ, and admissible in testimony to show the circumstances attending the giving of the note.

The defendant relies strongly upon the decision in the case of People v. King, 23 Cal. App. 259, 137 Pac. 1076, wherein the undisputed rule that proof of an offense distinct from and wholly disconnected with the particular crime charged against a defendant is not admissible in evidence, is set forth and applied. In that case the defendant was charged with embezzlement. The defendant admitted the receipt of the money, and set up in defense that he had returned the same. Notwithstanding such defense and admission made by the defendant at the beginning of the trial, the prosecution was allowed to prove other distinct acts of embezzlement. We do not see that there is any necessity for either criticizing or approving the decision in the King Case, as it is readily distinguishable from the one at bar. The circumstances of previous embezzlement by the defendant King had nothing to do with the actual embezzlement of the

moneys for which he was being tried, and which it was claimed by him he had returned to the owner thereof.

In the case at bar, the testimony as to prior offense admitted is the conversation had between the defendant and the witnesses Jansen and Lauridson on the day preceding the giving of the note about the deposit or leaving with the defendant of certain moneys to be loaned on mortgages, inquiry for said mortgages, admission by the defendant that no such mortgages were ever taken, after having stated that such mortgages were in the recorder's office, the further admission by the defendant that he had used the money; a statement by one of the witnesses that the defendant might be sent to prison for such offense, and the offer by the defendant to give the note for the forging of which he was tried and convicted.

[2] The King Case and others, following the rule therein laid down, wherein testimony as to other offenses is held inadmissible, rests upon an entirely different state of circumstances; such testimony being excluded only when the offenses are disconnected, and, whether the testimony as to the leaving of the $7,600 with the defendant in 1910, as related by the witnesses, before anything was said of the conversation had between the defendant and the witnesses on October 6th, was or was not admissible, the defendant was not prejudiced thereby, because all the facts showing his prior embezzlement of the moneys are included in the circumstances occurring on the 6th of October, upon which the note involved in this case is based.

[3] Again, whenever the question of motive, or purpose, or reason for an act is involved, testimony showing such motive, reason, or purpose is always admissible, even though it may establish the commission of other offenses. People v. Soeder, 150 Cal. 12, 87 Pac. 1016; People v. Argentos, 156 Cal. 720, 106 Pac. 65; People v. Sanders, 114 Cal. 216, 46 Pac. 153; People v. Cook, 148 Cal. 340, 83 Pac. 43; People v. Hatch, 163 Cal. 378, 125 Pac. 907; People v. McPherson, 6 Cal. App. 266, 91 Pac. 1098; People v. Courtright, 10 Cal. App. 522, 102 Pac. 542; People v. Mack, 14 Cal. App. 12, 110 Pac. 967.

A large number of other cases might be cited, but these will suffice to illustrate the point in controversy, and, in our opinion, clearly establish the admissibility of the testimony referred to.

[4] During the course of the trial the defendant's father, James Cornell, was placed upon the witness stand by the prosecution and asked as to whether he had or had not authorized the defendant to sign his name to promissory notes. The witness not answering the question directly, or rather having answered in a more or less evasive manner, the district attorney proceeded to interrogate the witness further, over the objection of the defendant that the prosecution was cross-examining its own witness, and that the cross-examination was for the purpose of discrediting the testimony of the witness and inducing the jury to disbelieve his statements. While the ruling of the court in this particular may have been technical error, a reading of the testimony of the witness James Cornell does not disclose anything really prejudicial, and, in view of the decision in the case of People v. Leyshon, 108 Cal. 440–446, 41 Pac. 480, which will be further discussed herein, it is clear that the defendant suffered no injury from the course of the district attorney in this particular, or of the ruling of the court in relation to such testimony.

[5, 6] Misconduct on the part of the district attorney is assigned as having occurred in the course of his cross-examination of the defendant. The transcript shows the following:

"Mr. Jones: Question. How long have you been engaged in this business—this tire business? Answer: Well, it has been several years. It was early in 1910. It might have been in 1909—the latter part of 1909—when that proposition was first presented to me. Question: You have spent a great deal of money in it? Answer: Yes. Question: Spent a great deal of money that you have got from other people in it?"

The asking of this question was assigned as error, and in the course of the colloquy that ensued, the court stated the matter as follows:

"He (referring to the defendant) stated that so far as one of the persons is concerned—that is, Mrs. Jansen—he spent her money. As to any other person, Mr. Jones, your question is improper"

—and, after an apology by the district attorney, instructed the jurors to pay no attention to the question. The question, in and of itself, does not directly assume that the defendant had improperly spent any money belonging to others, and the jury having been promptly directed by the court not to pay any attention to the question or to any inference that might be drawn therefrom as to any other moneys, we do not think that the defendant was materially prejudiced. That the act of the district attorney was not sufficient to warrant reversal, we refer to People v. Glaze, 139 Cal. 159, 72 Pac. 965; People v. Lawrence, 143 Cal. 156, 76 Pac. 893, 68 L. R. A. 193. The question by the district attorney of the defendant, as to whether he had not spent considerable money in riotous living, was not objected to, and therefore need not be considered. Other objections were also urged against the admission of certain testimony, but they do not seem to be of sufficient importance to require any statement herein.

[7] In behalf of the defendant's second assignment of reasons for reversal, it is argued with considerable insistence that the court erred in instructing the jury, and especially in the refusal to give defendant's proposed instructions numbered 7 and 8. Defendant's proposed instruction No. 7 is as follows:

"You are instructed that if the testimony in this case in its weight and effect be such that two conclusions cannot be reasonably drawn from it, the one favoring defendant's innocence and the other tending to establish his guilt, the law demands that the jury shall adopt the former and find the defendant not guilty." (Assuming that the word "cannot" was a clerical error and should have been corrected by the court to read "can," we will consider the instruction in its corrected form.)

Defendant's proposed instruction No. 8 reads:

"You are instructed that when, from the evidence, a man's conduct may be as consistently and reasonably referred to, two motives, one criminal, the other not criminal, the law will ascribe it to that which is innocent, and it is your duty to so find."

These two instructions, while different in form and language, convey practically the same idea, to wit: That the law presumes innocence, and where two conclusions may be drawn from a defendant's acts, the jury must find him not guilty.

Was it error on the part of the court to refuse said proposed instructions?

Instruction No. 41 proposed by the defendant and given by the court reads as follows:

"In this case, C. O. Cartwright has testified that the defendant had no authority to sign his name to said promissory note. I instruct you that you are sole judges of the fact as to whether the defendant had authority so to do, or believed that he had such authority, and unless you feel an abiding conviction to a moral certainty that the defendant did not have such authority and did not believe that he had such authority, then you must find the defendant not guilty."

Further, defendant's proposed instruction No. 37, given to the jury by the court, reads:

"I charge you that if after an entire comparison and consideration of the evidence in this case you entertain a reasonable doubt as to whether the defendant and C. O. Cartwright became partners, and that defendant signed the name of C. O. Cartwright to said promissory note, believing that he had the right to sign the name of C. O. Cartwright as his business associate or partner, then you must find the defendant not guilty."

Defendant's proposed instruction 38 on the same point, and given by the court, is as follows:

"If the defendant believed that he had the right to sign C. O. Cartwright's name to said promissory note by reason of the claim made by the defendant that he and said Cartwright were associated together in business, then I charge you that such belief destroys all criminal intent, and you must find the defendant not guilty."

Further instructions given by the court were to the same tenor and import as these just recited. The two theories upon which the case was tried, by the admission of the defendant through his counsel at the beginning thereof, were, on behalf of the prosecution, that the defendant had no authority to sign the names as signed in the note, and, on the part of the defense, that he was so authorized, and it was these matters which the instructions just recited directly and forcibly instructed the jury that they must ascertain and find from the evidence against the defendant beyond a reasonable doubt before a verdict of guilty would be justified. There were no other theories involved in the case to which the refused instructions 7 and 8 could possibly apply, and, being covered, in substance, by the instructions given, no prejudice was occasioned by their refusal.

The jury was further instructed:

"That every material allegation in the indictment must be established to the satisfaction of the jury beyond all reasonable doubt; that the jury should take into consideration only the evidence, and should disregard and discard from their minds every impression or idea suggested by questions asked by counsel which were not allowed to be answered, and, further, that the presumption of innocence continued through the trial and until the jurors were convinced to a moral certainty and beyond all reasonable doubt of the guilt of the defendant."

Upon the question as to whether a partnership existed between the defendant and C. O. Cartwright, and whether the defendant did or did not have a right to sign the name of the said C. O. Cartwright to the note in question, as such partner, the jury was fully instructed. Also the jury was clearly and pointedly instructed that the defendant could not be found guilty of the offense charged because he might have been guilty of misappropriating the moneys belonging to the witness Jansen.

[8] It may be here proper to remark that the trial court, after once instructing the jury clearly upon the points involved in the case, was not required to repeat the instructions with all the variableness and shadows of turning possible to skillful and learned attorneys.

Forty-four distinct and separate instructions were asked for by the defendant in this case, which necessarily devolved upon the trial court the duty of sifting out and excluding a large number of them, even though they might be correct statements of the law, as most of them constituted only repetition of what had already been given, with variations in language.

[9] The third reason assigned as grounds for reversal is as to the sufficiency in form and substance of the verdict. It is as follows:

"People of the State of California versus Joseph D. Cornell. We, the jury in the above-entitled cause, find the defendant guilty of the crime of forgery, as charged in the indictment, of the promissory note set forth in the indictment; and we further find that said defendant forged the name of C. O. Cartwright to said promissory note, as charged in the indictment; and we further find the defendant guilty of uttering and passing the forged promissory note as charged in the indictment.

"Robert E. Clark, Foreman."

No question was raised at the time of the return of the verdict as to its form or sufficiency, and it was first presented to the trial court upon the defendant's motion for new trial, hence, whether the court should or should not have returned the verdict to the jury and directed the jury to reconsider the same, as provided by section 1161 of the Pe-

nal Code, is not presented for consideration. Section 1150 of the Penal Code provides:

"That the jury may render a general verdict, or when in doubt as to the legal effect of the facts proved, they may, except upon a trial for libel, find a special verdict."

Section 1152 of the same Code defines a special verdict as:

"One by which the jury finds the facts only, leaving the judgment to the court."

The appellant insists that the court erred in submitting a special form of verdict to the jury. An examination of the sections above referred to shows that there is nothing in this claim. There is nothing in the verdict, which is special in its nature, as defined by section 1152 of the Penal Code. There is a clause in the verdict which is particular, as language is ordinarily understood, in its reference to the defendant having forged the name of C. O. Cartwright. A special verdict is one which simply finds the facts. To have made this verdict special, under the definition contained in the Code, it must have set forth the facts of the defendant signing the name of Cartwright without authority, etc., but, instead of so doing, the jury finds the general fact of forgery, in that the defendant forged a particular name. Is the verdict sufficient to support the judgment?

[10] Looking at the verdict and reading it as a whole, it is clear that the jury intended to find the defendant guilty of forgery, as charged in the indictment, in this, to wit: That he forged the name of C. O. Cartwright to the instrument set forth in the indictment, and thereafter uttered and passed the same as charged.

Bishop, in his Criminal Procedure (2d Ed.) § 1005a, speaking of verdicts, says:

"The language of the verdict, being that of lay people, need not follow the strict rules of pleading or be otherwise technical. Whatever conveys the idea to the common understanding will suffice, and all fair intendments will be made to support it. As in an indictment or a pleading bad grammar or spelling does not vitiate, so, a fortiori, it does not in the verdict unless the meaning becomes inadequate. Surplusage is harmless. The finding must be construed as a whole, not in its separate parts."

In People v. Brady, 65 Pac. 824,[1] the court says:

"Where the intention of the jury is unmistakable, mere clerical errors should be disregarded."

In People v. Jochinsky, 106 Cal. 640, 39 Pac. 1077, the verdict was as follows:

"We, the jury, find the defendant guilty of burglary in the first degree, we further find that the goods taken from Prince's store on the night of the 13th and 14th of April, 1893, were brought from Sonoma county into the city and county of San Francisco, state of California, by the defendant."

The objection there was that the verdict was both general and special, and that it was faulty because it did not specify where the burglary was committed. The objection was held invalid. In State v. Bowen, 16 Kan. 476, the verdict returned by the jury read:

"We, the jury, find the defendant not guilty in manner and form as charged in the information, but do find him guilty of manslaughter in the second degree."

Upon this the defendant moved to be discharged on the ground that murder includes all the degrees of manslaughter, and the first part of the verdict finding him not guilty in manner and form as charged was responsive to all the charges, and acquitted him of guilt not only of murder but as to all the degrees of manslaughter, and therefore the latter part of the verdict should be disregarded as surplusage. The court held the point not well taken, and that the verdict must be taken as a whole, and its meaning determined from a consideration of every part, and, when so taken, there was no chance for misconception as to the meaning of the jury, and that it found him guilty of the crime of manslaughter.

In Kimball v. Territory, 13 Ariz. 310, 115 Pac. 70, the court says:

"Where the intention to convict of the crime is unmistakably expressed in the verdict, any mere irregularity or surplusage contained therein is immaterial."

In that case, however, the verdict simply found the defendant guilty of obtaining property by false representations, without finding him guilty of any intent to defraud, which constituted a necessary part of the crime.

In People v. Gilbert, 57 Cal. 96, the verdict was:

"We, the jury, find the defendant guilty, as indicted, to the sum of $90."

The defendant was charged with the crime of embezzlement. The reference in the verdict was held to make it explicitly appear that the jury found him guilty of embezzlement, and that they further found that the sum embezzled was $90, and the verdict held legally sufficient.

In State v. Arbruzino, 67 W. Va. 534, 68 S. E. 269, a verdict was returned in the following form:

"We, the jury, find the defendant, Tonio Arbruzino, not guilty of the felonious and malicious assault charged in the within indictment with the intent therein charged, but we do find him guilty of the unlawful assault therein charged with the intent therein also charged."

The court held that what the jury meant was to be ascertained by reference to the indictment, and that the verdict should always be read in connection therewith, and if it be certain, upon reading them together, what the meaning of the verdict may be, it is sufficient (citing a number of authorities).

In the same volume, 68 S. E., on page 458 (Barber v. State, 8 Ga. App. 28), the sufficiency of a verdict was passed upon, and it was there said:

"A verdict is to be given a reasonable intendment, and, when ambiguous, may be construed in the light of the issues actually submitted to the jury under the charge of the court; and

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 133 Cal. xx.

if, when so construed, it expresses with reasonable certainty a finding supported by the evidence, it is to be upheld as legal."

In Willingham v. State, 62 Tex. Cr. R. 55, 136 S. W. 470, the jury returned a verdict in these words:

"We, the juror, find the defendant guilty and ses his pently at sixty days in jail & $25 fine."

The court, in upholding this verdict, said:

"It is well settled, where the sense is clear, that neither incorrect orthography nor ungrammatical language will render a verdict illegal or void, and that it is to be reasonably construed, and in such manner as to give it the meaning intended to be conveyed by the jury" (citing a number of authorities).

In State v. Schweitzer, 18 Idaho, 609, 111 Pac. 130, the verdict read:

"We, the jury in the above-entitled case, find the defendant, George Schweitzer, guilty of selling by short weights as charged in the complaint."

This was held sufficient, as the intent of the jury was clear in that it found the defendant guilty. The words "selling by short weights" might be treated as surplusage, and still the verdict held good, for then it found the defendant guilty as charged in the complaint. This case distinguishes the general current of authority from the case of People v. Tilley, 135 Cal. 61, 67 Pac. 42, where it was held that a verdict in these words, "We, the jury in the above-entitled case, find the defendant, Charles H. Tilley, guilty of receiving stolen property," was insufficient, as it must, in order to constitute a crime, include the knowledge that the property was stolen, and also the intent to deprive the owner of the same. It may be stated also that the verdict in the Tilley Case did not refer to the indictment or information, which also distinguishes that case from the one at bar, where the indictment is clearly and distinctly referred to.

In People v. McCarty, 48 Cal. 557, the verdict returned was:

"We, the undersigned jurors, find a verdict of murder in the second degree. A. J. Chase, Foreman."

This verdict, being recorded, was read to the jury, and each of the jurors answered that it was his verdict. It was there stated, in upholding this verdict, that:

"While the Penal Code sets forth a form of verdict, it does not bind the jury, and that a mere departure from such form does not of itself vitiate the verdict, if it can be clearly understood as being a general verdict of guilty or not guilty, and that there was no difficulty in understanding the verdict there rendered as being one finding the defendant guilty of murder in the second degree as charged in the indictment."

In People v. Perdue, 49 Cal. 427, the verdict returned was:

"We, the jury in the case of The People of the State of California vs. Charles Perdue, do find a verdict of manslaughter. By the Foreman, Wm. A. Creps."

This verdict was held sufficient.

In the case of People v. Holmes, 118 Cal. 444, 50 Pac. 675, the portion of the verdict pertinent here was:

"We find a verdict of 'guilty' against all the others named in the indictment, to wit (setting forth the names) and find a verdict of 'involuntary manslaughter,' 'not a felony,' as charged and laid down by the court under the head of Involuntary Manslaughter, and pray the * * * mercy of the court in its sentence and punishment, and so say we all."

The court said:

"The verdict clearly shows an intention to convict, and the grade of the offense is fixed by declaring it to be involuntary manslaughter. * * * But whatever may have been the intention of the jury, by no possible construction could we reach the conclusion that the jury meant to acquit the defendants, for they not only found them guilty in terms, but recommended them 'to the extreme mercy of the court in its sentence and punishment.' Whether the crime of which the defendants were found guilty was or was not a felony did not lie with the jury to declare—the statute does this. There is no good reason why the verdict of a jury should not have a reasonable construction and be given effect according to its manifest intention. The words 'not a felony' should be rejected as surplusage, and the general verdict of 'guilty of involuntary manslaughter' should stand as the verdict."

[11] Appellant further urges that, admitting the verdict finds the defendant guilty of forging the name of C. O. Cartwright, it is yet silent as to the forging of the name of James Cornell, unless the first clause in the verdict finds the defendant guilty of forging both of the names as charged in the indictment, and that, in such case, as the testimony is insufficient to support a verdict finding the defendant guilty as to James Cornell, a new trial should be granted. This contention is answered in the negative in the case of People v. Leyshon, 108 Cal. 445, 446, 41 Pac. 480. There the defendant was tried on an information charging forgery to a note of the names of Mrs. Maggie Henry and Eliza J. Clark.

"The defense interposed was that the business relations between the defendant and the two women whose names appeared upon the note were such that defendant either had authority, or supposed he had authority, to sign their names thereto. As to Mrs. Maggie Henry, there was evidence tending to show some foundation for the position assumed by the defendant; but there was a conflict in the evidence on this point, and upon well-recognized principles the verdict cannot, under such circumstances, be set aside for such cause. As to the name of Eliza J. Clark, signed by defendant, we find in the record not an iota of evidence tending to show in the defendant any authority, or ground upon which to found a belief of authority, to use her name upon the promissory note. As to her, the case presented a bald case of forgery, not relieved by any pretext worthy of consideration. The proof that defendant forged the name of Eliza J. Clark to the promissory note described in the information is sufficient alone to uphold the verdict, and for that reason the several rulings of the court upon the admission and rejection of testimony touching the business relations existing between defendant and Mrs. Maggie Henry need not be considered, for, if erroneous, such rulings do not, under the circumstances, call for a reversal."

In this case, as heretofore stated, the defendant sets up a like defense. The testimony as to whether the defendant did or did not have authority to sign the name of

James Cornell is of such a character that the court would not be warranted in holding it sufficient to support the verdict. But the testimony as to the authority of the defendant to sign the name of C. O. Cartwright is of such a nature and character as to abundantly warrant the jury in finding the verdict which it returned. A careful reading of the testimony shows that the defendant's claim of authority to sign the name of C. O. Cartwright by reason of their alleged relations is little more than what was called in the Leyshon Case "a mere pretext." The whole basis of the claim of the defendant as to his authority to sign the name of Cartwright rested upon the fact that some years previously the defendant had assigned to Cartwright a one-third interest of his one-third interest in certain pending applications for patents in the Crosby tire which the defendant was exploiting; that C. O. Cartwright had on a previous occasion at a bank in Sacramento signed a note with the defendant. But the testimony shows that the defendant at no other instance ever affixed the name of Cartwright to any paper; that there were no business relations between the defendant and Cartwright as to the patents involved, that Cartwright never participated in any way in the management thereof, or agreed to become a partner or in any way associated with the defendant in his business enterprises, or did anything that a partner would ordinarily be expected to do, and the fact of the defendant's having signed the names of James Cornell and C. O. Cartwright to the note in question was never disclosed by the defendant to either of the persons whose names he had signed, and was only discovered by them a long time afterwards when Mrs. Jansen was seeking payment on the note.

The holding in the Leyshon Case disposes of the objection urged by appellant that the testimony being sufficient to establish forgery only of one name to the note, the admission of the note in evidence was error. The crime of forgery being established by proof of the forgery of one name, the testimony need go no further, and the note was clearly admissible in evidence.

Finding no substantial reason for reversal herein, the judgment and order of the trial court will be and the same are hereby affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

PLUMMER, Judge pro tem. [12] A re-examination of the record in this cause discloses the fact that counsel for the defendant did enter an exception to the form of the verdict at the time of its return by the jury. This exception does not appear to have been set out in the reporter's notes, and was inserted in close, typewritten form in the minutes of the clerk, where it was not readily discernible and therefore was not seen. The exception simply went to the form and not to the sufficiency of the verdict, and it nowhere appears that the court was requested to return the verdict to the jury and instruct the jury to further consider the same, as provided by section 1161 of the Penal Code. But, as appears from the opinion of the court hereinbefore rendered, the form and the sufficiency of the verdict returned by the jury in this case have been carefully and fully considered, as having been properly presented for consideration upon motion for new trial in the court below, and as presented to this court on appeal, no injury has resulted to the defendant. However, that no further misapprehension may arise, and in the furtherance of accuracy, the following words:

"No question was raised at the time of the return of the verdict as to its form or sufficiency, and it was first presented to the trial court upon the motion for new trial; hence whether the court should or should not have returned the verdict to the jury and directed the jury to reconsider the same as provided in section 1161 of the Penal Code is not presented for consideration"

—will be and the same are hereby stricken from the opinion heretofore rendered. Every question concerning said verdict which could have been considered if the court had been requested to return the verdict to the jury under said section, having been fully set forth by this court in its consideration of the form and sufficiency of the verdict in its opinion, no reason is presented why a rehearing should be granted to consider the provisions of said section.

The appellant also urgently insists that a rehearing should be granted in order that further consideration may be had of certain instructions not specifically set forth in the court's opinion, and also for the reason that his cause has been prejudiced by the language of the court in reference to his alleged partnership with Dr. C. O. Cartwright.

[13] The defendant was not on trial for embezzlement, and hence instructions 42, 43, and 44, not specifically mentioned in the opinion heretofore rendered, requested by the defendant and refused by the trial court, were properly refused, though correct statements of the law.

[14, 15] Instruction 44, in so far as it had any bearing upon this case, was included in instruction No. 45, given at the request of the defendant, wherein the jury was instructed that evidence of an offense different from that alleged in the indictment could not be considered by them as rendering it more probable or likely that the defendant committed the offense charged, etc. Nor does it appear that the modification of instruction No. 23 by the trial court was such as to cause any miscarriage of justice. The jury was instructed that:

"A general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his copartner by an instrument in writing."

This would necessarily include promissory notes as an instrument in writing. This instruction is followed by one stating that authority to sign one's name to a promissory note might be given by mere word of mouth.

Defendant's instructions 24, 25, 26, and 27 were covered by instructions given by the court.

[16] Instruction 20 was properly refused, as there was no testimony upon which it could be based.

[17] To show that there has been no miscarriage of justice, as contemplated by section 4½ of article 6 of the Constitution, by reason of any technical errors of the trial court, and also that the defendant has not been prejudiced by this court in applying a quotation from the opinion of the Supreme Court in the case of People v. Leyshon, 108 Cal. 445, 41 Pac. 480, to the cause at bar, the defendant's own testimony may properly be set forth.

The $7,600 misappropriated by the defendant was received by him in the year 1910. In reply to the question (Tr. p. 100), "What did you do with the money, or in what manner, if any, did you loan or invest it for her," he testified:

"The money was invested by me in the development and operation of a certain patent resilient spring tire. The money was practically loaned to the Crosby Resilient Tire Company, which was organized for the purpose of exploiting and developing and placing on the market that tire. I do not recall at the moment when the corporation was organized, but I believe in 1910 or early in 1911. I had absolute charge of the business of the corporation."

As to what took place between the defendant and Dr. Cartwright most clearly appears from the testimony of the defendant in reply to questions by the court (Transcript, p. 150 et seq.):

"Prior to November 9, 1911, had you had any conversation on that particular subject as to becoming associated with him? Ans. I think not. I think that the conversations that I had with him prior to that time were along general lines as to the development of the tire and its possibilities. Ques. Well, now what was that conversation, in substance? Ans. We were speaking of the tire, its possibilities, and speaking of the foreign patents, and I told the doctor of the large amount of money that it was taking to exploit and develop this tire, and how much more it was taking than I ever thought it would take in the first place when I went into it; the patents and all the incidental expenses, and I stated to him, however, that I had the utmost confidence in it, and my confidence was growing as I observed the development of the tire. And he also expressed confidence in the tire; in fact had always had confidence in it. And then I suggested to him that he become associated with me in business—in the foreign business, not the United States patents or the United States business, but the foreign business. Ques. Well, you say, 'I suggested to him that he become associated.' Did you say, 'Doctor, I would like to have you associated with me in this'? Ans. Probably words to that effect. I won't say just exactly what the words were; but I did tell him that I would like to have him become associated with us in it and reap the benefits with us when there were any benefits to be reaped, and assist us in any way possible in the development if it became necessary. Ques. Well, then, what did he say? Ans. Well, he stated that he would be willing to do so; and I told him that I would then give him an assignment; that I could not give him stock in the foreign patents because there was no foreign corporation covering the foreign patents, but that I would give him an assignment covering my interest in the foreign patents, and that thereafter when the tire had developed sufficiently so that we could commence to market foreign patents or do something with them, and a corporation would be then formed for that purpose; then stock would be issued to him proportionately to the value of the assignments, whatever it might be. Ques. Well, was there another conversation in reference to the subject-matter? I am not speaking now in reference to the tire generally, but I mean in reference to his association with you. Ans. Yes; there was some; undoubtedly we held a conversation when I delivered the assignments to him, but all the conversations were practically along the same lines. If you got one you practically got them all."

After testifying that the words "association and partnership" were not used in any conversation, that no books were ever opened, that no accounting was ever had, the following testimony appears:

(Question by the Court:) "I am speaking now as to whether or not there was a partnership. I am trying to get at any conversation that may have been had touching any partnership which was actually formed, or which you thought was formed. As I understand, the result of your testimony was that it was only that one time that you remember specifically that you spoke about him being associated with you? Ans. Well, I cannot recall the definite conversations; but I know that many times he did speak about —when it comes to specifying the time of the conversations, I cannot do it, I cannot recall it; I don't remember it, just when they were. Ques. That is the only time that you can recollect, is the one time when the conversation occurred as you say? Ans. Yes; the specific time that I recollect. Ques. And you said something about becoming associated, and he said 'All right'? Ans. Yes. Ques. And he said in effect, 'All right'? Ans. Yes. Ques. And you do not recall any subsequent conversation, or the details of it, in reference to that particular subject-matter. I mean about the association part, other than you said a moment ago? Ans. Only specifically in regard to the conversation which followed about the subsequent formation of an actual partnership. Ques. Yes; but that was never consummated? Ans. No; that has not yet been consummated."

At about the time to which this conversation relates, the defendant delivered to Cartwright an instrument transferring to him for life a one-third interest in the defendant's one-third interest in and to all patents pending and applied for in foreign countries in reference to said tire. The trial was had in September, 1915, and by the defendant's own testimony it appears that the alleged partnership with Dr. Cartwright had not even then been consummated.

The chronological order is as follows: The money was left with the defendant in 1910, to be loaned upon real estate mortgages. The defendant applied it to the uses and pur-

poses of the Crosby Tire Company, a corporation, of which he was sole manager. In November, 1911, he had a conversation with Dr. Cartwright about becoming associated with him in foreign patents concerning said tire, which were not being handled by the company. In October, 1913, the note for the forgery, of which the defendant was tried and convicted, was given to cover the money that had been used by the defendant in the corporation in which he does not testify that Dr. Cartwright had any interest whatsoever. The trial was had September, 1915, at which time, as above stated, partnership relations had not been established.

The testimony of the defendant is quite voluminous, but, as he said to the court, "When you get one conversation, you get it all."

The foregoing, in connection with the opinion heretofore rendered, we think sufficient to show that the defendant's petition for a rehearing herein should be denied; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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SCHEAFER et al. v. HERMAN et al., Board of Election Com'rs. (S. F. 7589.)

(Supreme Court of California. March 18, 1916.)

1. MUNICIPAL CORPORATIONS ⊂=79 — CONTROL OF "MUNICIPAL AFFAIRS"—GENERAL STATUTES.

Under Const. art. 11, § 6, providing that general laws shall control the acts of the city,

except in municipal affairs, the matter of election and removal of municipal officers, when provided for in a special charter, is a "municipal affair," so that general statutes inconsistent with such charter do not control.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 183; Dec. Dig. ⟸ 79.

For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

2. MUNICIPAL CORPORATIONS ⟸124(5) — ELECTION AND RECALL OF OFFICERS—PETITIONS—REQUIREMENTS.

St. 1911, p. 1675, art. 11, c. 5, the special charter of the city of San Francisco, provides a complete scheme for the election and recall of the municipal officers, but does not require that the recall petition shall carry the date of signature of each signer thereof. Section 7 of said chapter, provides that, unless there be some other method provided in the chapter, recall elections shall be held as provided by general laws. St. 1911, p. 1679, art. 11, c. 1, § 5, declares that all provisions of the general laws respecting elections not inconsistent with provisions of chapter 2 shall be applicable to all elections held in the city and county of San Francisco. *Held*, that the last section does not import into section 7 the provisions of Pol. Code, § 1083a, as amended by St. 1915, p. 286, a part of the general election law of the state, relating to recall elections, which requires the date of signature of each signer to be attached to the petition.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 294; Dec. Dig. ⟸ 124(5).]

3. MUNICIPAL CORPORATIONS ⟸79 — ELECTION AND RECALL OF OFFICERS—STATUTES APPLICABLE.

Where the special charter of a city contained a complete scheme for the recall of officers, which omitted the requirement that the petition therefor should bear the date of signature of each signer, the Legislature could not thereafter make applicable to municipal recalls a statute making that requirement, which constituted an additional burden to the recall inconsistent with the charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 183; Dec. Dig. ⟸ 79.]

4. STATUTES ⟸142 — CONSTRUCTION — CONVENIENCE.

That a statute, if construed to apply to a given situation, would render the duties of the board of election commissioners more convenient to be performed, does not require such construction, which in effect would amend the statute contrary to its terms.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 210; Dec. Dig. ⟸142.]

5. MUNICIPAL CORPORATIONS ⟸159(1) — ELECTION AND RECALL OF OFFICERS — REVIEW OF RECALL PETITION—TIME.

Failure of the board of election commissioners to pass upon the sufficiency of a recall petition within 10 days, as required by the municipal charter, does not invalidate the petition, where such failure was the result of a violation of duty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 350; Dec. Dig. ⟸ 159(1).]

Melvin, J., dissenting.

In Bank. Original application for writ of mandate by L. Scheafer and others against John Herman and others, as the Board of Election Commissioners of the City and County of San Francisco. Ordered that the writ issue.

Daniel O'Connell, of San Francisco, for petitioners. Thomas V. Cator and John S. Partridge, both of San Francisco (Thos. E. Haven, of San Francisco, of counsel), for respondents.

SHAW, J. This is an original proceeding in this court against the board of election commissioners of the city and county of San Francisco, in mandamus, to compel the board to perform its duties with respect to a certain recall petition alleged to have been presented to the board for its action.

On September 27, 1915, the petitioners duly presented to and filed with the said board a petition for the recall of Percy V. Long as city attorney of said city and county. There were appended to the petition the names of 10,395 persons, the same being more than 10 per cent. of the total vote cast for mayor of the city and county of San Francisco at the then last preceding municipal election. Added to each signature was the place of residence, with street and number, of the person signing. The petition was duly verified by the persons who circulated the same. Thereupon the petitioners demanded of the board that it proceed to examine the signatures and determine whether or not it was signed by the requisite number of electors, and, if they found it sufficient in that respect, that they proceed to order and fix a date for holding the proposed recall election. The commissioners refused to do so, basing their refusal upon the ground that the persons signing the petition had not added to their signatures, respectively, the date on which they signed the petition. Upon the hearing it was conceded that the petition appeared to be signed by a sufficient number of persons to require the calling of an election, under the provisions of the charter of San Francisco, if the persons so signing were qualified to sign such petition. The sole question involved appears to be whether or not it was necessary for each person signing such petitions to state, in addition to his residence, street, and number, the date of such signing.

[1] It is conceded that the subject of the removal of officers of a city and county, by means of a recall, when provided for in a special charter, is a municipal affair, within the meaning of that phrase as used in section 6, article 11, of the Constitution, and that consequently it is not subject to or controlled by general laws inconsistent therewith. This is in accordance with our decisions. Croly v. Sacramento, 119 Cal. 233, 51 Pac. 323; Coffey v. Superior Court, 147 Cal. 535, 82 Pac. 75; Dinan v. Superior Court, 6 Cal. App. 222, 91 Pac. 806. This does not mean

that the general laws prescribing procedure and causes for removal do not apply to such municipal officers. The rule is that, where a freeholder's charter has provided a mode of removal of officers and that mode is resorted to, the general law cannot control the exercise of the power in that manner, or change the procedure required by the charter. Coffey v. Superior Court, supra.

[2] The charter of San Francisco contains a complete scheme for the recall of municipal officers. Article 11, c. 5, p. 1661, Stats. 1911. Section 1 of this chapter provides that:

"The holder of any elective office may be removed or recalled by the electors. The procedure to effect such removal or recall shall be as follows: A petition demanding the election of a successor to the person sought to be removed or recalled shall be filed with the board of election commissioners. Such petition shall be signed by registered voters equal in number to at least ten per cent of the entire vote cast for mayor at the last preceding general municipal election."

Section 2 provides that the petition shall be in all respects the same, and shall be examined and certified in the same manner, as provided in petitions for the initiative, under sections 2 and 3 of chapter 3, article 11 of the charter. These relate to initiative proceedings. Section 2 of chapter 3 defines the term "registered voters," provides for the circulation of separate copies of a petition for initiative measures for signatures and the verification thereof by the person circulating the same, and adds the following:

"Each signer of said petition shall add to his signature his place of residence, giving the street and number. Unless and until it be proven otherwise by official investigation, it shall be presumed that the petition filed conforms to all legal requirements and contains the signatures of the requisite number of registered voters, and, after an election based thereon, the sufficiency of said petition shall not be questioned."

Section 3 of chapter 5, relating to the recall, requires the board, within ten days after the filing of the petition, unless it is found insufficient, to order and fix a date for holding a recall election.

It is clear that these provisions do not require the voter to add to his signature the date upon which he writes it. It requires only that he add his place of residence, giving the street and number thereof. The respondents claim that the date is required by reason of the provisions of section 1083a of the Political Code, as amended in 1915, which took effect August 8, 1915. St. 1915, p. 286. This section constitutes a part of the general election law of the state, and relates particularly to initiative, referendum, and recall elections, and to petitions required to be signed by qualified electors. The clause upon which the respondents rely refers to the mode of signing such petitions and provides that:

"Such signer shall at the time of so signing such petition or paper affix thereto the date of such signing."

It is claimed that this becomes a part of the charter by adoption. This claim is based upon section 7 of chapter 5 of article 11 of the charter.

Chapter 5 relates to the recall. Sections 1 to 6 prescribe the form of petition, the number of signatures required, the call for the election thereon, the nomination of candidates, the circulation of sample ballots, and other matters, all of which precede the recall election. The first clause of section 7 is as follows:

"Until and unless there be some other method provided in this chapter for the conduct of a recall election, such election shall be governed, so far as applicable, by the laws governing the holding of other municipal elections, except as hereinafter provided."

The matters thereinafter provided consist of directions regarding the form of the ballot, the number of votes necessary to recall the incumbent and to elect a successor. Nothing is provided with respect to signatures to the recall petition.

The thing referred to in the clause of section 7 above quoted, and which is to be governed by "the laws governing the holding of other municipal elections," is the matter of "the conduct of a recall election." Chapter 2 of the article is entitled "Municipal Elections." St. 1899, p. 345. It provides for the time of holding primary and general elections, the mode of nominating candidates, the election proclamation, the form of ballots, and other things preliminary to the holding of elections, but it contains nothing about the conduct of elections. With respect to the conduct of elections the only provision in the charter is section 5, chapter 1, article 11 (St. 1911, p. 1679), which declares that:

"All provisions of the general laws of this state, including penal laws, respecting elections, not inconsistent with the provisions of chapter 2 hereof, shall be applicable to all elections held in the city and county of San Francisco."

The argument is that this language imports into section 7 of chapter 5, article 11, of the charter, which relates to recall elections, all the provisions of section 1083a of the Political Code, respecting the signatures to recall petitions.

It cannot be so construed. Section 7 does not refer to the general laws for the purpose of ascertaining the law relating to recall petitions. The reference is only for the purpose of ascertaining the law governing the manner of conducting recall elections. Section 7 does not purport to provide anything whatever regarding the signatures to the recall petitions. That subject is controlled entirely by section 2 of the same chapter and by section 2, chapter 3, which, by reference, is made a part of section 2 of chapter 5, neither of which refers to the general law. They purport to be complete in themselves and do not require aid from any other statute to make them cover the subject for which

they were intended to provide. The reference in section 7 to the general law, as providing for the conduct of recall elections, is confined to that subject and cannot be extended to the subject of the mode of signing recall petitions to initiate a recall proceeding under the charter.

[3] It is further argued that section 1083a applies under another rule of interpretation, namely, that the general law prevails in all cases where it is not inconsistent with the provisions of the charter. It is argued that there is nothing in the charter on the subject of dating the signatures to a recall petition; that, therefore, the provisions of section 1083a, requiring the date of signing to be inserted, is not inconsistent with the charter, but is an independent, supplemental provision, which the Legislature had the power to enact and to make applicable to municipal affairs in all municipalities wherein there were no charter provisions inconsistent therewith. This argument is untenable. There is an inconsistency. The charter, as we have said, contains a complete scheme for the making and filing of petitions for the recall of municipal officers. Article 11 of the charter was adopted prior to any recall legislation by the state. It gave the voters of San Francisco the right and power to initiate proceedings to recall municipal officers by complying with its provisions. Among these provisions was one that the petition for the recall should be signed by registered voters of the city and county and that each signer "shall add to his signature his place of residence, giving the street and number." This was all that was necessary. He was not required to add thereto the date of signing the petition, or any other matter whatever. Those who circulated the petition were not required or allowed to exact anything more. Any addition to the things required to effect a recall would be an additional burden upon the right and would be inconsistent with the charter which gave the right without compliance with further conditions. The provisions of the general law requiring him to add the date of his signature being, therefore, inconsistent with the provisions of the charter which allowed him to make a recall petition without such date, it follows that it does not apply to or affect proceedings for recall under the charter.

[4] Arguments are also presented with respect to the inconveniences attending the lack of a date to the signature, as that the election board, when they examine the petition, must determine whether or not each petitioner was a qualified registered voter on the date of signing the petition, and must therefore ascertain such date. No doubt this might be a convenient aid to the board in making its examination in cases of dispute and where fraud was charged. But matters of inconvenience do not affect the argument that recall proceedings are to be controlled by reference to the provisions of the charter and not with regard to other provisions that might be more convenient or might tend to prevent fraud. The law provides a way to amend the charter. If amendment is desired, this way must be followed. It cannot be done by the short cut of interpretation contrary to the sense of the language used.

[5] Our conclusion is that the failure of the persons signing the recall petition to add to their signatures the date on which they signed it does not affect the validity of the petition, nor excuse the board of election commissioners from the duty of examining such petition to ascertain and determine whether or not it is signed by the requisite number of electors entitled to vote, as provided in section 3, chapter 3, article 11, of the charter. It is not disputed that the lapse of 10 days is not material to the right of the petitioners. That provision is directory only. The refusal of the board to act within the time prescribed does not destroy the rights of the persons signing the petition, nor terminate the proceeding. It is the duty of the board to proceed now to examine the petition in the same manner as if they had begun the examination within the 10 days provided by the charter.

Let a writ of mandate issue directed to the board of election commissioners of the city and county of San Francisco, commanding it to proceed forthwith finally to determine from the records of registration whether or not the said petition for the recall of Percy V. Long as city attorney of the said city and county is signed by the requisite number of electors entitled to vote, and, if it finds it sufficient and otherwise lawful, that it thereupon proceed to order and fix a date for holding the election upon said recall petition.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

MELVIN, J. I dissent. The duty of the election board is to examine the petition and to determine whether or not each petitioner was qualified as a registered voter at the time he affixed his signature. How can such a duty be performed unless the date of signature be established? The opportunities for fraud in the inauguration of a recall are so numerous that every precaution should be taken to guard against improper practices. It may be that the law does not in terms command the dating of the signatures. It does, however, require the election commissioners solemnly to certify to the status of each signer as a registered voter at the moment when he affixed his name to the petition. They cannot possibly perform that duty without evidence upon this subject, and surely the law does not contemplate the calling of all of the signers as witnesses before the board. Therefore, it seems to me, there is a clear implication that the date of sign-

ing must be indicated by each of the petitioners or by the person who circulates and verifies the petition.

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LANTZ v. COLE et al. (RHEINSCHILD, Intervener). (L. A. 3639.)

(Supreme Court of California. March 7, 1916. Rehearing Denied April 6, 1916.)

1. COURTS ⟸85(1)—RULES OF COURT—VALIDITY.

A rule of the superior court will not deprive that tribunal of the right to make a valid order for the service of a bill of exception within the limitations of Code Civ. Proc. § 1054, providing that the time for serving bills of exception may be extended, for good cause, for a period not exceeding 30 days beyond the time fixed by the code.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 294, 298, 299, 301; Dec. Dig. ⟸85(1).]

2. APPEAL AND ERROR ⟸227 — RIGHT TO URGE OBJECTIONS.

Where respondent made no objection to the settlement of a bill of exceptions on the ground that it was not served within time, but presented amendments, some of which were allowed, and the bill was settled, he cannot on appeal object to consideration of the bill on the ground that it was not served within time.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⟸227.]

3. JUDGMENT ⟸743(2) — CONCLUSIVENESS — MATTERS CONCLUDED.

In a former action between plaintiff and defendants' grantor, the court adjudged that defendants' grantor, who intervened in the action against defendants, had acquired title by reason of a purchase of the lands in controversy, when they were sold to satisfy bonds issued for public improvements, and that plaintiff had only the right to redeem within the time fixed by law. At that time no deed had been made to the intervener, the purchaser. *Held*, that such judgment was a conclusive adjudication against the title of plaintiff despite the invalidity of a subsequent deed to the intervener, so plaintiff could not maintain ejectment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1276; Dec. Dig. ⟸743(2).]

4. EJECTMENT ⟸17 — ACTIONS — RIGHT TO MAINTAIN.

As under Civ. Code, § 654, the owner is entitled to possession, plaintiff, who had only a bare right to redeem property sold for nonpayment of assessments for public improvement, cannot maintain ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 63, 64; Dec. Dig. ⟸17.]

Department 1. Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by H. P. Lantz, as administrator with the will annexed of the estate of George Locke, deceased, against Edward H. Cole and others, in which Susie Rheinschild, as executrix of the last will and testament of George Rheinschild, deceased, was substituted as intervener in place of her testator. From a judgment for plaintiff and an order

denying new trial, defendants and intervener appeal. Judgment and order reversed.

Murphey & Poplin and J. L. Murphey, all of Los Angeles, for appellants. Charles Lantz and Davis, Lantz & Wood, all of Los Angeles, for respondent.

SLOSS, J. This action was begun by the plaintiff, as administrator with the will annexed of the estate of George Locke, deceased, to recover possession of a lot of land in the city of Los Angeles, together with damages for the withholding of possession by the defendants. The defendants named in the complaint are the trustees and the pastor of the Brooklyn Heights Congregational Church, an unincorporated religious association. They answered asserting, among other defenses, the right to occupy the premises under a lease and option of purchase from one George Rheinschild to the defendants' predecessors as trustees of the church. After the filing of the answer, Rheinschild (whose claim was based on sales for nonpayment of street improvement bonds) intervened to unite with defendants in resisting plaintiff's claim. He alleged, in addition to matters contained in the answer of defendants, that he was the owner in fee and entitled to possession of the property described in the complaint. He set up the pendency of another action brought by the present plaintiff against himself and one Fishburn as defendants. Rheinschild's complaint in intervention was filed in March, 1908. He died in September, 1911. By supplemental answer, filed in June, 1912, the executrix of his will alleged that the action of Lantz v. Fishburn and Rheinschild, the pendency of which had been set up in the complaint in intervention, had been finally decided by the District Court of Appeal for the Second Appellate District, which court had directed the trial court to enter judgment that Rheinschild held title to the lot in question, subject only to the right of plaintiff to redeem within the time allowed by law. It was further alleged that the superior court had, pursuant to the mandate of the court of appeal, entered its judgment finally adjudging the title to said lot to be in Rheinschild, his heirs and legal representatives, "with only the right in the estate of Locke to redeem from the effect of said sales." In the present action, the court found that Locke, up to the time of his death, was the owner of the land; that his estate had since his death owned the land subject to the sales above mentioned; that the defendants in April, 1902, wrongfully entered upon the land and ousted plaintiff therefrom, and have ever since withheld possession from him, to his damage in the sum of $106. It is further found that the sales of said lot to Rheinschild, made in the year 1907, were valid, but that no valid deed had been issued upon said sales. The judgment was that the lot is owned in fee by the estate of Locke, subject to the sales made July 9, 1907, to George Rheinschild; that plaintiff as administrator is entitled to, and do, recover the possession; and that the plaintiff have and recover from the defendants the sum of $106 and costs. The defendants and the intervener appeal from this judgment, and from an order denying their motion for a new trial.

[1,2] The respondent objects to the consideration of the bill of exceptions on the ground that the bill was not served within the time allowed by law. Service was actually made within an extension of time granted by the court below, but it is claimed that the order granting this extension was in conflict with a rule of court providing that the court could not extend the time for a period which, including the time covered by the stipulation, would exceed 30 days. The rule did not deprive the court of power to make a valid order within the limitations of section 1054 of the Code of Civil Procedure. Connell v. Higgins, 150 Pac. 769. But in any event, it does not appear that there was any objection to the settlement of the bill on this ground. Without, so far as the record shows, objecting to the settlement of the bill on the ground that it was not served in time, the plaintiff presented amendments, some of which were allowed, and the bill was settled by the judge. Under these circumstances, the point cannot be raised here for the first time. Patrick v. Morse, 64 Cal. 462, 2 Pac. 49; Horton v. Jack, 115 Cal. 29, 34, 46 Pac. 920; Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791; Hayne on New Trial and Appeal, §§ 145, 146.

[3] It was conceded that on June 18, 1885, the title to the lot was in George Locke. The controversy between the parties was over the effect of the street improvement proceedings under which Rheinschild claimed. The improvements were ordered in 1893. There were two proceedings, including work upon two streets. In each case a bond was issued in 1894. On default in the payment of the bonds, sales were made on the 8th day of July, 1907. These steps had all been taken prior to the judgment reviewed by the Court of Appeal in the action of Lantz, Administrator, v. Fishburn and Rheinschild. The opinion of that court is reported in 17 Cal. App. at page 583, 120 Pac. 1068. The action there under consideration was one to quiet title to the same lot here in controversy. The respondent was plaintiff therein, and Rheinschild, intervener here, and the party under whom defendants claim, was a party defendant. Unquestionably, the judgment in that case is a binding adjudication as between the plaintiff, on the one hand, and Rheinschild and his privies, on the other. There had been sales of the land prior to those of 1907, but these sales had been held void. Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816. In the case reported in 17 Cal. App., the court, in speaking of the sales made in 1907, said:

"We conclude that the last sales made by the treasurer were legal and valid, and had the effect of vesting in Rheinschild as purchaser title to the property. Therefore, at the time the issues were made up in the action upon which the trial court based its judgment, there was no title left in the plaintiff and no right, except the right to redeem within the time fixed by the street act. The title of such a purchaser, pending the issuance of a deed, is only qualified by this right of redemption, and, unless such latter right is exercised within the limit fixed by the law, such title becomes absolute. Duff v. Randall, 116 Cal. 226 [48 Pac. 66, 58 Am. St. Rep. 158]. The trial court properly held that the proceedings had, with respect to all matters conferring jurisdiction upon the treasurer to make the second sales, were regular and valid. Upon these findings, the judgment should have been that defendant Rheinschild held title to the lots in question subject only to the right of plaintiff to redeem within the time allowed by law."

The judgment of the Court of Appeal, following these expressions, was as follows:

"The judgment is reversed, with directions to the trial court to enter judgment upon the findings in accordance with the views expressed in this opinion."

This judgment of the District Court of Appeal became final, the remittitur went down, and judgment was entered in the lower court as directed. Upon familiar principles, the judgment so entered was a conclusive adjudication that the title to the property was as declared in such judgment.

At that time there had been no deed to the purchaser under the sales, and much of the argument in the briefs is directed to the question whether the deeds subsequently made were issued in compliance with the provisions of the statute. The court found against their validity. But we do not find it necessary to go into this inquiry. We are satisfied that the matter adjudged in the former action was sufficient to require a finding here against the plaintiff's claim, irrespective of the defect, if there was a defect, in the giving of the deeds. The issues in the action of Lantz v. Fishburn and Rheinschild involved an adjudication of the nature, validity, and extent of the claims of the respective parties to ownership of the land. That action resulted in a judgment which declared and adjudged that Rheinschild held the title to the property, subject only to the right of plaintiff to redeem within the time allowed by law. As will be seen from its citation of the case of Duff v. Randall, 116 Cal. 226, 48 Pac. 66, 58 Am. St. Rep. 158, the District Court of Appeal regarded the sales as having the same effect as an execution sale, which, under the provisions of the Code of Civil Procedure, § 700, vests in the purchaser "all the right, title, interest, and claim of the judgment debtor," including the right to rents and profits (Code Civ. Proc. § 704), leaving the debtor only the right to redeem. Whether this view was correct in point of law is not now the question. It may be that, as claimed by the respondent, the effect of a sale for nonpayment of street improvement bonds is different from that of an execution sale; that it does not transfer the title to the purchaser until the execution of a deed. But it is now too late to raise this point, it having heretofore been conclusively adjudicated that title did pass to Rheinschild by the sales, and that nothing remained in Locke's estate but the right to redeem.

[4] The respondent urges that his action was one of ejectment, in which the right of possession merely was involved. But the judgment under review undertook to determine title, a part of the judgment declaring that the property was owned in fee by the estate of George Locke, subject to the sales made. Furthermore, the plaintiff's asserted right of possession rested solely upon the title claimed by him to be vested in his testator. If the title was not vested in Locke's estate, but, on the contrary, was vested in Rheinschild, there was no foundation for the conclusion that the plaintiff was entitled to possession. The owner of property is entitled to its possession (Civ. Code, § 654), unless he has transferred his right to another. That the title was in Rheinschild, and not in the estate of Locke, is, as we have seen, finally and conclusively settled by the judgment of Lantz v. Fishburn.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

172 Cal. 60

ALLEN v. CHATFIELD. (S. F. 6416.)

(Supreme Court of California. Feb. 5, 1916.)

1. VENDOR AND PURCHASER ⊂=334(4)—ABANDONMENT OF CONTRACT—VENDOR'S SALE TO ANOTHER.

A vendor who conveyed the property in fee to other purchasers wtihout any reservation or recognition of a prior purchaser's rights therein under a contract, on the theory that such purchaser had forfeited his right to purchase, thereby abandoned his contract with such purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 961; Dec. Dig. ⊂= 334(4).]

2. VENDOR AND PURCHASER ⊂=130(5)—CONTRACT—CONSTRUCTION—TITLE.

Under a contract of sale whereby the vendor was to have one year to make a good and merchantable title and until a final judgment could be obtained in a pending suit, the purchaser was not required to rely on the vendor's assurance that the option under which the plaintiff in the pending suit claimed the right to purchase had expired, but was entitled to a conclusive adjudication that such claim had expired or of some act of such party which would estop him from asserting such claim.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 246; Dec. Dig. ⊂= 130(5).]

3. TENDER ⊂=11—ESTOPPEL—STATUTE.

Code Civ. Proc. § 2074, dispensing with the production and proffer of a written instrument when described and tendered in the offer if the offer is not accepted, and section 2076, preclud-

ing one who receives a tender in writing without objection from thereafter urging an objection with respect to the particular elements of a tender, do not estop the person receiving such offer from afterwards taking advantage of a lack of any other essential of a valid tender.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 20; Dec. Dig. ⟸11.]

4. VENDOR AND PURCHASER ⟸148—TENDER OF PERFORMANCE—TIME—STATUTE.

Under Civ. Code, § 1490, declaring that, where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before or afterwards, and under the general law apart from statute, an offer of performance by a vendor who had contracted to give a good and merchantable title after final judgment had in a pending suit against him, made before final judgment in such suit, was premature and ineffectual to put the purchaser refusing such offer in default or for any other purpose.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 290–295; Dec. Dig. ⟸148.]

5. TENDER ⟸15(3)—OFFER OF PERFORMANCE—EFFECT—STATUTE.

Civ. Code, § 1495, declaratory of the common law, provides that an offer to perform, either written or oral, shall be without effect if the person making it is not then able to perform according to the offer. Code Civ. Proc. § 2074, dispenses with the production and proffer of a written instrument when described and tendered in the offer, if the offer is not accepted, and section 2076 precludes one receiving a tender in writing without objection from afterwards objecting with respect to the particular elements of a tender mentioned in the section. Civ. Code, § 1501, provides that a failure to object shall not waive a defect which the person making the offer could not then obviate. Pol. Code, § 4480, declares that the provisions of the different Codes must be construed as parts of the same statute. *Held*, that section 1501 was to be construed as a qualification of section 2076, and that a vendor's offer of an unmerchantable title was not a due offer of performance of a contract which required a merchantable title, so that the defect in the title was not waived by the purchaser's nonacceptance of the offer.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 44; Dec. Dig. ⟸15(3).]

6. VENDOR AND PURCHASER ⟸334(4)—REMEDIES OF PURCHASER — RECOVERY OF PURCHASE PRICE.

A purchaser who had not been put in default by the vendor's tender of performance, and whose payment the vendor had retained after repudiating the contract by a conveyance to another, was entitled to recover the amount paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 961; Dec. Dig. ⟸334(4).]

In Bank. Appeal from Superior Court. City and County of San Francisco; W. M. Conley, Judge.

Action by Edward O. Allen against Thomas F. Chatfield. Judgment for defendant, and from an order denying his motion for a new trial, plaintiff appeals. Order denying a new trial reversed.

Lindley & Eickhoff, of San Francisco, for appellant. Dorn & Dorn & Savage and Theodore J. Savage, all of San Francisco, for respondent.

SHAW, J. The complaint is in the form of a common-law count for money had and received by the defendant for the plaintiff's use; the amount thereof being $5,000. The answer denies the allegations of the complaint. The court found that all the allegations of the complaint are untrue. Judgment was given for the defendant. The plaintiff's motion for a new trial was denied. From the order denying the same, the plaintiff appeals, claiming that the findings and judgment are contrary to the evidence. We have reached the conclusion that this claim must be sustained.

The object of the action was to recover $5,000 paid by Allen to Chatfield upon the purchase price of certain property sold by Chatfield and one Agnes Bell Rhodes to Allen by a written agreement executed by them. Agnes Bell Rhodes held the legal title for the benefit of Chatfield, and had given him a power of attorney to dispose of the property in her name. She had no other interest, and she is not made a party to this action. The plaintiff's claim is that the defendant, by making an absolute conveyance of the property to a third person without reservation of the plaintiff's rights under the contract, has abandoned the agreement and rendered himself unable to perform the same, and that plaintiff is consequently entitled to a return of the money paid.

The agreement was made on December 11, 1906. Prior to that time one Henderson had begun an action against Chatfield, Rhodes, and others to establish his right to purchase the property upon an option contract executed by F. W. Clough, predecessor in interest of Chatfield and Rhodes, on January 10, 1905, to Alexander and Mulgrew, giving an option to purchase the property at any time before December 31, 1909, at a price varying from $18,000 to $22,000 according to the year of its exercise. Henderson claimed to be the owner of this option, and Chatfield disputed his right to it, although he admitted that he had taken the property subject to such rights as Henderson may have had. This action was pending at the time the contract between Allen and Chatfield was executed, and it is this action which is referred to in said contract. If Henderson should prevail in the action, the result would be that he would have had the right to buy the property for about one-half the sum which Allen agreed to pay, and, if he exercised his right thereunder, Chatfield and Rhodes would be unable to convey the title to Allen. In this situation Chatfield sold the property to Allen, and the parties thereupon executed the following agreement:

"San Francisco, December 11, 1906.

"Received of Edward O. Allen the sum of one thousand dollars ($1,000.00) gold coin, as payment on account and to secure the sale to him of the following property situate on Clear Lake, Lake county, California: [Here follows description of property.]

"The total purchase price of said property is forty thousand dollars ($40,000.00), of which the sum of four thousand dollars ($4,000.00) must be paid within thirty (30) days from date hereof or this contract shall become void and the payment of $1,000 forfeited. The balance of said purchase price, to wit, thirty-five thousand dollars ($35,000.00), shall be due and payable within one (1) year from date hereof or until title is made good and merchantable (if title is not made good within one year), and if not so paid this contract shall be void, and all previous payments hereunder forfeited. I agree upon payment of said $35,000 to convey said property to Edward O. Allen or his assignee by good and sufficient deed of grant, bargain, and sale; the payment of said sum and the delivery of said deed being conditions concurrent. I also agree to furnish a complete abstract of title thereto within ten (10) days from date. Any objections to said title must be reported in writing within twenty (20) days after receipt of abstract. I am to have twelve (12) months within which to cure any valid objection to said title and thereafter until the final judgment can be obtained in the case pending in the superior court of Lake county entitled 'Blythe H. Henderson v. Thomas F. Chatfield et al.'; and if within said period the title cannot be made good and merchantable, all moneys paid hereunder shall at his option be refunded to said Edward O. Allen or his assignees. Possession shall be retained by me without compensation for twelve (12) months from date hereof. A formal contract of sale shall be entered into at the time of payment of said $4,000. In view of the pendency of said suit of Henderson v. Chatfield, it is agreed that this instrument shall not be recorded."

Upon this agreement Allen subsequently paid the $4,000 mentioned thereunder, making a payment in all of $5,000. The "formal contract of sale" referred to was not executed. This however, does not affect the rights of the parties, since, if Chatfield has, without justification, abandoned the contract as it is, Allen's right of recovery is clear.

In the action of Henderson v. Chatfield et al., referred to in the contract, judgment was given against Chatfield in September, 1908, declaring the right of Henderson to buy under his option, and also providing that he be let into possession of the land. A new trial was denied, and an appeal was duly taken therein from the judgment and order. On March 7, 1910, the attorneys for the respective parties to that action filed a stipulation that the matters in dispute therein had been settled, and providing that the District Court of Appeal, to which the appeals had been transferred, should reverse the judgment and remand the case to the superior court, with directions to dismiss the action. This reversal was ordered on March 8, 1910, and in pursuance thereof the action was dismissed in the superior court on March 23, 1910.

By the aforesaid agreement with Allen Chatfield bound himself to obtain a final judgment in the case of Henderson v. Chatfield as a condition precedent to his right to demand the acceptance by Allen of a conveyance under the contract. The contract specified that the balance of the purchase money, $35,000, was not to be payable "until title is made good and merchantable," and it further stated that Chatfield was to have time until final judgment in said case to make the title good and merchantable. Until the title was thus perfected Allen was not under obligation to pay the remainder of the price, and this completion of the title was a condition precedent to the maturing of his obligation to pay.

[1] On March 5, 1910, Chatfield conveyed the property to Theodore A. Bell, who, on March 10, 1910, conveyed the same to Soda Bay Land Company. Both of these deeds were absolute conveyances in fee, and were not taken subject to the Allen contract, or with any reservation or recognition of his rights therein. The evidence shows that they were made upon the theory that Allen had forfeited his right to buy the land by his refusal on February 3, 1910, to perform the agreement, upon a formal written tender to him by Chatfield of a deed for the property, accompanied by a demand for the payment of the price. This conveyance to Bell was a clear abandonment by Chatfield of the provisions of the contract with Allen, and, unless such abandonment was justified in some manner by the conduct of Allen, amounting to a default on his part, Allen is entitled to a recovery of the money paid on his agreement. This proposition has often been stated by this court, and it may now be considered as settled by the decision in Brimmer v. Salisbury, 167 Cal. 526, 531, 140 Pac. 30.

[2] The case therefore depends upon the question whether or not Allen was put in default by the aforesaid tender made on February 3, 1910. So far as material, this tender is as follows:

"San Francisco, February 3, 1910.

"Edward O. Allen, Esq.—Dear Sir: I beg to advise you that the matter embraced within the suit of Blythe H. Henderson v. Thomas F. Chatfield et al., pending in the superior court of Lake county, viz., the ownership of an option to purchase Soda Bay resort, has ceased to exist by lapse of time. The said option provides that it must be exercised on or before December 31, 1909. It was not so exercised, and, consequently, the subject-matter of that suit has ceased to exist."

Then follows a statement that deeds are therewith tendered, as provided in the agreement, together with a bill of sale and a release of mortgage. Continuing, the tender reads:

"I demand of you, concurrently with the delivery of said documents, the payment to me of thirty-five thousand dollars ($35,000.00), balance due on the purchase price of said property."

Allen testified that:

On presentation of these documents "I shrugged my shoulders and said I didn't have the money to give him at that time."

Allen did not pay or offer to pay then or afterwards any further sum upon the contract price.

It will be observed that at the time this tender was made the final judgment in Henderson v. Chatfield had not been given. The

judgment as it then stood was against Chatfield, and would deprive him, so far as appeared on its face, of the right or power to make a good title to Allen. The controversy had not been settled, the stipulation for reversal had not been made, and Chatfield could not then convey the title required by his agreement with Allen. The fact stated in the written tender that the Henderson option had expired by lapse of time on December 31, 1909, and that it had not been exercised, did not remove the defect nor render it immaterial. The title was still in litigation, and the expiration of the option by lapse of time did not render it free from dispute. The question whether or not Henderson had, in fact, exercised the option before its expiration was unsettled. If Henderson could prove that he had done so or that he had made a lawful offer to do so, he could still enforce the contract against Chatfield and prevent the conveyance of the land to Allen. Under his contract for a merchantable title, Allen was not required to rely on Chatfield's assurance, but was entitled to a conclusive adjudication that Henderson's claim had expired, or to some act of Henderson's which would estop him from asserting the same. Sheehy v. Miles, 93 Cal. 296, 28 Pac. 1046; Peckham v. Stewart, 97 Cal. 153, 31 Pac. 928; Muller v. Palmer, 144 Cal. 313, 77 Pac. 954; Gwin v. Calegaris, 139 Cal. 389, 73 Pac. 851. This defect, therefore, had not been removed, and Chatfield was at that time unable to perform the contract according to its terms.

[3] The defendant claims that this defect was waived by Allen's refusal to pay the purchase money and his failure to specify any objections to the tender. Reliance is here placed upon the provisions of sections 2074 and 2076 of the Code of Civil Procedure which are as follows:

"Sec. 2074. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property."

"Sec. 2076. The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward."

Section 2074 dispenses with the production and proffer of money, personal property, or a written instrument, when the same is described and tendered in the offer, if the offer is not accepted. The provisions of section 2076 preclude one who receives a tender in writing, without objection, from afterwards urging an objection with respect to the particular elements of a tender mentioned in that section. Neither of these sections dispenses with any other essential of a valid tender, or estops the person receiving such offer from afterwards taking advantage of a lack thereof. Doak v. Bruson, 152 Cal. 20, 91 Pac. 1001, and cases there cited.

The essentials of a valid offer of performance are set forth at some length in the Civil Code in sections 1485 to 1505, inclusive. Sections 1496 and 1501 are similar in effect to the aforesaid sections of the Code of Civil Procedure. Sections 1490 and 1495 specify certain essentials which are not in all cases covered by the provisions of the Code of Civil Procedure aforesaid. In respect of these the tender of Chatfield was not sufficient.

[4] Section 1490 declares that:

"Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before or afterwards."

Aside from this statutory provision the general rule of law is that a premature offer of performance is ineffectual to put the other party in default, or for any other purpose. Rhorer v. Bila, 83 Cal. 54, 23 Pac. 274; Powe v. Powe, 42 Ala. 113; Bowen v. Julius, 141 Ind. 310, 40 N. E. 700; Rogers v. Morrell, 82 S. C. 402, 64 S. E. 143, 129 Am. St. Rep. 899; Portland v. Atlantic, etc., Co., 74 Me. 250; Illingworth v. Miltenberger, 11 Mo. 87; Schultz v. O'Rourke, 18 Mont. 429, 45 Pac. 634; Moore v. Kime, 43 Neb. 521, 61 N. W. 736; Tillou v. Britton, 9 N. J. Law, 127; Ellis v. Craig, 7 Johns. Ch. (N. Y.) 7. As we have seen, the balance of the price was not due nor payable by Allen "until title is made good and merchantable," and the title was not considered good and merchantable until final judgment was obtained in the Henderson Case. Until that event, or something legally equivalent to it, had happened, Allen was under no obligation to pay. It was not within the power of Chatfield to accelerate the time of the payment by a premature tender of something less than a merchantable title. An acceptance by Allen of such premature offer would have accomplished a mutual departure from the contract, and not an observance thereof. Sections 2074 and 2076 do not say that a failure to object to a premature offer renders the contract immediately due, or that it waives a subsequent offer made at maturity. Under section 1490, therefore, the offer was made too soon and was ineffectual.

[5] Again, under section 1495 of the Civil Code, an offer to perform, made in writing or orally, is of no effect if the person making it is not at the time able to perform according to the offer. The same principle prevails at common law. Doak v. Bruson, supra; Eddy v. Davis, 116 N. Y. 251, 22 N. E. 362; Bigler v. Morgan, 77 N. Y. 318; Ladd v. Mason, 10 Or. 308; McCourt v. Johns, 33 Or. 565, 53 Pac. 601; Holladay v. Holladay, 13 Or. 523, 11 Pac. 260, 12 Pac. 821; Hyams v. Bamberger, 10 Utah, 3, 36 Pac. 202. By these cases it is established that an offer made without ability to perform does not put the other party in default. Here the written offer of Chatfield described deeds which would have conveyed a merchantable title to Allen, if Chat-

field and Rhodes had then possessed such a title to convey. The deeds were produced, and they also are sufficient in form to convey the title. Section 2074 makes the unaccepted written offer to deliver the deeds equivalent to the "actual production and tender of the * * * instrument." Under section 2076 Allen is now "precluded from objecting" to any defects in the form, terms, or execution of the deeds which he did not specify at the time. But under section 1495 of the Civil Code the present ability to perform according to the offer is a necessary element in a good offer. The sections of the Code of Civil Procedure do not purport to dispense with that requirement in cases where it is not specified as an objection at the time the offer is made. They do not in any wise qualify or repeal the provisions of section 1495 to the effect that an offer made by a person not then able to perform is of no effect. Chatfield was able to deliver the deeds, but he was not able to convey a merchantable title, for he did not have such a title. The deeds, no matter how perfect in form and execution, could not convey that which the grantors did not have. Furthermore, the written offer stated that the suit of Henderson v. Chatfield was still pending and undetermined, and sought to substitute Chatfield's assurance that its subject-matter had ceased to exist, in place of the final judgment against Henderson, required by the agreement. The offer showed on its face the inability to perform according to the agreement and Allen was not required to accept it or point out the confessed inability.

That this is the correct construction of this section is further shown by a consideration of section 1501 of the Civil Code. It provides in effect that the failure to object does not waive a defect which the person making the offer could not then obviate if objections were then made thereto. Section 2076 of the Code of Civil Procedure is not in direct conflict with this provision. The provisions of the different codes, with relation to each other, must be construed as parts of the same statute. Pol. Code, § 4480. This provision of section 1501 is therefore to be construed as a qualification of section 2076. At the time this offer was made the Henderson Case was not finally decided, the judgment then existing was in favor of Henderson, and the claims which Henderson may have had under the option adjudged to belong to him thereby had not been precluded by an adjudication. Chatfield could not have removed these defects except by some agreement with Henderson. No such agreement was then made, and Chatfield was without power to have it made. Hence this defect in title was not waived. The offer of an unmerchantable title cannot be said to be a due offer of performance of a contract which required a merchantable title. Colton v. Oakland Bank, 137 Cal. 383, 70 Pac. 225.

[6] It follows that Allen was not put in default by this tender, and that Chatfield was not thereby authorized to treat the contract as having been rescinded or abandoned by Allen, or to convey the property absolutely to a third person in practical repudiation of the contract he had made with Allen. He had received the $5,000 which Allen here claims, and had retained it for nearly five years, in the meantime having also been in the possession of the property. Every principle of justice demands that he should return it to Allen. We therefore conclude that the evidence does not justify the findings or judgment.

The order denying a new trial is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

(172 Cal. 277)

STARCK v. PACIFIC ELECTRIC CO.

(L. A. 3658.)

(Supreme Court of California. March 9, 1916. Rehearing Denied April 6, 1916.)

1. STREET RAILROADS ⟸98(1) — INJURIES ON TRACKS—CONTRIBUTORY NEGLIGENCE.

A pedestrian about to cross a street in front of an approaching car must use his faculties, and cannot rely upon the operator's strict compliance with the speed laws.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 204; Dec. Dig. ⟸98(1).]

2. STREET RAILROADS ⟸117(17) — INJURIES ON TRACKS—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

Evidence, in an action for personal injuries from being struck by defendant's street car, *held* to make plaintiff's contributory negligence a question for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 248, 255; Dec. Dig. ⟸117(17).]

3. STREET RAILROADS ⟸102(2)—INJURIES ON TRACKS—NEGLIGENCE—SIGNAL.

Where plaintiff by his own testimony admitted that he knew of the approach of the street car by which he was struck, the defendant's failure to sound an alarm has no causal connection with the accident.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. ⟸102(2).]

4. STREET RAILROADS ⟸103(2)—INJURIES ON TRACKS—NEGLIGENCE—LAST CLEAR CHANCE.

Where the motorman of an electric car discovers a pedestrian's peril, he is bound, under the doctrine of last clear chance, to use reasonable prudence in analyzing the situation and proper prudence in avoiding injury; but, even where the motorman, through gross negligence, fails to keep a lookout, which might have resulted in the discovery of the peril of a person on or near the tracks, so that he has no actual knowledge of such peril, there is no room for the application of the doctrine.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. ⟸103(2).]

5. STREET RAILROADS ⟸113(4)—INJURIES ON TRACKS—EVIDENCE—MATERIALITY.

In an action for personal injuries by being struck by defendant's street car, where there was a conflict of testimony as to whether the special west-bound car, carrying the employés

of a film company, stopped at a certain avenue, evidence that one of the employés lived on that avenue was immaterial to the issue.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 236; Dec. Dig. ⟹113(4).]

6. Street Railroads ⟹113(4)—Injuries on Tracks—Evidence—Discovery of Peril.

In an action for personal injuries from being struck by defendant's street car, the court should have allowed the question, propounded to the motorman, as to when he first discovered that plaintiff was in danger from the car, since his belief and knowledge were relevant facts.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 236; Dec. Dig. ⟹113(4).]

7. Street Railroads ⟹110(2)—Injuries on Tracks—Pleading—Contributory Negligence.

In such action, the pleading of contributory negligence as "a further, separate, and distinct answer and defense," and not merely in denial of the allegations of the complaint, affirmatively set up the issue of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. ⟹110(2).]

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Warina Starck, a minor, by her guardian ad litem, W. A. Starck, against the Pacific Electric Company. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order reversed.

Frank Karr, A. W. Ashburn, and R. C. Gortner, all of Los Angeles, for appellant.
E. B. Drake, of Los Angeles, for respondent.

MELVIN, J. Defendant appeals from a judgment against it and from the order denying its motion for a new trial. The action was one for personal injuries received by the plaintiff when she was struck by one of the defendant's electric cars on Sunset boulevard in the city of Los Angeles. The accident occurred near the place where Elysian Park avenue runs into Sunset boulevard. The said boulevard extends east and west, and the avenue connects with it from the north. The defendant corporation operates its electric cars on double tracks, the east-bound cars using the southerly track and the west-bound the northerly. The plaintiff just before the accident had taken her place on the southerly curb of Sunset boulevard to wait for a car, but she decided to make a purchase at a store on the northeast corner of Sunset boulevard and Elysian Park avenue. She stepped off the southerly curb of the boulevard, and looked to the west to see if there was a car coming from Hollywood, that is, an east-bound car on the track nearest to her. She saw none, but she did observe a west-bound car on the farther track. This car was then about half a block distant. She walked across the southerly track, and, as she testified, when she reached a place between the two tracks the west-bound car stopped between her and the store for which she was bound. She stopped opposite the middle of the car. She then, as she said, looked to the west, and saw a car coming from that direction. This car was a little beyond Allison street, or at a distance from her of approximately 300 feet. What next happened may best be told in her own words as follows:

"After seeing that car, I thought I had plenty of time to go around the back end of the car that was standing still. I went at just an ordinary walk. I was not able to tell how fast the car from Hollywood was coming at that time. When I got about the rear steps of the car that was standing still, something struck me. I do not know what it was that struck me. I don't know what became of me after I was struck. So far as I know, I was knocked unconscious. The next thing I knew after I started around the end of the car and was struck was that I remembered something of the dragging."

The evidence was to the effect that she was knocked against the west-bound car and was dragged by it for a number of feet. Miss Starck was 16 years of age. She had lived near the place where the accident occurred for about 8 years, and was familiar with the manner of operating cars on Sunset boulevard. She was active and in perfect health. The speed limit for electric cars in that part of the city is 20 miles an hour. There was evidence to the effect that the east-bound car was moving at a rate of speed beyond 20 miles an hour, some of the witnesses placing it as high as 35 miles an hour. The defendant introduced evidence tending to show that the east-bound car was moving at a rate of speed between 15 and 18 miles an hour, and that it was not stopping to take passengers, but that the sign, "Take next car," was displayed; that the west-bound car did not stop at Elysian Park avenue; that the plaintiff walked out into Sunset boulevard as if intending to board the approaching east-bound car. Testifying with reference to the occurrences at the time of the accident the motorman said:

"As she walked out from the sidewalk, as I went on down, I supposed she wanted the car, and she got within about three feet of the track and kept on going, and I saw that she was in danger and didn't want the car, and I threw my brakes over into the emergency and grabbed my gong and began to ring the gong, and she walked right on. She walked on past, and just got into clear of my car and stopped as the other car came from the east. As far as I could see—I could only see about the front of the steps—she was into the clear. That was the last I could see. I could not see out the side on account of the passengers on each side of the car. I rang my gong four times at about the time when the plaintiff walked out from the curb. That was all the signals I gave until I saw she was in danger, and began ringing my gong as fast and loud as I could. I continued to ring it until I was past her. And while I was ringing the gong the plaintiff walked on. She paid no attention. She was looking toward the store. Seemed to be looking straight ahead. She didn't change her speed any whatever. There was nothing more that I could have done toward stopping my car immediately that I didn't do when I discovered that the plaintiff was in danger."

It is not necessary to refer to the testimony of other witnesses, as that of plaintiff is quite as favorable to her case as is that of any other witness, and the motorman's statement has the same relation to defendant's theories.

Appellant insists that in any view of the evidence the plaintiff's negligence operated as the proximate contributing cause up to the moment of the accident, and that there was no room for the doctrine of "last clear chance." In discussing this phase of the case we may eliminate all questions with reference to the sounding of an alarm by the motorman, because the plaintiff knew of the coming of the car, and it makes no difference whether the gong was sounded or not. Indeed counsel for plaintiff concedes this to be the law. We must also assume for the purposes of this discussion that the car was moving in excess of the lawful rate of 20 miles an hour.

Appellant's theory of the case is that the excessive rate of speed, if defendant's servant was violating the ordinance, was not an element in the injury to plaintiff; that she had no right to turn her back to the approaching car upon the supposition that the motorman would not violate the ordinance limiting the speed; and that while the question of contributory negligence or freedom from it is ordinarily one of fact for the jury, where the standard of conduct is so obvious as to be applicable to all persons, one who fails (as it is insisted plaintiff failed) to measure up to that standard under the circumstances is not entitled to have her case go to the jury.

[1, 2] Undoubtedly the plaintiff was astoundingly careless when she turned her back on the approaching car and walked in a leisurely manner parallel to the track. And undoubtedly one about to cross in front of a suburban or interurban car must use his or her faculties, and may not depend upon the compliance by the operator of the car with the local by-law relating to speed. Brown v. Pacific Electric Ry. Co., 167 Cal. 204, 138 Pac. 1005; Hutson v. Southern California Ry. Co., 150 Cal. 703, 89 Pac. 1093; Griffin v. San Pedro, L. A. & S. L. R. Co., 151 Pac. 282. And undoubtedly there are cases in which a plaintiff so far violates the standard of conduct applicable to all persons that an appellate court may say, as matter of law, that upon the undoubted facts the judgment should be in favor of the defendant. Chrissinger v. Southern Pacific Co., 169 Cal. 624, 149 Pac. 175; Hamlin v. Pacific Electric Co., 150 Cal. 779, 89 Pac. 1109. But here we are confronted with a conflict of testimony. The motorman said that he saw plaintiff as she walked from the sidewalk, and that he was then more than 300 feet from the place where the accident occurred, but that she did not go into the zone of danger until it was too late to stop the car in time to prevent the accident. But she testified that she first saw the car when it was something like 300 feet away, and that she had already crossed the first track and was confronted by the car standing on the second track. The jury may have believed that the part of his testimony regarding the distance from which he first noticed her was true, but that her statement with reference to the position which she occupied when the car was 300 feet from her was correct. This would place her between the west-bound car and the southerly track with a clear space of only 20 inches between the two cars if they should pass, and would give play for the doctrine of "last clear chance." We do not wish, of course, to imply any views on the part of this court upon the relative verity of the statements of these two witnesses. We merely illustrate our idea that because of the conflict of evidence there was a case to go to the jury.

But this judgment and order must be reversed because of errors in the instructions. The court gave the following instruction:

"In determining whether plaintiff was negligent, you will take it that she had the right to assume, until she knew to the contrary, that defendant would not violate the city ordinance and run at a speed over 20 miles per hour."

By this instruction the jurors were told, in effect, that plaintiff was justified in turning her back toward the approaching car, which in broad daylight she plainly saw, and in placing her trust in the theory that if the law was not violated, the car would not overtake her before she advanced around the end of the other car on the northerly track. This is not the law in California. A pedestrian about to cross a street in front of an approaching car has no right to omit any of the precautions which the law demands, nor to rely upon the strict compliance by the servants of the railway company with the speed laws. Brown v. Pacific Electric Ry., supra; Griffin v. San Pedro etc., R. Co., supra; Hutson v. Southern California Railway Co., 150 Cal. 703, 89 Pac. 1093.

[3] The defendant offered in vain an instruction which was in part as follows:

"There is no dispute in this case that plaintiff was aware of the proximity and approach of both of defendant's cars. The question of whether warning was given by gong or otherwise, therefore, becomes immaterial."

The jury should have been instructed upon this subject. Where a plaintiff by his own testimony admits that he knew of the approach of the car, the failure of the defendant to sound an alarm has no causal connection with the accident. Lambert v. Southern Pacific Co., 146 Cal. 236, 79 Pac. 873.

After defining the expression "last clear chance" the court instructed the jury as follows:

"You are therefore instructed that although you may believe from the evidence that the plaintiff, on the occasion in controversy here, by her own negligence, got into a place of danger, yet if you shall further believe that the motorman in charge of defendant's car, going east, discovered the peril of the plaintiff, or saw her in such a position that an ordinarily

prudent person would have known that she was in danger of being injured, and that she was a sufficient distance away that the motorman, after such discovery, had an opportunity by the use of ordinary care to have avoided striking the plaintiff, then it was his duty to have done so, and if said motorman failed to use ordinary care under those circumstances, in preventing the accident to the plaintiff, and the plaintiff used ordinary care to have avoided the injury after she had discovered that she was about to be injured, if she did so, then I further instruct you that the failure of the motorman to use ordinary care under these circumstances was the proximate cause of the injury, and you will find for the plaintiff damages as defined in these instructions."

[4] Undoubtedly the first part of the instruction correctly states the law. If the motorman discovered the young woman's peril, and then failed to use ordinary care to prevent the accident, there was room for the application of the doctrine of "last clear chance." But the instruction went further, and told the jury that if the motorman saw Miss Starck in such a position that an ordinarily prudent person would have known that she was in danger of being injured, and that if he then failed to use ordinary care in an effort to avoid injuring her, they should measure the company's liability by the rule of "last clear chance." This part of the instruction is attacked by appellant, whose counsel assert that it violates the rule of "last clear chance," which is based, not upon opportunity by the exercise of common prudence to observe the danger in which another has placed himself, but upon actual knowledge of such peril. Undoubtedly that is the general rule, and this court has held, again and again, that even where the motorman or engineer has, by gross negligence, omitted to keep an outlook which might have resulted in his discovery of the plight of a person on or near the track, that fact may not avail the negligent person injured. Tucker v. United Railroads of San Francisco, 51 Cal. Dec. 75; Bennichsen v. Market Street Ry. Co., 149 Cal. 20, 84 Pac. 420; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; Herbert v. Southern Pacific Co., 121 Cal. 232, 53 Pac. 651; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 754, 134 Pac. 709. Particular emphasis is laid by appellant upon the authority last cited, the contention being that, in the opinion in that case, the doctrine of the Herbert Case was applied to a condition of affairs wherein the person to be charged knew the actual situation of the plaintiff but did not realize the danger. In the Thompson Case the instruction, which was condemned because it attempted to apply the "last clear chance" doctrine to a defendant who was not actually aware that plaintiff had negligently placed himself in a position of danger, was in part as follows:

"If therefore you should find from the evidence that the motorman of defendant's car which collided with the automobile, saw, or by the exercise of reasonable care and prudence should have seen, the situation in which plaintiff was before the collision, and had the opportunity, by the exercise of proper care, to avoid the collision and avoid injuring the plaintiff and failed to exercise such care or to do what reasonable prudence would dictate he should have done to avoid injuring the plaintiff, the defendant is liable, and your verdict must be for the plaintiff."

This language must be read in view of the facts of that case. So read, it does not sustain appellant's attack upon the instruction here under review. In the Thompson Case it was not denied that the engineer saw the automobile as it came down the road parallel with the track and turned to go up the incline towards the place where the road crossed the railway. The instruction was framed with the purpose of charging defendant's servant with the duty of anticipating the possible attempt of the driver of the automobile to cross the track in front of the car. Commenting upon it Mr. Justice Sloss, who delivered the opinion of Department 1 of this court, said:

"This instruction is manifestly erroneous in so far as it attempts to apply the last clear chance doctrine to a defendant who is not actually aware of the fact that plaintiff has put himself in a position of danger."

That unquestionably is the law, but the instruction in the case at bar presupposes, by way of protasis, not mere opportunity to see the plaintiff, but the actual discovery of her in a position which would indicate to any one of ordinarily sound judgment that she was in danger. It differs radically from the instruction reviewed in the Thompson Case, and is not tainted by the same vice. The rule is that if for any reason the motorman does not see the plaintiff at all, there is no place for the doctrine invoked, but, having looked and having observed the situation of a person, he is bound to use reasonable prudence in analyzing that situation and proper diligence in avoiding peril if any exists.

[5] There was a conflict of testimony upon the question whether the west-bound car stopped at Elysian Park avenue. That car was a special one, which carried the persons employed by a certain film company. One of the witnesses was asked if any employés of the corporation lived on Elysian Park avenue. He answered that one of them, giving her name, did reside there. This was error, which doubtless will not be repeated upon a second trial. The court was not interested in knowing whether or not on some occasions there might be a reason for stopping the car at that place. The question involved was whether or not on that particular day and at about the time of the accident such a stop had been made.

[6] The court should have also allowed the question propounded to the motorman: "When did you first discover that the plaintiff was in danger from your car?" His belief and knowledge were relevant facts, and he therefore should have been permitted to declare them. 2 Enc. of Evidence, 259; 8

Enc. of Evidence, 14; Kyle v. Craig, 125 Cal. 114, 57 Pac. 791.

[7] After the submission of the case, plaintiff filed a memorandum, citing Crabbe v. Mammoth Channel Gold Mining Co., 168 Cal. 504, 143 Pac. 714, to the effect that appellant might not complain of the instructions upon contributory negligence because that defense was not affirmatively set up in the answer. The respondent is in error. The defense of contributory negligence was pleaded as "a further, separate, and distinct answer and defense," and not merely in denial of the allegations of the complaint. The issue was tendered, we think, sufficiently and in form, and the authority cited therefore does not apply.

No other alleged errors require consideration.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

172 Cal. 236

SEBERG et al. v. FLEISHHACKER et al.
(S. F. 6804.)

(Supreme Court of California. March 7, 1916. Rehearing Denied April 6, 1916.)

1. NEGLIGENCE ⇐67—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Where the deceased was employed to measure certain doors for foot plates and to inspect iron work installed in and about the elevator shafts, and he, without looking, protruded his head through an opening in the elevator shaft, was struck by the descending elevator, and killed, he was guilty of such contributory negligence as to preclude recovery from the elevator company in whose control the elevator still remained.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 90, 91; Dec. Dig. ⇐67.]

2. NEGLIGENCE ⇐134(6)—EVIDENCE.

Damages cannot be awarded the widow of one killed by an elevator which struck him when he protruded his head into the shaft without looking, on the theory that he might have stumbled and fallen into the shaft; recovery on that basis being altogether speculative.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. ⇐134(6).]

Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Anna M. Seberg and others against Mortimer Fleishhacker and others. From a judgment for plaintiff and an order denying a new trial, the defendant Van Emon Elevator Company appeals. Reversed.

Samuel Knight, of San Francisco (F. E. Boland, of San Francisco, of counsel), for appellant. A. M. De Vall, of San Francisco, for respondents.

SHAW, J. This is an appeal by the defendant Van Emon Elevator Company from the judgment and from an order denying its motion for a new trial. The action was begun by the widow and minor child of Angelo R. Seberg, deceased, to recover damages caused to the plaintiffs from the death of said Angelo R. Seberg by the alleged negligence of the defendants. The action was dismissed as to all the defendants except the Van Emon Elevator Company. The jury returned a verdict against said company for $5,000 damages. The defendant Fleishhacker, as owner, had contracted for the erection of a building in San Francisco. The different portions of the building were let to different contractors. McLeran & Peterson were the general contractors for the erection of the building. They were to furnish and install all the carpenter work, roofing, glazing, tiling, marble work, and ornamental iron work, in the building, and particularly all carpenter work, iron work, woodwork, and glazing inclosing the elevator shaft, including the sliding doors therein giving access to the elevator from the several floors of the building. The Van Emon Elevator Company contracted to furnish and install the elevators only. At the time of the accident which caused the death of the decedent, this elevator had been installed and was running, but the work on it was not fully completed. It was operated by and in control of the elevator company. The iron grill and woodwork inclosing the elevator shaft, including the doors, were completed, with the exception of placing the glass in the upper part of the doors. An aperture was left in the doors at a height of 3½ feet, in which the glass was to be inserted. The Monarch Iron Works, as subcontractor of McLeran & Peterson, were putting in the iron and brass work, including the brass plates called "kick plates," to be placed across the lower part of the front doors of the building, and also the iron work inclosing the elevator shaft. Seberg was in the employ of the Monarch Iron Works as a draftsman. A part of his duties was to estimate the work on the Fleishhacker job and to inspect the work placed in the building by his employers. On the day of the accident, he was sent to the building to measure the places for the kick plates, all of which were on the ground floor. For some reason he went to the second floor of the building, put his head through the aperture left in the door opening into the elevator shaft, whereupon his head was struck by the descending elevator, causing his death.

[1] The appellant contends that the evidence shows that the deceased was guilty of contributory negligence in putting his head through the opening in the door. We think this defense was established. The act of putting one's head into an elevator shaft without taking reasonable precautions to ascertain whether or not the elevator is in operation or in dangerous proximity is clearly a careless act. The opening in the door was 22 inches wide and 3 feet long from top to bottom. One could easily look through this

opening and, without protruding his head into the shaft, could ascertain whether or not the elevator was near by in either direction. If Seberg had done so and had perceived the elevator coming, or in close proximity, it would have been careless and imprudent for him to put his head through the opening into the shaft. If he put his head through without looking, he was careless. In either case, therefore, he would be chargeable with negligence. He had been sent there to take the measurement of the space for the kick plates. It was also a part of his duty to inspect the work done by his employers on the building, including the grill work inclosing the elevator shaft; but he had not been sent there for that purpose. It is to be presumed, unless the contrary appears, that he was in the ordinary use of his faculties. There is not the slightest indication in the evidence to the contrary. No explanation is given to account for his conduct. The only reasonable conclusion is that his doing so was a thoughtless and imprudent act not coming within the definition of ordinary care. This act of his contributed directly to the injury which caused his death.

[2] The only explanation offered by the respondent's counsel is that the jury were at liberty to infer that while walking along the floor he may have stumbled and fallen into the opening of the door, or that he may have lost his balance while looking in and was not able to get out in time. No proof was offered to show that there was any obstruction on the floor near the elevator. There is no evidence to support either theory. They are pure speculation without facts upon which to base them. With respect to the claim that he may have lost his balance, it is sufficient to say that if, as we have shown, it was negligence to put his head in without looking, it would be greater negligence if he leaned so far into the shaft as to cause him to lose his balance, without taking the precautions above mentioned to ascertain whether or not it was in operation.

The case of Gay v. Winter, 34 Cal. 153, was one where a small boy fell into a hole in the sidewalk, no one seeing him fall. The court said that, in the absence of direct proof, the natural instincts of self-preservation would justify the jury in inferring that the child was using ordinary care and diligence in walking along the sidewalk. The circumstances are not similar. Ordinarily one does not apprehend danger from holes in the sidewalk. Certainly a small boy could not be expected to do so and could not be charged, as a matter of law, with negligence, if he did not carefully look for such holes. The deceased, if he possessed ordinary intelligence, must have known that it was a dangerous act to protrude himself into the elevator shaft without looking to see whether or not it was in operation. The rule announced in that case does not apply to the case at bar. On the other hand, the case of Kauffman v. Machin Shirt Co., 167 Cal. 510, 140 Pac. 15, is in all substantial particulars identical with the case at bar, and supports the above conclusions.

It is unnecessary to determine the other questions arising in the case and presented in the briefs.

The judgment is reversed.

We concur: LAWLER, J.; SLOSS, J.

172 Cal. 294

GIBSON v. KENNEDY EXTENSION GOLD MINING CO. (S. F. 6789.)

(Supreme Court of California. March 13, 1916. Rehearing Denied April 6, 1916.)

1. MASTER AND SERVANT ⟸278(12)—INJURIES TO SERVANT — SUFFICIENCY OF EVIDENCE—CAUSE OF ACCIDENT.

In an action for injuries to a miner when the bucket in which he was being hoisted left the skids in the shaft, evidence *held* sufficient to warrant the jury in finding that the speed at which the bucket was hoisted and not plaintiff's carrying a tamping stick was the cause of the bucket leaving the skids.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 95; Dec. Dig. ⟸278(12).]

2. MASTER AND SERVANT ⟸279(6)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action for injuries to a miner, evidence *held* sufficient to warrant the jury in finding that the signal to the engineer indicated that a man was to be hoisted in the bucket so as to establish negligence on his part in hoisting it at full speed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 979; Dec. Dig. ⟸279(6).]

3. MASTER AND SERVANT ⟸190(14)—INJURIES TO SERVANT—NEGLIGENCE—SIGNALS—STATUTE.

The fact that the signals given to the mine engineer, which according to practice of the mine indicated that a man was to be hoisted in the bucket, were not the signals prescribed by St. 1893, p. 82, does not excuse the engineer for hoisting the bucket at full speed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 463; Dec. Dig. ⟸190(14).]

4. APPEAL AND ERROR ⟸1001(2)—REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE.

The Supreme Court can only determine whether there was substantial evidence to support the verdict of the jury, the question whether it would have reached the same conclusion that the jury did being immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3922; Dec. Dig. ⟸1001(2).]

5. MASTER AND SERVANT ⟸294(4)—INJURIES TO SERVANT — INSTRUCTIONS—FELLOW SERVANT—STATUTE.

A requested instruction that a master is not liable for injuries to a foreman caused by the negligence of an inferior servant over whom the foreman had control, based on the contention that the Roseberry Act of 1911 (St. 1911, p. 796), providing that it should not be a defense to actions against an employer for injuries to an employé that the injury was caused by the negligence of a fellow servant, did not

apply in such case in view of Civ. Code, § 1970, as amended in 1907 (St. 1907, p. 119), which deprived the employer of the defense of negligence of a fellow servant, where the negligence was that of a superior employé, was properly refused since, if the negligence was that of a fellow servant, the defense was taken away by the Roseberry Act; if not, there was never any defense but the master was liable under the general rule of respondeat superior.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1157; Dec. Dig. ⊂⊃294(4).]

6. MASTER AND SERVANT ⊂⊃182(1)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—STATUTE.

Civ. Code, § 1970, as amended in 1907 (St. 1907, p. 119), does not apply where a superior employé was injured by the negligence of an inferior one.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 371; Dec. Dig. ⊂⊃182(1).]

7. TRIAL ⊂⊃260(8) — REQUESTED INSTRUCTIONS—REPETITION.

In an action for injuries to a mine foreman, the refusal of requested instructions that if the jury could not determine from the evidence what caused the bucket in which plaintiff was riding to leave the skids and that if it was caused by the tamping stick carried by plaintiff coming in contact with the timber, plaintiff could not recover, was not erroneous where the court told the jury that they should find for plaintiff if his injuries were proximately caused by the negligent hoisting of the bucket at a dangerous speed, and that the failure of plaintiff to lash the tamping stick did not contribute thereto, properly instructed as to the burden of proof, resting on plaintiff and stated that if the jury could find that the bucket did not leave the skids because of its excessive speed and the inclination of plaintiff's body, they should find against plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. ⊂⊃260(8).]

8. TRIAL ⊂⊃260(8) — REQUESTED INSTRUCTIONS—REPETITION.

In an action for injuries to a mine foreman, a requested instruction that the law required plaintiff in carrying a tamping stick in the bucket with him to securely lash it to the cable, and, if he failed to do so, and such failure directly contributed to the accident, the verdict should be against the plaintiff, was properly refused where the court charged that plaintiff could only recover if the excessive speed of the bucket was the proximate cause of the injury, and the failure to lash the tamping stick did not contribute thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. ⊂⊃260(8).]

9. APPEAL AND ERROR ⊂⊃1052(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—CURE BY ADMISSION OF OTHER EVIDENCE.

In an action for injuries to a mine foreman alleged to have been caused by the excessive speed of the bucket in which he was being hoisted, the exclusion of evidence as to the number of times the bucket had been safely hoisted after the accident, if erroneous, was not prejudicial, where the engineer testified, without limiting himself as to time, that the bucket had been lifted and lowered 100,000 times.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4172; Dec. Dig. ⊂⊃1052(2).]

10. EVIDENCE ⊂⊃77(1)—WEIGHT—STATUTE.

Where an injured mine foreman and another employé each gave part of the signals for hoisting the bucket, the testimony of neither could be considered weaker within Code Civ. Proc. § 2061, subd. 7, so as to justify the drawing of inferences under that section from plaintiff's failure to call the other employé as a witness, and therefore the sustaining of objections to questions asked of that witness when called by defendant as to his whereabouts prior to the trial was not error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. ⊂⊃77(1).]

11. EVIDENCE ⊂⊃77(3) — WEIGHT — FAILURE TO CALL WITNESS.

Where either party had equal power to call a witness to the accident, no inferences can be drawn against one because he was called by the other.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. ⊂⊃77(3).]

Department 1. Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by John Andrew Gibson against the Kennedy Extension Gold Mining Company for damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

L. A. Redman, of San Francisco, for appellant. Alfred Sutro, of San Francisco (Pillsbury, Madison & Sutro, of San Francisco, of counsel), for respondent.

SLOSS, J. The plaintiff, employed by the defendant in the operation of its mine near Jackson, Amador county, was seriously injured while ascending the shaft of the mine. He brought this action to recover damages for his injuries, and obtained a verdict and judgment in the sum of $20,000. The defendant appeals from the judgment.

The shaft had an inclination of 66 degrees from the surface to about 855 feet down, and an inclination of 74 degrees below that point. There were various levels, including one at 800 feet and one at 950 feet from the surface. Ore was brought up by means of two iron buckets, one or the other of which was attached to a cable running from an engine at the surface into and down the shaft. The ore buckets were three feet in depth and 26 inches in diameter. They were used for hoisting and lowering men, materials, and tools, as well as in bringing rock to the surface. By reason of the inclination of the shaft, the buckets did not swing clear, but rested in their course on the lower or foot wall. They were guided and held in line by parallel skids, made of 4x6 timbers, set on edge and attached to the timbering of the shaft. On opposite sides of the buckets were iron lugs used in dumping the buckets, and serving the further purpose of controlling the rolling of the buckets on the skids.

The movement of the cable and buckets was controlled by an engineer operating the engine at the surface. Signals indicating the desired movements were given by means of a bell, which was rung by pulling a bell cord running from the top to the bottom of the shaft.

At the time of the accident which caused plaintiff's injuries, an empty ore bucket had been lowered to the 950-foot level. The other ore bucket was at that point and had just been filled with broken rock or muck which was to be hoisted to the surface. The plaintiff was at the 950-foot level and desired to ascend to the 800-foot level. A mucker working on the 950-foot level detached the cable from the empty bucket and attached it to the full one. The plaintiff mounted this bucket for the purpose of ascending to the 800-foot level. Certain signals were given. Just what bells were rung, and what was the meaning of the signals claimed by the respective parties to have been given, are points around which much of the controversy in the case was waged. The claim of the plaintiff, as set forth in his complaint, was that the defendant (acting, of course, through its engineer) hoisted the bucket at a great and unusual and highly dangerous speed; that the plaintiff, noticing this, leaned over in an endeavor to pull the bell cord so as to signal a stop; that while plaintiff was so engaged, the bucket left the skids and was being hauled up between the right-hand skid and the side wall of the shaft; that over the part of the shaft in which the bucket was then traveling there was a platform against which plaintiff, as he thought, would probably be crushed, and that, in the effort to save himself from this threatening danger, he jumped from the bucket. In thus jumping he received the injuries complained of.

It appeared that the engine, when run at full speed, would raise a loaded bucket at a rate of not over 450 feet per minute. The speed at which it was run with a man or men aboard was about one-half of this. The plaintiff claimed that the bucket had been hoisted at full speed, when it should, under the signal given, have been hoisted at one-half speed. The defendant's contention, on the other hand, was, first, that there was no excessive speed in that full speed would not have caused the bucket to leave the skids, and, second, that in any event it was not negligent on the part of the defendant to run the bucket at full speed, because, as it claimed, no signal indicating that a man was to ride on the bucket had been given. Beyond all this, the defendant claimed and attempted to show by affirmative proof that the true cause of the accident was that the plaintiff had, in violation of the rules of the mine and of a statute governing the operation of mines (St. 1893, p. 82), taken with him on the bucket a tamping stick, consisting of a piece of iron pipe between 5 and 6 feet in length, without lashing the same to the cable. The plaintiff had, as it was claimed, carelessly allowed the tamping stick to strike one of the timbers of the shaft and this, so the defendant insisted, was the true and only cause of the bucket leaving the skids.

[1] The trial was protracted, and the points to which we have referred were elaborately developed by the testimony. The appellant urges with great force and earnestness that the evidence established conclusively that the striking of the tamping stick against the timbers, rather than the speed of the ascent, was the true cause of the accident. It may fairly be said that the showing made in this behalf is one that throws no small doubt on the correctness of the conclusion reached by the jury. We cannot, however, say that such conclusion was without substantial support in the evidence. The plaintiff's own testimony was clear and direct to the effect that he was holding the tamping stick and the cable in the same hand, and that the stick was still in his hand, free and clear of any contact with the timbers, when the bucket left the skids and up to the moment when he jumped. The version given by him was not inherently improbable, and this court would not be justified in determining that the jury was not authorized to accept it. True, the condition, after the accident, of the stick and the timbers in the shaft, as testified to by defendant's witnesses, tended strongly to support the defendant's theory. But these indications were open to other interpretations, which might reasonably have been accepted. Taken altogether, the evidence was such as to fairly support a finding that the speed at which the bucket was hoisted did, and that the carrying of the tamping stick did not, cause the bucket to leave the skids.

[2] On the question of the sufficiency of the evidence the case really resolves itself into the inquiry whether a signal for slow speed was actually given to and negligently disregarded by the engineer. The statute above referred to requires all persons or corporations operating any mine within the state of California to adopt, use, and put in force a prescribed system or code of mine bell signals. Under this code, one bell is the signal to hoist if the bucket or car is stationary, or to stop if it is in motion. Two bells furnish the signal to lower. Three bells means "man to be hoisted; run slow." In the defendant's mine, the 800-foot level was indicated by the signal 2 bells, followed after a slight pause by 2 bells (2–2). Under this code, as elaborated by the rules contained in section 2 of the act, the proper signal for hoisting at slow speed from the 950 to the 800 foot level would have been 2–2 (the signal designating the 800-foot level), followed by 3 (indicating man on board), followed by 1 (the signal for hoisting). Concededly these signals were not given on the occasion in question. The plaintiff's testimony was that the signals given were 3 bells, then 2–2, and then 1 (3–2–2–1). He declared that the mucker, who was on the 950-foot level with him, first rang the 3 bells, that he himself then rang the 2–2, indicating the 800-foot level, after which he got on the bucket, whereupon, pursuant to his direction, the

mucker rang the final bell as the signal to hoist. The mucker, Angelo Bianchinotti, a witness called by the defendant, did not support the plaintiff with reference to the ringing of the 3 bells. His testimony was that Gibson had given the 2–2 signal before mounting the bucket, and that he (Angelo) had then rung the one bell. The engineer's version differed from that of both Gibson and Angelo. But, whatever may have been his testimony, the jury was certainly justified in finding the facts to be as testified to by Gibson or by Angelo. In other words, the evidence would have justified a finding that the signal given was 3–2–2–1, or a finding that it was 2–2–1. The plaintiff claims, and we think the evidence sustains the claim, that under the system in force at the defendant's mine, one, at least, of these signals would serve to indicate that the bucket was to be hoisted at slow speed to the 800-foot level.

[3] It is true that these were not the signals defined by the statute, but if, notwithstanding, they were the signals commonly used in this mine for this purpose, and did convey to the engineer knowledge that a man was on the bucket, he was not justified in ignoring the fact thus brought to his attention, and hoisting the bucket at a speed in excess of that to be used when men were carried. It is not necessary at this point to go into the question, much disputed by counsel, whether the statutory system was in fact in force in this mine. Assuming that it was, the statute certainly does not prohibit the use of additional signals to indicate that men are to be hoisted or lowered. If in fact such signals were used, the engineer was bound, in the exercise of due care, to act upon them when they were actually given him. If, for example, in lowering from the surface, the engineer had actually seen that a man was on the bucket, it would hardly be claimed that he would be justified in lowering at the speed of 2,000 feet per minute—the speed at which empty buckets were sent down—merely because he had not been given the statutory signal of 3 bells to indicate slow speed. And likewise, if by any other means outside of the statutory signals, he was advised that a man was about to ride up on the bucket, it was his duty to act upon this information.

We need not stop to inquire whether the evidence supports the view that, in this mine, the signal 3–2–2–1 would indicate that a man was to be hoisted to the 800-foot level. However this may be, there was evidence which warranted the conclusion that the signal 2–2–1 (without 3) was commonly used to indicate that a man desired to be hoisted to the 800-foot level from some lower point in the shaft. Mazoni, a miner, one of defendant's witnesses, testified directly to this effect. When asked the meaning of 1 bell, following 2 and 2, he answered that it meant "somebody on the bucket." Immediately after this answer he said that it meant "start the bucket." It was sought to clear up this confusion by further questions, and in response to a rather searching examination by both counsel and the court, the witness stated clearly that the signal given when men desired to go from the 950 to the 800 foot level was 2 and 2 and 1; that the only hoisting done between these levels was the hoisting of men; that 2–2–1 was the recognized and regular signal for going from the 950 to the 800 foot level, and that a signal to go from the 950 to the 800 (i. e. 2–2–1) meant "that there was a man on the bucket." After all this he testified, in response to a question of defendant's counsel, that if it were desired to send up something, not accompanied by a man, from the 950 to the 800 foot level, the signal given would be 2–2–1, but later again, when asked how fast the bucket would go from the 950 to the 800 foot level if 2–2–1 were rung, his answer was "man on, not go very fast." The plaintiff himself testified that in going from the 950 to the 800 foot level the only signal ever given was 2–2–1. Angelo, the mucker, testified that the signal 2–2–1 was used by him when he went from the 950 to the 800 foot level.

The defendant contends strenuously that 2–2–1 merely indicated that the bucket was to be hoisted to the 800-foot level and stopped there; that it did not indicate that a man was aboard, but left the engineer free to hoist at full speed. It is argued that the evidence to which we have referred shows merely that the men often took the chance of riding on a bucket at full speed. This is perhaps a permissible interpretation of the evidence, but it is by no means the necessary one. The testimony of the plaintiff, of Mazoni, and of Angelo (two of whom were defendant's witnesses) certainly warranted the jury in believing that the usual and ordinary course when buckets were hoisted from the 950 to the 800 foot level and stopped there, was to have a man on board; that this was generally understood in the mine and that the engineer on receiving the signal 2–2–1 was therefore advised that a man intended to ride. The same signal would no doubt have been proper for sending up a bucket between these two levels without any man, but there is no evidence that there was ever any occasion to send up a bucket in this way, and the direct testimony is to the contrary. It is argued that under plaintiff's claim in this regard there would be no signal whatever for sending up a bucket to the 800-foot level at full speed. This may be true, but the fact does not overcome the explicit testimony regarding the practice in this mine. It may be that the jury believed that there was no full-speed signal between the 950 and the 800 levels because there was no occasion to use such a signal.

The conduct of the plaintiff and the engineer just after the accident lends some support to the contention that the signal 2–2–1 meant "hoist slowly to the 800-foot

level." According to the engineer's testimony, Gibson made it manifest, as soon as he came out of the shaft, that he held the engineer responsible for his mishap. At this time Gibson was unable to speak. He plainly showed his resentment towards the engineer, and indicated with his fingers that he had given the signal 2–2–1. The engineer disputed this, claiming that a different signal had been given. The significance of these actions, taking place as they did on the very heels of the occurrence, is apparent. Unless Gibson and the engineer both understood that the signal 2–2–1 indicated that a man was to be hoisted and called for slow speed, why should Gibson, in taking the engineer to task, have asserted that he had given this signal and why should the engineer have disputed it?

Considering all these circumstances, we are forced to the conclusion that the evidence warranted the jury in finding that the engineer negligently hoisted the bucket at full speed, notwithstanding the giving of signals indicating that a man was to be hoisted; that the excessive speed, together with the resultant act of the plaintiff in seeking to reach the bell cord, caused the bucket to leave the skids, and that the plaintiff received the injuries complained of by reason of his jumping from the bucket in order to escape the seemingly imminent danger of being crushed against the platform above. If this be true, the appellant's claim that the verdict is against the evidence cannot be sustained. For like reasons the contention that the court should have granted a nonsuit is not entitled to favorable consideration.

[4] Whether we should have reached the same conclusion that the jury did is beside the question. The weight of the evidence is to be determined by the jury, and if their verdict has the support of substantial evidence, this court has reached the end of its inquiry.

Complaint is made of various instructions given, and of the refusal to give others.

[5] The defendant requested an instruction that while under the law an employer is responsible to an employé injured by the neglect of a "fellow servant," he is not responsible to an employé injured through the neglect of another employé if the injured employé had the right of control or direction of the services of the culpable employé. There was evidence that Gibson, who was foreman at the mine, had such control over the engineer. The court refused the instruction, charging that negligence of a fellow servant was no defense. The requested instruction was properly refused. At the time of the accident to Gibson, the statute of 1911, commonly known as the "Roseberry Act," was in force. That statute provided in terms that in actions by employés against employers to recover damages for injuries sustained in the course of the employment, it should not be a defense that the injury was caused by the negligence of a fellow servant. The instruction given by the court simply follows this statutory rule. The appellant's argument, if we understand it, is that the Roseberry Act, in using the term "fellow servant," referred to those persons only who occupied the status of fellow servants at the time the act was passed. At that time, section 1970 of the Civil Code, as amended in 1907, took from the employer the benefit of the fellow-servant defense where the negligence was that of an employé having the right to direct and control the injured employé. The contention is that employés occupying this position of superior and inferior were not fellow servants, and hence not covered by the Roseberry Act. We do not see how this construction of the statutes, assuming its soundness, can help the appellant. If Gibson and the engineer were fellow servants when the Roseberry Act was passed, this relation ceased, under that act, to be of advantage to the employer in an action against him. If they were not fellow servants because they had already, by the amendment of section 1970, been taken out of that category, the employer was, by that section, deprived of any defense under the fellow-servant rule. The general rule of law has been and is that an employer is liable for the torts committed by his employés in the course of their employment. Respondeat superior. Before the enactment of either of the statutes above mentioned, there was an exemption from liability where the party injured was an employé, and the injury had been caused by the neglect of another employé. This doctrine, known as the fellow-servant rule, was an exception to the general rule of liability for the torts of employés. The amendment to section 1970 of the Civil Code limited the scope of this exception. The Roseberry Act limited it still further, or destroyed it altogether. Unless the party injured and the person guilty of the negligent act were fellow servants, their relation would not, at any stage of our legal history, have affected the defendant's liability as employer of the negligent person. But appellant's whole argument rests on the assumption that Gibson and the engineer were not fellow servants. We are totally unable to comprehend how the enactment of statutes limiting a defense can create a new ground of defense.

[6] We may say, in passing, that we do not subscribe to the appellant's contention that the amendment of section 1970 had any application to the case of an employé of superior rank, who was injured by the alleged neglect of one of inferior rank.

[7] The court refused to instruct the jury that if it could not satisfactorily determine from the evidence what caused the bucket to leave the skidway, its verdict should be in favor of the defendant. The defendant also requested, and the court refused, to charge

that the defendant was entitled to a verdict if the bucket was caused to leave the skidway by the tamping stick coming in contact with the timber. These instructions were unobjectionable, but we think the points which they embodied were sufficiently covered by instructions given. The court told the jury that it should find for the plaintiff if his injuries were proximately caused by the negligent hoisting of the bucket at a great and unusual and dangerous rate of speed, and the failure to lash the tamping stick to the cable did not contribute as a cause to any injury sustained by the plaintiff. There were further instructions properly defining the burden of proof resting upon the plaintiff, and declaring that if the jury should find that the bucket did not leave the skids "because of the speed at which it was traveling and the inclination of plaintiff's body," the verdict should be against the plaintiff.

The court refused to instruct that if the signal 3 bells was not given, the verdict should be against the plaintiff. As we have already pointed out, there was evidence from which the jury had the right to conclude that the signal 2–2–1 indicated slow speed. The requested instruction was therefore rightly refused. It assumed that 3 bells was the only signal for slow speed, whereas the jury was authorized to find the fact to be contrary to this assumption.

The point is made that the instruction authorizing a verdict for the plaintiff if the proximate cause of the injury was the negligent hoisting of the bucket at a great and unusual and dangerous rate of speed should not have been given, because there was no evidence to support the claim that the cause of the accident was such speed. This point is sufficiently answered by what we have said in our discussion of the sufficiency of the evidence. The defendant also requested various instructions based upon the theory that the proper and only signals were those defined by the statute of 1893, and that the plaintiff could not recover unless the statutory signals had been given. We have already stated our reasons for believing this to be an erroneous view. The assumption that the statutory signals only were in force is contrary to evidence, which the jury had a right to accept.

[8] The defendant requested an instruction that:

"By the law of this state and by the rules in force at the mine at the time of the accident it was the duty of Gibson, the plaintiff, to securely lash to the cable * * * the upper end of the tamping stick, * * * and if you find from the evidence that he failed to so lash it and that such failure on his part directly contributed to the accident, then I charge you that your verdict should be against plaintiff and in favor of the defendant mining company."

This instruction was refused. As we have already stated, the court did, however, instruct the jury that the plaintiff could recover only if the great and dangerous speed of the bucket was the proximate cause of the injury and the failure to lash the stick to the cable did not contribute as a cause to any injury sustained by him. We think this instruction afforded to the defendant every protection which it had the right to ask. The requested instruction recognized that the carrying of the tamping stick would not affect plaintiff's right of recovery, unless it contributed causally to the accident. The instruction given told the jury, in effect, that if it did so contribute, the plaintiff could not recover.

[9] The appellant assigns as error certain rulings in the admission and rejection of evidence. The court refused to allow evidence showing the number of times that the bucket had been raised and lowered over the skidway without accident after the injury to plaintiff. Without passing upon the propriety of this evidence, we think it sufficient to say that the engineer himself testified that he had lifted and lowered the bucket over the skids over 100,000 times. His testimony was not limited to the period prior to the accident, but even if it had been, the showing made was sufficient to give to defendant every substantial benefit which it could have had from a more elaborate showing on this point. The ruling was not sufficiently important to be regarded as prejudicial.

[10] The appellant complains of the action of the court in sustaining objections to questions asked by it of the witness Bianchinotti regarding his whereabouts after the accident and prior to the trial. The purpose of these questions was to show that the plaintiff could have found Bianchinotti and produced him as a witness. The failure to do so might, it is claimed, have been viewed by the jury as a circumstance against plaintiff under the rule of subdivision 7 of section 2061 of the Code of Civil Procedure. But this is not a case of producing weaker evidence where stronger is within the power of the party. The disqualification of parties as witnesses has been removed by our law, and the plaintiff, in testifying to the signals given, was giving evidence which was not in a legal sense "weaker" than that of any other eyewitness. People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50.

[11] Furthermore, it was no more within the power of the plaintiff than of the defendant to produce the testimony of Bianchinotti. No inference was to be drawn against either party because the other called the witness. The other objections to rulings on the evidence do not require particular notice. None of them, we think, can be regarded as working an injury which would justify a reversal.

On the whole case, we are satisfied that the evidence was sufficient to support the verdict, and that no substantial error affecting the appellant's rights was committed by the court. The verdict is for a large amount, but it is not claimed that it exceeds the sum which a jury might properly find to be due

compensation to the plaintiff for the injuries received by him.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(29 Cal. App. 356)

RANSOME-CRUMMEY CO. v. WOODHAMS.

(Civ. 1735.)

(District Court of Appeal, First District, California. Jan. 11, 1916. Rehearing Denied by Supreme Court March 9, 1916.)

1. MUNICIPAL CORPORATIONS ⟸288(2)—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—CONSTITUTIONAL PROVISIONS—"CITY."

Const. 1879, art. 11, § 19, provided that no public work or improvement should be done or made in any city upon or about the streets or otherwise, the cost and expense of which was chargeable or might be assessed upon private property by special assessment, unless an estimate of the cost and expense should be made and an assessment made, levied, collected, and paid before the work or improvements should be commenced. *Held* that, as the word "city" in another part of the same section has been construed to include towns, it must be given the same construction in the provision in question, though the argument that the word was used in its narrow and restricted meaning as referring to larger and more populous and important centers than towns is persuasive.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 759, 761; Dec. Dig. ⟸288(2).

For other definitions, see Words and Phrases, First and Second Series, City.]

2. STATUTES ⟸209—CONSTRUCTION—MEANING OF WORDS.

When a word or phrase has been given a particular scope or meaning in one part of a law, it should be given the same scope and meaning in other parts of the same law and particularly of the same section.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 286; Dec. Dig. ⟸209.]

3. MUNICIPAL CORPORATIONS ⟸266—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—CONSTITUTIONAL AND STATUTORY PROVISIONS.

While repeals by implication are not favored, Const. art. 11, § 19, requiring public works or improvements to be preceded by an estimate of the cost and the levy and collection of an assessment, was so utterly at variance with the scheme for the improvement of public streets contained in Santa Clara Town Charter (St. 1871–72, p. 251) § 13 et seq., as to abrogate the provisions of the charter, especially in view of Const. art. 22, § 1, providing that the provisions of all laws inconsistent with that Constitution should cease upon the adoption thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 712; Dec. Dig. ⟸266.]

4. MUNICIPAL CORPORATIONS ⟸266—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under the Santa Clara Town Charter, § 13 et seq., providing, relative to street improvements, that after the completion of the work the cost shall be certified and assessed and apportioned to the several abutting owners and constitute liens upon their respective holdings, the method of providing the means of street improvement was so radically opposed to the method provided by Const. art. 11, § 19, that there could be no excision of the portion of the charter permitting the improvement to be completed before the levy and collection of the assessments, and the constitutional provision repealed the charter provisions and relegated the town to the general laws for its authority and procedure in the improvement of public streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 712; Dec. Dig. ⟸266.]

5. MUNICIPAL CORPORATIONS ⟸266—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The repeal in 1884 of so much of Const. 1879, art. 11, § 19, as required an estimate of the cost and expense of public works or improvements and the levy and collection of an assessment before commencement of the work, did not revive provision of a town charter abrogated by the adoption of such constitutional provisions in the absence of express words of revivor, in view of Const. art. 22, § 1, providing that laws inconsistent with that Constitution should cease upon its adoption.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 712; Dec. Dig. ⟸266.]

6. APPEAL AND ERROR ⟸1175(2)—DISPOSITION OF CASE—GRANTING NEW TRIAL.

Street Improvement Act 1911 (St. 1911, p. 730) § 23, provides that the warrant and assessment, together with the certificate of the city engineer of the quantity and character of the work, shall be recorded in the office of the superintendent of streets, and the diagram there filed; that when so recorded the amounts assessed shall be a lien; and that after the warrant, etc., are recorded they shall be delivered to the contractor, who shall be authorized to demand the assessments. In an action to establish a lien the court found that the warrant, etc., were recorded in the office of the street commissioner in the manner therein stated; that copies thereof, together with the diagram, were attached together between covers by the street commissioner and deposited by him in his office on February 7th, and thereafter kept on deposit in his office; that such warrant, etc., were delivered to plaintiff on February 7th after the recordation thereof. *Held*, that while if this was to be construed as a finding that on February 7th the warrant, etc., were presented to the street commissioner for recordation and the diagram for filing and were placed in his custody and possession for such purpose, and that copies thereof were then retained as a part of his records and remained there subject to inspection, the conclusion that there was a substantial compliance with the statute would be justified, the finding was too uncertain to permit the rendering of judgment in plaintiff's favor upon the reversal of a judgment for defendant, and a new trial would be granted, especially as defendant had had no opportunity on appeal to assail the sufficiency of the finding or of the facts found as constituting a compliance with the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4574; Dec. Dig. ⟸1175(2).]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Ransome-Crummey Company against Mary E. Woodhams. From a judgment for defendant, and an order denying new trial, plaintiff appeals. Reversed and remanded.

R. M. F. Soto, of San Francisco, for appellant. Rogers, Bloomingdale & Free, of San Jose, for respondent.

PER CURIAM. This is an appeal by the plaintiff from a judgment in defendant's favor and from an order denying a new trial.

The action was brought to obtain a judgment declaring that the plaintiff has a lien upon a certain lot of the defendant in the town of Santa Clara for street work done by plaintiff under the provisions of the so-called improvement act of 1191. Stats. 1911, p. 730. The answer of the defendant presents as the principal proposition in the case the question as to whether the matter of street improvement in the town of Santa Clara is governed by the provisions of the general statutes upon the subject, or by the provisions of the special charter of the town of Santa Clara.

[1] The essential facts of the case are these: The town of Santa Clara received its present charter in 1872 under a special act of reincorporation entitled "An act to reincorporate the town of Santa Clara." Stats. 1871–72, p. 251. Sections 13 et seq. of said act provide a complete scheme for the improvement of the public streets of the town, one of the distinctive features of which as applicable to the case at bar is the provision that the work of the particular street improvement shall be contracted for, proceeded with, and completed, and the actual cost of the same to each lot owner as thus ascertained shall be certified by the surveyor and town marshal to the board of trustees of the town, who shall thereupon make the assessment and apportionment of the actual cost thereof to the several abutting owners, which shall constitute liens upon the respective holdings. In the year 1879 the present state Constitution was adopted. By section 19 of article 11 of said Constitution it was provided that:

"No public work or improvement of any description whatsoever shall be done or made, in any city, in, upon or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment, in proportion to benefits, on the property to be affected or benefited, shall be levied, collected, and paid into the city treasury before such work or improvements shall be commenced, or any contract for letting or doing the same authorized or performed."

It was further provided by section 1 of article 22 of the Constitution that:

"The provisions of all laws which are inconsistent with this Constitution shall cease upon the adoption thereof."

That the effect of these two provisions of the state Constitution was the abrogation of the provisions of all general laws and all special charters which were inconsistent with the terms of section 19 of article 11 of the Constitution, and which came within the provisions thereof, there can no longer remain an open question. McDonald v. Patterson, 54 Cal. 245; Donahue v. Graham, 61 Cal. 276; Thomason v. Ruggles, 69 Cal. 465; Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 Pac. 3; Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615. It is contended, however, by the respondent herein that the provisions of the charter of the town of Santa Clara do not come within the terms of section 19 of article 11 of the Constitution, and were not therefore repealed or abrogated by it, for the reason that the application of the provisions of said section of the Constitution is expressly limited to "cities," and may not be extended to apply to "towns," and hence cannot affect the town of Santa Clara. It is very plausibly and persuasively argued by counsel for the respondent that the distinction between "cities" and "towns" is one which has been recognized from almost the inception of our state history; that in recognition of this distinction the Legislature of 1850 passed two statutes—one providing for the creation and legal existence of cities (St. 1850, p. 87), and the other for the incorporation of towns (St. 1850, p. 128); that most of the municipalities of the state which were in existence in 1879 were originally incorporated under one or the other of these two acts; that Santa Clara was incorporated in 1852 as a "town" under the act of 1850, which provided for the incorporation of towns, and was reincorporated as a town in 1865 and again in 1872; that the state Constitution of 1879, adopted in the presence of these actual conditions, repeatedly recognized and expressly maintained this distinction by numerous provisions wherein the term "city" and "town" were both employed when it was the purpose and intent of its framers to make its several provisions applicable to both; and hence that it must be concluded that when the framers of the Constitution used only the word "city" in section 19 of article 11 of the Constitution in relation to street improvements, they intended that the provisions of that section should be limited to "cities" and should not be held to include "towns." It is also urged by the respondent that the term "cities" is a term more narrow and restricted in its meaning and application than "towns," and is always used with reference to the larger and more populous and important centers than the latter phrase, and hence must be intended by the Constitution makers to be given this restricted meaning in the particular section under review.

While this train of logic is, as we have seen, persuasive in its reasoning, it has standing in the way of its adoption an obstacle which we have not been able to surmount. Section 19 of article 11 of the Constitution, as originally adopted, was twofold as to its subject-matter. The first portion of the section was that above set forth, and which, it may be incidentally stated, was eliminated from it by an amendment of the section in 1884. The second part of the section referred to the unrelated subject of the right of persons or companies supplying water or artificial light to a "city" to use the streets

thereof under certain general regulations and without the requirement of a franchise from the municipality. In the case of People v. Stephens, 62 Cal. 209, this portion of section 19 of article 11 of the Constitution was the subject of construction, with special reference to the scope and meaning to be given to the word "city"; and the court there held that the word "city," as employed therein, was intended by the framers of the Constitution to include "town" within its meaning. At the time of this decision the section was in its original form. In the later case of Pereria v. Wallace, 129 Cal. 397, 62 Pac. 61, the case of People v. Stephens was referred to with approval.

[2] It is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law and particularly of the same section thereof. 2 Sutherland on Statutory Construction (2d Ed.) 758, and cases cited. We feel ourselves constrained by this rule of interpretation and by the foregoing cases to hold that the word "city," as used in the particular portion of the section under review in this case, also embraced "town" within its scope and meaning, and hence was applicable to the town of Santa Clara, and operated to repeal those sections of its charter upon the subject of street improvements which were inconsistent with its terms.

[3] It is earnestly insisted by the respondent, however, that this effect should not be given to the section of the Constitution under review for the reason that repeals by implication are not favored by the courts, citing many authorities to sustain this contention. There is no room or need for quarrel with the legal principle involved in those cases, but the difficulty is in its application to the instant case, for if the word "city" in section 19 of article 11 of the Constitution is to be construed as including "town" within its meaning, then the section must be given the same intendment and application as though the word "town" had been expressly used; and, so construed, there can be no question but that the portion of the section in question here is so utterly at variance with the provisions of the charter of the town of Santa Clara upon the same subject as to work the abrogation of the latter, even though the Constitution had not elsewhere provided that:

"The provisions of all laws which are inconsistent with this Constitution shall cease upon the adoption thereof." Const. art. 22, § 1.

[4] It is further contended by the respondent that even though it should be held that section 19 of article 11 of the Constitution, as it stood before its amendment, applied to the town of Santa Clara, and operated to repeal such portions thereof as were obnoxious to it, still this would not require the repeal of the entire provision of its town charter applicable to street improvements so as to permit or require such work to be done under the general laws. It is suggested that an excision might be made of that portion only of the town charter as permitted the improvement to be completed before the assessments had been levied and collected with which to make it; but our examination of the provisions of the town charter in the light of the constitutional requirement has satisfied us that the two methods of providing the means of street improvement in the town of Santa Clara are so radically at opposites that no such excision would be practicable. In our opinion, the effect of the constitutional provision was to relegate the town of Santa Clara to the general laws as to its source of authority and procedure in the improvement of its public streets.

[5] It is conceded by the respondent that if the constitutional provision under consideration was effective to work an abrogation of the provisions of the town charter upon the subject in so far as they were inconsistent with it, the repeal of that portion of the section of the Constitution which was accomplished in the year 1884 did not operate to revive the charter provisions. The cases of Byrne v. Drain, 127 Cal. 663, 60 Pac. 433, and Ex parte Helm, 143 Cal. 553, 77 Pac. 453, are to be distinguished from the case at bar, since the only effect of these cases was to hold that the provisions of town charters relating to municipal affairs, which were subject to the control of general laws under the Constitution as adopted in 1879, were to be revived when that control was removed by the amendment of section 6 of article 11 of the Constitution in 1896. In the case at bar the provisions of the town charter relating to street improvements "ceased" upon the adoption of the section of the Constitution above quoted, which was inconsistent with them, and would not be called back into being by the elimination of the constitutional provision with which they had been at variance, in the absence of express words of revivor.

[6] By the findings of the trial court in this case all of the allegations of the complaint were specifically found to be true with the exception of subdivision c of paragraph V of said complaint, which has reference to the manner of the recordation of the warrant, assessment, and certificate of the town engineer, and the filing of the diagram as required by the provisions of section 23 of the street improvement act of 1911. The court finds that the said instruments—

"were recorded in the office of the street commissioner of the town of Santa Clara in the following manner, namely, that copies of the warrant, assessment and certificate of the town engineer, together with the diagram mentioned and referred to in paragraph V of the complaint, were attached together between covers by said street commissioner, and deposited by him in his office on the 7th day of February,

1912, and thereafter kept by him on deposit in his said office; that said warrant, assessment and diagram, together with the certificate of said town engineer, were delivered to the plaintiff on the 7th day of February, 1912, and after the recordation thereof, as above set forth."

If this finding is to be construed as a finding that on the 7th day of February, 1912, the original warrant, assessment, and certificate were presented to the street commissioner for proper recordation, and said diagram for filing in his said office, and that thereupon said warrant, assessment, and certificate of the town engineer were then and there placed in the custody and possession of the street commissioner for such purpose, and that these copies of those original documents were then and thereafter retained by him as a part of the permanent records and files of his office, and there remained as such, and subject to the inspection of all persons who were or might become interested in the property to which the lien to be created by the proper recordation of these documents was to attach, then we are of the opinion that a liberal construction of the terms of the section of the act in question would justify the conclusion that the finding of the court as so construed shows a substantial compliance with the requirements of the statute. S. M. Bernard Co. v. Los Angeles, 18 Cal. App. 626, 124 Pac. 88; Hager v. Melton, 66 W. Va. 62, 66 S. E. 13. In view, however, of the uncertainty of this finding, and of the fact that the respondent has had no opportunity on appeal to assail the sufficiency thereof, or of the facts upon which it was predicated, as constituting a compliance with the section of the act under review, we are disposed to disregard the suggestion of the appellant that it is entitled to judgment in its favor upon the findings, and to return the case for a new trial.

Judgment and order reversed, and cause remanded for a new trial.

29 Cal. App. 451

HENDERSON et al. v. PALMER UNION OIL CO. et al. (Civ. 1446.)

(District Court of Appeal, Third District, California. Jan. 22, 1916. Rehearing Denied by Supreme Court March 20, 1916.)

1. CORPORATIONS ⟸552—POWER OF COURTS OF EQUITY—RECEIVER.

In the absence of any statute regulating the matter, a court of equity has the right, in a proper proceeding instituted by a creditor or stockholder, to appoint a receiver to administer the property of a corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2201; Dec. Dig. ⟸552.]

2. CORPORATIONS ⟸621(1)—RECEIVERS—APPOINTMENT—POWER OF COURT OF EQUITY.

Code Civ. Proc. § 564, declares that a receiver may be appointed by a court in which an action is pending in cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights, and in all cases where receivers have been appointed by usages of courts of equity. Section 565 declares that, upon dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business may appoint receivers of a corporation. *Held*, that the expression "upon dissolution" necessarily implies dissolution effected in any manner, and, though a corporation is dissolved by expiration of its charter, only the superior court of the county in which the corporation carries on its business or has its principal place of business is authorized to appoint a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2461–2464, 2471; Dec. Dig. ⟸621(1).]

3. CORPORATIONS ⟸621(1)—RECEIVERS—APPOINTMENT—POWER OF COURT OF EQUITY.

In such case, the fact that the corporation has been dissolved for a considerable period of time does not authorize the superior court of a county other than the one wherein the corporation had its principal place of business to appoint a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2461–2464, 2471; Dec. Dig. ⟸621(1).]

4. CORPORATIONS ⟸621(1)—RECEIVERS—APPOINTMENT—POWER OF COURT OF EQUITY.

As the Constitution clothes the superior court with original jurisdiction in cases of equity, Code Civ. Proc. § 565, which allows only the superior court of a county wherein a corporation had its principal place of business to appoint a receiver on dissolution, is valid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2461–2464, 2471; Dec. Dig. ⟸621(1).]

5. CORPORATIONS ⟸621(1)—RECEIVERS—APPOINTMENT—POWER OF COURT OF EQUITY.

That it will result in inconvenience in permitting only the superior court of a county in which a corporation had its principal place of business to appoint a receiver on dissolution does not warrant a different construction of Code Civ. Proc. § 565.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2461–2464, 2471; Dec. Dig. ⟸621(1).]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Application by E. E. Henderson and others against the Palmer Union Oil Company and others for appointment of a receiver. From an order appointing a receiver, defendants appeal. Reversed.

Gavin McNab, R. P. Henshall, A. H. Jarman, and Nat. Schmulowitz, all of San Francisco (B. M. Aikins, of San Francisco, of counsel), for appellants. Peck, Bunker & Cole, Henry C. McPike, and Henry G. Tardy, all of Oakland, for respondents.

BURNETT, J. On the application of the plaintiffs made ex parte, based on a verified complaint and the execution of an undertaking in an amount fixed by the court and approved by it, the superior court of Alameda county made an order appointing one Samuel J. Taylor, a resident of said county, receiver of the court to take charge of the estate and effects of the Palmer Oil Company. The complaint in the case is quite voluminous, and it seems unnecessary to set it out in detail. Respondents claim that the condi-

tions for the appointment, stated in the complaint, sufficient to warrant said appointment, are as follows:

"(a) The charter of the Palmer Oil Company expired on the 28th day of March, 1913. (b) On that day, the defendants Brown, Van Ee, Hilborn, Stratton, and Ladd, were all of its directors. (c) The plaintiffs, before the expiration of the charter, were and thence to the filing of the complaint continued to be stockholders. (d) Palmer Oil Company was a California corporation. (e) At the time of the expiration of its charter, Palmer Oil Company had estate and effects, debts, and property due and belonging to it to be divided among its stockholders. (f) Frauds and improper conduct of directors warranting the action of the court on ex parte application."

As to this last specification, it may be said that the acts of said directors are set out at great length, and there can be no doubt that the grossest fraud is thereby exhibited, and the utter unworthiness of said directors to occupy a position of trust and responsibility is disclosed.

[1, 2] The provisions of law on which reliance is had for said appointment are the following:

"A receiver may be appointed by the court in which an action is pending, or by the judge thereof: * * * (5) In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; (6) in all other cases where receivers have heretofore been appointed by the usages of courts of equity." Section 564, Code Civ. Proc.

"Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members." Section 565, Code of Civ. Proc.

The questions concerning the appointment of receivers have been thoroughly considered by the Supreme Court in various decisions, and it would be presumptuous to attempt to add to the learning contained therein. For a somewhat general observation, we may adopt the quotation made by respondents from the able opinion written by Chief Justice Beatty, in the case of Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, as follows:

"When a corporation ceases to exist, from whatever cause, whether from lapse of time, voluntary dissolution, or judgment of forfeiture for neglect or abuse of its powers, it necessarily results that its property is left to be disposed of according to law. * * * Some means must be provided for winding up the corporation and distributing its assets according to the equitable rights of those interested. In the absence of any statute regulating the matter, a court of equity would have the undoubted right, in a proper proceeding instituted by a creditor or a stockholder, to appoint a receiver to administer the property. But in many of the states, statutes have been passed expressly providing for the appointment of receivers, or trustees exercising the same functions, though sometimes called by other names. In all cases it is made their duty to collect the assets, pay the debts, and distribute the surplus pro rata to the stockholders."

Here, as we have seen, the statute expressly provides for the appointment of receivers charged with said duty, and there seems to be no serious controversy as to the authority of the superior court to make the appointment in the cases provided for. There is, however, an earnest contention made by appellants that the jurisdiction to appoint a receiver in case of dissolution of the corporation is limited to the particular superior court where the corporation carries on its business or has its principal place of business. It is said, in State I. & I. Co. v. San Francisco, 101 Cal. 148, 35 Pac. 554:

"The power of a court to appoint any persons in the place of those who are directors of the corporation at the time of its dissolution is given in section 565 of the Code of Civil Procedure, and the authority given therein is the measure of its power. That section gives to the superior court of the county in which the corporation carries on its business authority to appoint one or more persons to be receivers or trustees of the corporation upon its dissolution, 'on application of any creditor of the corporation or of any stockholder or member thereof,' and unless such application is made the court has no authority to make the appointment. Its jurisdiction to make such appointment rests upon an application therefor by either a creditor or a stockholder, and can neither be invoked at the instance of a stranger, nor assumed by the court of its own motion."

It was further held in that case that:

"The power of the court recognized in section 400 of the Civil Code to appoint persons other than the directors or managers of the corporation, at the time of its dissolution, to settle its affairs, does not authorize the court to take upon itself the power to settle its affairs or to appoint a receiver for that purpose."

It must be apparent that, if said section is the measure of authority in the premises, then no superior court other than that designated has jurisdiction to make such appointment, and since it appears in the complaint that said corporation was dissolved it should further appear, so it is contended, that it did business or had its principal place of business in Alameda county. To the contrary, it appears that it had its "several offices and places of business" in San Francisco, Los Angeles, and Portland, Or. It must have carried on its business at its places of business, and therefore, it is argued, the jurisdiction of the subject-matter is in those counties.

Of course, when the Legislature provides that the superior court of a certain county has authority to appoint a receiver, by necessary implication it excludes every other, and the section would have no additional significance if it read: "The superior court of the county in which the corporation carries on its business or has its principal place of business and no other superior court * * * may appoint," etc. As to this contention, respondents argue that:

"A fair interpretation of the language will show that nothing is accomplished by this act, than the mere assertion of jurisdiction which already existed independently of the statute and already resided just where the statute in terms placed it, to wit, in a court of equity. The original jurisdiction of equity gains nothing and loses nothing by the statute. It leaves the matter just where it found it with powers as full and ample after its passage as they were before its enactment. We come now to a consideration of the words 'upon the dissolution.' * * * This language taken from section 18 of the act of 1850 (St. 1850, p. 349), to be understood in its full import, requires construction along the lines employed by courts in the interpretation of statutes, where there is any doubt as to its meaning. What is the meaning of the words 'upon the dissolution of any corporation'? Ordinarily the word 'upon' is used in the same sense as 'on,' and the word 'on' is defined by Webster as meaning 'at the time of, with reference to some cause or motive; by virtue of; in consequence of; as on the ratification of a treaty, the armies were disbanded.' Read in connection with other words of the statute of 1850 from which it was taken, this section has a meaning entirely different from the meaning it has when standing alone. 'It is an established rule, in construing a statute, that the intention of a law-giver and the meaning of the law are to be ascertained by viewing the whole and every part of the act.' Brown's Legal Maxims, p. 445.

"Recurring to the statute of 1850, it will be seen that there was a scheme provided, complete in itself, for dissolving and winding up a dissolved corporation. The act treated of three methods of dissolution; one by direct act of the Legislature, another by quo warranto, and a third by voluntary act of the corporation itself. Each of these supposed, and of necessity were, to act upon a living, going concern, one with a 'domicile' in the state, by necessary construction, and with a place of business in some county within the state's territorial limits by its own selection. It was in co-ordination with these several methods of dissolution that the other sections of the statute were designed to act. These other sections are numbered 16, 18, and 31, which became, respectively, section 400 of the Civil Code, sections 565 and 803 of the Code of Civil Procedure and sections 1227 to 1233 of the same Code. * * * But there was one class of dissolution, for which no provision was made in the act of 1850, and consequently, none in the Codes. That is a case of dissolution by 'expiration of charter.' Dissolution by expiration of charter is the class to which the present case belongs. Nothing in the act of 1850 belonged to this class. * * * These initial words of section 16, 'Upon the dissolution of a corporation, *unless other persons shall be appointed* by the Legislature, or by some court of competent authority,' were, excepting those in italics, all eliminated from section 400, when it was taken into the Civil Code; and it needs no great amount of insight to discern that the eliminated phrases confined the statute as originally passed to the methods of 'dissolution' provided for in other parts of the same act. This section must be construed noscitur a sociis, just as its lineal descendants, sections 400, 565, 803, and 1227 to 1233 must be construed.

"Now, what is the object of the foregoing analysis, and what application has it to the present case?

"Turn for a moment to the complaint, and read: 'Said Palmer Oil Company on or about the 28th day of March, 1913, was dissolved by the expiration of its charter,' and 'filed October 9, 1913.' And it will appear that there intervened between the dissolution of Palmer Oil Company and the commencement of the action, the date of the application for the appointment of the receiver, about seven months.

"On the 28th of October, 1913, Palmer Oil Company ceased to exist. It died a natural death, and could no more have a 'principal place of business' or be 'carrying on business' seven months after its death, than could a rat survive the sinking of the ship that carries it.

"In the case of Crossman v. Vivienda Water Company [150 Cal. 575, 89 Pac. 335], the status of all dissolved corporations was defined by the Supreme Court in these words: 'It is settled beyond question that, except as otherwise provided by statute, the effect of a dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. As to this, all the text-writers agree, and their statement is supported by an overwhelming weight of authority.'

"How, may we ask, could Mr. York, who verified the complaint in this case, swear that on the 9th day of October, 1913, the Palmer Oil Company 'carries on its business,' or 'has its principal place of business,' in Alameda county? Will the court construe 'carries on its business' or 'has its principal place of business' into 'carried on its business' or 'had its principal place of business'? The answer is, ita lex non scripta est. Would it not be a healthier construction, one in harmony with the fact and the law, to say, 'a dissolved corporation carries on no business, has no principal place of business in any county of the state,' and leave the application of the wronged stockholder, to be made to any superior court, holden in any county of the state, and leave the consequences of such an application to the effect of that other law, written all over the decisions of the Supreme Court, that a court of general jurisdiction having jurisdiction of the subject-matter, first applied to, will retain jurisdiction for all purposes?"

There is plausibility in the views thus expressed; but to adopt them would be to violate, as we conceive, the plain provisions of the statute.

In the first place, there is no safe ground for holding that said section 400 of the Civil Code and section 565 of the Code of Civil Procedure were intended to apply in case of dissolution by and according to any particular method. No such indication is shown by the headnotes, the context, or the body of the sections. The familiar rules of interpretation preclude any such contention. "Upon the dissolution" necessarily implies dissolution effected in any manner. It is the fact of dissolution, the termination of the existence of the corporation as such, that the statute contemplates. It matters not whether the dissolution is the result of the operation of law, the voluntary act of the parties, or is accomplished through quo warranto proceedings; the Legislature has seen fit to make no distinction as to the county wherein a receiver must be appointed, if at all. And it may be said that no reason is apparent why a distinction should be made. While the point has probably not been directly involved in any decision of the Supreme Court, it has at least been assumed that the section concerns both voluntary and involuntary dis-

solutions. For instance, in the Havemeyer Case, supra, it was said that:

"Under section 400 of the Civil Code and section 565 of the Code of Civil Procedure, both of which refer to voluntary as well as involuntary dissolutions of corporations, the administration and distribution of the assets of a dissolved corporation is left, as a rule, to the directors in office at the date of dissolution, though such dissolution be upon judgment of forfeiture; and the appointment of a receiver is an exception to the mode only in cases of neglect of duty or abuse of power by the directors when required for the protection of the rights of a creditor or stockholder."

[3] Nor can we perceive the force of respondents' contention that the section does not apply where the corporation has been dissolved for a considerable period of time. If dissolution had occurred one day before the application for the appointment had been made, would respondents still contend that the section was inoperative? Or, if only a few hours had intervened, would the case call for a different rule? We think it would be a strained construction to hold that, if the application for the appointment of a receiver is not made at the very instant of dissolution, we must not look to the said section 565 for guidance. It is at least perfectly clear that "upon dissolution" does not mean "before dissolution." The phrase undoubtedly means "after dissolution," and it is not limited to any particular lapse of time. It may include an application made immediately following the dissolution or one separated by quite a period of time.

Of course, after dissolution the corporation is not "alive," and it is not strictly accurate to say that it has a place of business. But if the section is to have any application at all, it must be in a case of dissolution, as by no possible construction can it refer to the appointment of a receiver for a going concern. The obvious conclusion is that the Legislature contemplated the appointment of a receiver after dissolution at the place where the corporation had its principal place of business or did business at the time of the dissolution.

[4, 5] Nor can we see any obstacle to the acceptance of this view in any provisions of the Constitution. Said instrument clothes the superior court with original jurisdiction in cases of equity, and, if it be said that the appointment of receivers is a branch of its equity powers, there is no inhibition upon the Legislature locally to limit the exercise of this jurisdiction as provided in said section. Nor should the declared inconvenience of such course receive more than scant consideration. Whether it is convenient or as easy as some other course to comply with the terms of a statute is not regarded as a sufficient reason for disregarding its mandates. But it should not be difficult to ascertain where a corporation has had its principal place of business at the time of its dissolution. There is virtually such an allegation here, and respondents no doubt found it easy to make it; otherwise it would not appear as they seem to attach to it very little importance.

It may be that the complaint could be amended so as to support an appointment made by the superior court of Alameda county; but, as the question is presented here, under the decisions of the Supreme Court and the language of said section as we understand them, the superior court is without authority to make such appointment.

There is much discussion in the briefs as to whether it is a suitable case for a receiver. We have examined the authorities in the light of the allegations of the complaint, and we feel satisfied that a sufficient showing was made to authorize this exceptional proceeding. Manifestly, as Chief Justice Beatty said in the Havemeyer Case, such step should not be taken unless necessary for the protection of the rights of creditors or stockholders, and it may be said, also, that, ordinarily, notice should be given before a receiver is appointed; but, in view of the allegations of the complaint, we cannot say that as to these considerations the court was at fault.

We think, though, the order should be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 482

LAGUDIS v. LONDON ASSUR. CORP.

(Civ. 1753.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

INSURANCE ⟸621—FIRE POLICY—ACTION—TIME.

An action on a policy of fire insurance brought before the expiration of the time when the loss under the terms of the policy would become payable was premature.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1542, 1543; Dec. Dig. ⟸621.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by S. Lagudis against the London Assurance Corporation. From a judgment for plaintiff and an order denying its motion for new trial, defendant appeals. Judgment and order reversed.

H. A. Thornton and Chickering & Gregory, all of San Francisco, for appellant. Traber & South, of Fresno, for respondent.

PER CURIAM. This is an appeal from the judgment and order denying the defendant's motion for a new trial.

The facts in this case are in all essential particulars similar to the facts in the case of Borger v. Connecticut Fire Ins. Co., 24 Cal. App. 696, 142 Pac. 115, and the condition of the policy of insurance sued upon, as to the time when the loss shall become payable, is

identical with the terms of the policy in that case. This action was also brought prior to the time when the loss would become payable had expired, and the contention that this action was prematurely brought stands upon the threshold of this case upon appeal as in the Borger Case, and in the case of Irwin v. Insurance Company of North America, 16 Cal. App. 143, 116 Pac. 294, to which our attention has been directed. We cannot distinguish between the facts of those prior cases and those of the case at bar, or the law applicable thereto as in said former cases laid down; and, this being so, a discussion of the other questions presented upon this appeal is unnecessary at this time.

Upon the authority of Borger v. Connecticut Fire Ins. Co., supra, and Irwin v. Insurance Co. of North America, supra, the judgment and order are reversed.

29 Cal. App. 487

KOEHLER v. D. FERRARI & CO. (Civ. 1710.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

JUDGMENT ⊂=143(17) — DEFAULT — SETTING ASIDE—"EXCUSABLE NEGLECT."

Where the defendants' attorney, failing to find plaintiff's attorney, secured a verbal consent, allowing five days in which to answer, and relied upon such consent, although it was not binding, he could have the default judgment taken within such time set aside under Code Civ. Proc. § 473, permitting the court, in its discretion, to relieve a party from a judgment taken against him through his "excusable neglect."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 290; Dec. Dig. ⊂=143(17).

For other definitions, see Words and Phrases, First and Second Series, Excusable Neglect.]

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by William Koehler against D. Ferrari & Co. From an order setting aside a judgment by default, plaintiff appeals. Affirmed.

Warner Temple, of San Francisco, for appellant. Devoto, Richardson & Devoto, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order setting aside a judgment taken by default. According to the showing made by the defendants, their attorney at that time, desiring further time within which to plead to the plaintiff's complaint, and failing, after several attempts, to find plaintiff's attorney at his office, obtained from the plaintiff himself a verbal stipulation, extending the time to answer to said complaint five days. Before the expiration of that time the default of the defendant had been taken. Immediately thereafter he moved to set aside the default, and the court granted the motion. The stipulation being oral—besides having been given by the plaintiff himself instead of by his attorney—was doubtless without force and not binding; but in relying upon it, as they certainly did, the defendants, it seems to us, committed no more than an act of inadvertence and excusable neglect, upon a showing of which the court was fully justified in setting aside the default. To hold otherwise would be to deprive the defendants of the very remedy that section 473 of the Code of Civil Procedure was intended to provide.

Order affirmed.

29 Cal. App. 480

KIERSKI v. LICK CO. (Civ. 1695.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

APPEAL AND ERROR ⊂=1010(1) — RECORD — FINDINGS OF COURT—CONCLUSIVENESS.

Where there is evidence to support the findings of the trial court that plaintiff's services were rendered the defendant after its incorporation, such findings are conclusive against the defendant's contention on appeal that the services were rendered to an individual before incorporation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981; Dec. Dig. ⊂=1010(1).]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Samuel Kierski against the Lick Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. Marks, of San Francisco, for appellant. J. C. B. Hebbard and George Lezinsky, both of San Francisco, for respondent.

PER CURIAM. This is an action to recover judgment for the value of services rendered by an attorney at law.

From the evidence it appears that a portion of the services embraced in the claim of plaintiff against the defendant were rendered prior to the incorporation of the defendant, the remainder of the services being rendered thereafter. The court in its findings limited the recovery to the services rendered to the defendant after its incorporation. It follows that the contention of the defendant that the evidence shows without conflict that the services were rendered prior to the incorporation of the defendant, and to an individual and not the corporation, is not borne out by the record. Lacking basis in fact this contention of the appellant is without merit; as is also its further contention that the finding as to the value of the services is not supported by the evidence.

The evidence amply sustains the findings of the trial court; and we find no error in the court's rulings upon the admission of evidence.

Judgment affirmed.

29 Cal. App. 476

BORGER v. CONNECTICUT FIRE INS. CO. (Civ. 1720.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

INSURANCE ⊂⊃623(4)—FIRE INSURANCE—DENIAL OF LIABILITY—EFFECT.

Where the policy allowed 90 days for payment in case of dispute as to extent of liability, the insured's suit within 90 days was premature, although the insurer immediately denied liability, since such denial did not, on proof of liability, make the sum fall due immediately.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1551; Dec. Dig. ⊂⊃623(4).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Alex Borger against the Connecticut Fire Insurance Company. From a judgment for plaintiff, and order denying new trial, defendant appeals. Reversed.

Coogan & O'Connor, of San Francisco, and Drew & Drew, of Fresno, for appellant. W. P. Thompson, of Fresno, for respondent.

PER CURIAM. This is an appeal from a judgment and order denying the defendant's motion for a new trial.

This cause was before the court upon a former appeal (24 Cal. App. 696, 142 Pac. 115), wherein the facts of the case in so far as required for the consideration of that appeal and of the present one are fully set forth. Upon the former appeal the judgment and order were reversed upon the ground that according to the terms of the insurance policy in question relating to the time when the loss should become payable, the action had been prematurely brought. Upon such reversal the plaintiff filed an amended complaint, wherein it was set forth that the defendant, upon the filing with it by the plaintiff of his proofs of loss, had denied liability upon its policy for such loss. Upon the second trial on the added issue thus presented the plaintiff again recovered judgment, upon which and upon the denial of his motion for a new trial the defendant has again appealed.

The present case presents practically the same question that was presented and decided upon the prior appeal. The respondent contends, however, that the effect of the defendant's denial of liability upon its policy for the loss in question, which plaintiff pleaded and proved upon the second trial, was to render the defendant's obligation immediately due and payable, notwithstanding the stipulation in the policy that the loss should not become due and payable until a certain time had elapsed after presentation of the proofs of loss, the action having been begun within such time. The respondent has collated a large number of cases from other jurisdictions in which the rule is laid down that a denial of liability by the insurer renders the loss immediately payable, if payable at all. The appellant, however, maintains that such is not the rule in this state, citing the case of Irwin v. Insurance Company of North America, 16 Cal. App. 143, 116 Pac. 294, wherein the contrary rule is laid down. In that case, which was an action to recover upon an insurance policy similar to the policy in the instant case as to its stipulation respecting the ownership of the property, and the time when the loss should become payable, the court says:

"Respondent contends that the condition of the policy as to the time of payment was waived by reason of the action of defendant in refusing payment on the ground that plaintiff was not the owner of the premises and possessed no insurable interest therein, the contrary of which was clearly established by the evidence, and for the further reason that by its answer it denied liability generally. We cannot construe such denial of liability, either before or after suit, as a waiver of the definite time fixed by contract for the payment of the loss. No breach of contract existed at the time the suit was brought; there was no sum due or payable to plaintiff. The terms of the contract gave to defendant 60 days, during which time it had a right to retain and use the money necessary to liquidate the loss. Within this time the defendant could make independent investigations in order to determine its liability. The loss was not payable until the time specified. A different rule might apply had the policy provided only that no action should be maintained for a period of 60 days, but we are not advised that a denial of liability before maturity can be said to have the effect to mature an obligation before the date fixed in the contract for its payment. Tatum v. Acherman, 148 Cal. 357, 369 [83 Pac. 151, 3 L. R. A. (N. S.) 908, 113 Am. St. Rep. 276, 7 Ann. Cas. 541]."

We are unable to distinguish the Irwin Case from the case at bar; and the fact that the Supreme Court has denied a petition for a rehearing renders the rule therein set forth binding upon this court, and constrains us to hold that the state of this case has not been changed by the plaintiff's said amendment to his complaint or by the retrial of the cause, and that the action must still be held to have been prematurely brought.

For the foregoing reasons, and upon the authority of Irwin v. Insurance Co. of North America, supra, and Borger v. Connecticut Fire Ins. Co., supra, the judgment and order are reversed.

29 Cal. App. 491

LICK v. ANDERSON et al. (Civ. 1636.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

1. MORTGAGES ⊂⊃558—ASSUMPTION OF DEBT—LIABILITY OF WIFE.

Where a wife accepted a deed to herself and husband providing that the conveyance was subject to a deed of trust and mortgage which the grantees agreed and assumed to pay, she became personally liable for the amount of the obligation which the incumbrance secured, after proper exhaustion of the security, although she did not sign the deed to herself and husband.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1596; Dec. Dig. ⊂⊃558.]

2. APPEAL AND ERROR ⟸1010(1)—REVIEW—FINDINGS.

Where the appellate court cannot say that the findings in the trial court are unsupported by the evidence and actions of the parties, the findings and judgment will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981; Dec. Dig. ⟸ 1010(1).]

Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by E. W. Lick against Charles W. Anderson and others. From a judgment for plaintiff, defendant Maria Ohlsen appeals. Affirmed.

Edwin H. Williams, of San Francisco, for appellant. Robert B. Gaylord, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in plaintiff's favor; the only appellant being the defendant Maria Ohlsen.

The following are substantially the facts of the case: In the month of February, 1911, Charles W. Anderson and his wife were the owners of a certain lot in San Francisco upon which there was outstanding a mortgage for the sum of $1,800. During that month the Andersons executed a trust deed to E. W. Lick, the plaintiff and respondent therein, to secure their promissory note for the sum of $700, with interest. On April 1, 1911, they conveyed the property to Henry J. Ohlsen and Maria Ohlsen by a deed which contained the following provision:

"Subject to a deed of trust for $700, dated February 23, 1911; also a certain mortgage of $1,800, dated February 23, 1911, which the grantees herein hereby agree and assume to pay."

This deed was recorded on May 9, 1911. In October, 1911, the Ohlsens conveyed the property to Clara B. Lucier by a deed which recited that the property was subject to the two foregoing incumbrances. At the time of executing this deed Maria Ohlsen also executed an assignment of the title insurance policy to Clara B. Lucier. In the year 1913 the plaintiff herein, his note not having been paid, proceeded to sell the property under his trust deed, but only received at such sale the sum of $50 to be applied upon his note because of the prior incumbrances. He thereupon commenced this action against the Ohlsens to recover the balance claimed by him to be due after his security had been thus exhausted, relying upon the above-quoted provision in the deed from the Andersons to the Ohlsens. It was the contention of Maria Ohlsen upon the trial that she was not liable upon this stipulation in the Anderson deed for the reason that the transaction was one entirely conducted by her husband, that the insertion of her name in the deed was a mere formality in which she had no part, and of which she had no notice, and from which she received no benefit, and that, having neither signed nor received the deed containing this stipulation, nor in any way ratified or assented to the above insertion therein, no relation existed between herself and the plaintiff out of which this obligation could arise; and this is her only contention upon this appeal.

[1] It is conceded that upon the face of of the instrument upon which the respondent relies for his recovery herein the relation of tenants in common was created by the insertion of their names as grantees in the Anderson deed; and it may not be disputed that, if a grantee accepts a deed containing such a provision as is above set forth, such a grantee becomes thereby personally liable for the amount of the obligation which the incumbrance secures after such security is properly exhausted, even though the signature of such grantee is not appended to the deed. Tulare Co. Bank v. Madden, 109 Cal. 312, 41 Pac. 1092; Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123.

[2] Upon the trial of this cause the findings of the court were against the foregoing contentions of the appellant, and were to the effect that the transaction by which the Andersons conveyed the lot to the Ohlsens was not one in which Henry J. Ohlsen was dealing in his separate property, but that the property received by himself and his wife was community property, and that the said Maria Ohlsen was consulted in the matter of such transaction and was advised as to the same.

The appellant insists that this finding of the court is not supported by any other evidence than that furnished by the face of the deed itself, and by the fact that several months after its execution and delivery to her husband she joined in the conveyance of the property and of the title insurance policy upon it to Clara B. Lucier. It may be conceded that under the authorities cited by appellant these facts alone might not have justified the finding and judgment of the trial court; but an inspection of the record discloses that, notwithstanding the denials of the appellant, there is some substantial evidence that she was made aware of the fact and contents of the deed from the Andersons to her husband and herself at or about the time of the transaction, and that the title to the property was permitted to remain in her husband and herself as the tenants in common thereof for several months thereafter with such knowledge and without any objection on her part. The testimony of the appellant herself is, to say the least of it, equivocal with regard to these matters; and, reading the record as a whole, we are unable to say that the findings of the court are unsupported by the evidence and actions of the parties before it. Volquards v. Myers, 23 Cal. App. 500, 504, 138 Pac. 963. This

being so, we will not disturb the findings and judgment of the trial court.

Judgment affirmed.

29 Cal. App. 494

JOHNS v. SANFILIPPO. (Civ. 1717.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

1. MASTER AND SERVANT ⟸40(3) — EMPLOYMENT—BREACH—SUFFICIENCY OF EVIDENCE.

In an action for breach of defendant's contract employing plaintiff's assignors, evidence *held* sufficient to show breach by wrongful discharge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 49; Dec. Dig. ⟸40(3).]

2. MASTER AND SERVANT ⟸35—BREACH OF CONTRACT—RIGHT OF ACTION.

Where defendant, who hired plaintiff's assignors to pick apricots, discharged them and prevented them from completing their contract without sufficient cause, plaintiff could sue for the agreed price of the fruit actually cared for according to the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 41; Dec. Dig. ⟸35.]

3. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS.

A finding of the trial court upon conflicting evidence cannot be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸1011(1).]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by J. T. Johns against S. D. Sanfilippo. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Judgment and order affirmed.

Beggs & McComish, of San Jose, for appellant. Maurice J. Rankin and Herman J. Shirley, both of San Jose, for respondent.

PER CURIAM. This is an appeal by the defendant from a judgment in plaintiff's favor and from an order denying a new trial.

The action was brought to recover damages for the alleged breach by the defendant of an agreement in writing between the plaintiff's assignors and the defendant, by the terms of which the former were to pick, cut, and spread upon trays for drying the apricot crop of the latter for the season of 1914, and for the agreed price of $8 per green ton. The plaintiff alleges that after about a week spent in the work of picking and preparing for drying of the crop the assignors were, without cause, discharged by the defendant, and prevented from completing their contract, and he therefore sues on their behalf for the balance due for so much of the crop as they had gathered prior to their discharge at the agreed price therefor per ton. The defendant in his answer denied the allegations of the plaintiff's complaint relative to the discharge, and also pleaded a counterclaim for the alleged loss he had sustained by reason of the insufficient manner in which the plaintiff's assignors had assayed to perform their contract and by reason of their abandonment thereof before its completion.

The court found that the undisputed facts averred in the complaint as to the terms of the contract and entry upon its performance were true, and then proceeded to find that:

"On July 25, 1914, said defendant discharged said J. T. Johns and N. T. Johns from said employment and ejected them from the premises on which said crop of fruit was situated, and prevented them or either of them, from the picking, cutting, and spreading on trays of said crop of apricots, and refused to pay them for the work already done, and refused to comply with the terms of said agreement."

[1] The appellant assails this finding as unsupported by the evidence; but, upon a careful reading of the record, we think that there is some substantial evidence going to show that, while the plaintiff's assignors, after a little more than a week spent in the harvesting of the crop in question, were dissatisfied at the defendant's slowness of payment, and were rather disposed not to go on with the contract, the defendant quickly took advantage of this frame of mind on their part to take the direction of their pickers out of their hands and order them off the premises, and that therefrom the court was justified in making the finding complained of.

[2] The chief contention of the appellant upon the oral argument of the cause was that the plaintiff had mistaken his remedy in bringing an action to recover upon the contract the agreed price of the portion of the crop actually harvested thereunder, and that his appropriate form of action should have been one in quantum meruit for the reasonable value of the services performed. This claim of the appellant is predicated upon the theory that the facts show that the contract was terminated either through the fault of the plaintiff's assignors, or by the mutual consent of the parties, and could not therefore be made the basis of a recovery founded upon its breach. The difficulty with this contention is that the findings of the court (which, as we have concluded, the proof sufficiently sustained) show that the plaintiff's assignors were discharged by the defendant and prevented from completing their contract without sufficient cause, in which case the authorities sustain the respondent's contention that he was entitled to sue for the agreed price of the fruit actually cared for according to the terms of the contract. Cox v. McLaughlin, 54 Cal. 605; Alderson v. Houston, 154 Cal. 1, 10, 96 Pac. 884.

[3] The appellant further contends that the findings of the court are inconsistent, particularly upon the matters set forth in his counterclaim, the alleged inconsistency arising out of the fact that, while the court

finds that the plaintiff's assignors "neglected to furnish a sufficient number of pickers and cutters to pick, harvest and cut said crop, and neglected to pick said fruit as directed by the defendant," the court also finds that the defendant was not damaged by this neglect in any sum whatever. Conceding that there may be some inconsistency in these findings, we are unable to see how the defendant is particularly injured thereby, for the evidence is fairly in conflict as to any injury which the defendant sustained by reason of said neglect; and, this conflict having been resolved in favor of the plaintiff, we cannot disturb the finding of the court thereon.

No other errors being complained of, the judgment and order are affirmed.

29 Cal. App. 526

PEOPLE v. CAVALLINI. (Cr. 304.)

(District Court of Appeal, Third District, California. Feb. 1, 1916. Rehearing Denied by Supreme Court March 30, 1916.)

INTOXICATING LIQUORS ⇐236(1)—PROSECUTION—EVIDENCE—PRIOR ACTS.

In a prosecution for keeping liquors for sale in no-license territory, where the only evidence that the district was no-license territory was a stipulation that it was such territory on the day alleged in the information, and the only evidence as to defendant's purpose in keeping the liquors he had on that day was inferences from his acts prior to that day, a conviction cannot be sustained, since so far as appears from the evidence those acts were lawful.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300–302, 307, 308, 319–322; Dec. Dig. ⇐236(1).]

Appeal from Superior Court, Madera County; W. R. Conley, Judge.

Salvatore Cavallini was convicted of keeping in a place of public resort alcoholic liquors for the purpose of sale and distribution in no-license territory, and he appeals. Reversed on rehearing.

L. J. Schino, of Merced, and M. H. Edwards, of Madera, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. This case was determined October 29, 1915, and opinion filed on that day. A rehearing was ordered particularly upon two points: First. Is the information sufficient to show that the fourth supervisor district of Madera county was no-license territory? Second. Was evidence tending to show that defendant kept and conducted a place where alcoholic liquors were sold on days prior to September 30, 1914, admissible?

Defendant was convicted and sentenced to pay a fine of $600, and to be imprisoned in the county jail for the period of seven months. He appeals from the judgment and the order denying his motion for a new trial.

The information reads as follows:

"Salvatore Cavallini is accused by the district attorney for the county of Madera, state of California, by this information, of the crime of keeping and conducting a place where alcoholic liquors are kept for the purpose of sale and distribution in 'no-license territory,' committed as follows: The said Salvatore Cavallini on or about the 30th day of September, 1914, at and in the said county of Madera, and state of California, and prior to the filing of this information did willfully and unlawfully keep a place of public resort in the fourth supervisor district of Madera county and did keep in said place of public resort for the purpose of sale and distribution in said 'no-license territory,' alcoholic liquors, to wit, beer, whisky, wine, and fermet, contrary to the form, force, and effect of the statute," etc.

In our former opinion we stated that there should have been a direct averment of the fact that the district mentioned was "no-license territory," and we may here add that the date when the ordinance so declaring took effect should have been stated or should have been proven. We were, however, influenced in our decision upon the demurrer and also as to the admissibility of certain evidence by a stipulation made at the opening of the trial which we assumed was in effect an admission that the district was "no-license territory" by force of an ordinance passed prior to September 30, 1914, and covering the period to which evidence would relate. It seemed to us that as the attack made on the information was aimed solely at the omission clearly to allege the existence of an ordinance making the district "no-license territory," this omission might be disregarded where all parties admitted the existence of the ordinance and went to trial pursuant to the stipulation.

It seems, however, that the full record on the subject was overlooked. The question arose in the first instance on the demurrer to the information which was overruled by the court.

In his opening statement to the jury the district attorney, Mr. Murray, addressing himself to defendant's attorney, said:

"I suppose, Mr. Schino, you will admit that the fourth supervisor district on the date alleged in the information was 'dry territory'? Mr. Schino: No, sir; if your honor please, we desire to make a formal objection in that respect. If I make that admission I will be bound by it. As quick as the first witness is sworn I desire to interpose an objection covering that proposition, unless your honor desires me to make the objection at this time. The Court: You may as well make your motion now. Mr. Schino: We will consider it made after the first witness is sworn? The Court: Yes. Mr. Schino: We will object to any testimony being introduced in the case with reference to the fourth supervisor district of Madera county being 'dry territory,' upon the ground that the information does not allege that the fourth supervisor district of Madera county at the time mentioned in the information was in 'no-license territory.' Second: That the information does not allege that any of the enumerated alcoholic liquors contained therein are alcoholic liquors within the meaning of the Code, or within the meaning of the local option act under which the defendant is being prosecuted, and upon the same ground as urged at the hearing on the demurrer. The Court:

The objection will be overruled. Now, I suppose under the objection you will admit it was 'no-license territory'? Mr. Schino: Yes; we will admit it with the understanding, of course, we reserve our objection. The Court: Certainly that is understood, but he will not have to bring in the records to make the proof. Mr. Schino: Certainly not. The Court: Then, gentlemen of the jury, it is stipulated by and between respective counsel representing the people and the defendant that the fourth supervisor district of Madera county is 'no-license territory.' That will be taken by you as a fact in the case. Mr. Schino: That is on the 30th of September, 1914. The Court: Yes; I have no reference to anything else except as to the date of this information; that is, on the 30th of September, 1914, the fourth supervisor district of the county of Madera was in 'no-license territory.' Call your first witness."

The stipulation went no further than an admission that, on September 30, 1914, the district was "no-license territory," and this admission was subject to defendant's objection that evidence showing a violation of the local option law was not admissible for the reason that the information failed to state a public offense.

Passing for the moment the alleged insufficiency of the information to state a public offense, and assuming that it was sufficient, the burden was upon the prosecution to show that defendant was guilty as charged on September 30, 1914, for there was no evidence and no admission of the existence of any ordinance declaring the district to be "no-license territory" prior to that date. In our former opinion we held that evidence that defendant kept a place of public resort for the purpose of sale and distribution of alcoholic liquors at times prior to September 30, 1914, was admissible as tending to show the character of the place and purpose of defendant on that day. All this evidence went before the jury under defendant's objection. Upon further reflection and particularly in view of the fact that it was not shown that the district was no-license territory prior to September 30, we think the evidence was inadmissible and was prejudicial. It was prejudicial for the reason that it constituted substantially all of the evidence upon the fact. Prior to September 30th defendant was lawfully engaged in the business for which he was prosecuted; he had a local and United States revenue license to sell merchandise including liquors; the stock on hand September 30th was rightfully in his possession and was purchased some time prior to that day. The evidence was that the officers seized quite a quantity of liquors at his place of business on the mentioned day, but the purpose for which he was then keeping the place and the liquors was left to be determined by the jury from the evidence that he had for some months previously been keeping there a place of public resort at which liquors were sold and distributed.

The case is as if the no-license ordinance had taken effect on September 30th and defendant was found then to be in possession of a quantity of liquors. The local option law does not forbid the keeping of intoxicating liquors; the offense consists in keeping them for the purpose of sale and distribution in no-license territory. The prosecution sought to establish this purpose and the jury were to infer such purpose from the fact that defendant had at that place for some months previously been conducting the business of selling and distributing liquors. From the doing of a lawful act the jury were to infer an intention to do and the doing of an unlawful act. Such an inference could not, we think, have legitimately been drawn and certainly would not be sufficient to overcome the presumption of innocence. Because defendant was lawfully conducting the business complained of on September 29th and was found on the 30th still in possession of the place and the merchandise, the jury were to infer the commission of the offense charged.

The court instructed the jury that "the mere shipment of alcoholic liquor, if any, to the defendant in no-license territory, is not of itself sufficient to establish guilt in a case of this kind," and "that the mere keeping of alcoholic liquors in 'no-license territory' by defendant at his home, or upon his premises where he resides (his family resided on the same lot where his place of business was situated), is not unlawful in itself. * * *" But it must appear "that it was the intention or purpose of said defendant to sell or distribute such liquors in said no-license territory"; also that, "under the law of this state, it matters not in what quantities alcoholic liquors are kept in a place in no-license territory, by any person, so long as the same are not kept for the purpose of sale and distribution." The court, however, instructed the jury that they were "to consider all the evidence in the case," which, of course, included the evidence of defendant's having for some months prior to September 30th kept a place of public resort for the purpose of selling and distributing alcoholic liquors. If the jury had not been permitted to consider the evidence of prior acts and conduct and had followed the instructions, the possession alone of the liquors on September 30th could not have been regarded by the jury as evidence of guilt. We do not mean to hold that prior acts and conduct tending to show the character of the place and the purpose of defendant would not have been admissible had the ordinance been in effect at the time to which such evidence related. Introduced not to prove distinct and separate offenses, but as tending to show the purpose of defendant at the time of the alleged offense, we think such acts and conduct would be admissible.

If there had been some substantial evidence that on September 30th defendant was keeping a place of public resort for the purpose of selling and distributing alcoholic liq-

uors, the evidence of which we are now speaking might have been admissible as tending to support the evidence as to what the defendant was doing on the 30th of September. What we hold is that, upon the facts appearing, the verdict was not sustained by evidence alone of prior acts, and evidence of such acts should not have been admitted.

As the judgment must be reversed, we do not find it necessary to consider the sufficiency of the information as, doubtless, should there be another trial, it will be amended so as to obviate all question.

The judgment and order denying defendant's motion for a new trial are reversed.

We concur: HART, J.; BURNETT, J.

(29 Cal. App. 649)

HELLINGS v. WRIGHT. (Civ. 1473.)

(District Court of Appeal, Third District, California. Feb. 11, 1916. Rehearing Denied by Supreme Court April 6, 1916.)

1. BROKERS ⊜43(1)—CONTRACTS FOR COMPENSATION—VALIDITY—ORAL CONTRACT.

Where defendant had a written contract with the owner of certain lots for their sale on commission and orally agreed with plaintiff to give the latter part of the commission on lots which he sold and plaintiff thereafter sold certain lots for which defendant received the commission, the statute of frauds does not prevent recovery by plaintiff of his commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⊜43(1).]

2. BROKERS ⊜92—CONTRACT—CONSTRUCTION —"SHARE."

A contract whereby a broker who has a written contract for the sale of lots on commission agrees to pay another broker three-fifths of that commission on lots sold by the latter, is an agreement to share the commission, since to "share" does not mean necessarily to divide equally.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 135; Dec. Dig. ⊜92.

For other definitions, see Words and Phrases, First and Second Series, Share.]

3. BROKERS ⊜82(1)—ACTIONS FOR COMPENSATION—COMPLAINT.

A complaint which alleges an oral agreement by defendant who had a written contract for the sale of certain lots to pay plaintiff a share of the commission on the lots sold by plaintiff, that plaintiff sold a certain number of lots on the installment plan as agreed, and that the payments had been made by the purchasers as required, and which was accompanied by an exhibit containing a description of the lots sold with the sale price of each, the commission earned by plaintiff and the monthly payments to be made on each lot by the purchasers, sufficiently alleges that the plaintiff obtained agreements from the purchasers to pay the balance in installments.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 101; Dec. Dig. ⊜82(1).]

4. APPEAL AND ERROR ⊜193(9) — PRESENTING QUESTIONS IN LOWER COURT — OBJECTIONS TO COMPLAINT.

The objection that a complaint on an oral agreement for a division of a broker's commission failed to allege that plaintiff secured agreements by the purchasers to pay the balances due in monthly installments as agreed, should have been made at the trial when evidence of the performance of the agreement was offered and not be first made on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1232–1236; Dec. Dig. ⊜193(9).]

5. APPEAL AND ERROR ⊜192(2)—COMPLAINT —FAILURE TO SIGN—WAIVER OF OBJECTION.

An objection that the complaint was not signed by the plaintiff or his attorney is not jurisdictional, but a matter of form which could be corrected if attention had been called thereto in the court below, especially where the complaint was verified by the attorney, and the objection was therefore waived by the failure of defendant to make it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⊜192(2); Pleading, Cent. Dig. §§ 1348, 1414, 1415.]

6. BROKERS ⊜43(1) — CONTRACTS FOR COMMISSIONS — PERFORMANCE WITHIN YEAR — POSSIBILITY OF PERFORMANCE.

An agreement by a broker to share with plaintiff his commission on lots sold by plaintiff for cash or on the installment plan at not less than $5 per month, could be performed within the year, and was therefore not required to be in writing, by Civ. Code, § 1624, subd. 1, which requires a contract which by its terms is not to be performed within a year from the making thereof to be in writing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⊜43(1).]

7. FRAUDS, STATUTE OF ⊜133 — CONTRACTS NOT TO BE PERFORMED IN YEAR—PAYMENT OF MONEY.

The fact that an oral contract which has been so far performed that nothing remains to be done but the payment of the consideration, does not require such payment within a year, is no defense to an action for the payment.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 293–298; Dec. Dig. ⊜133.]

8. BROKERS ⊜43(3)—EMPLOYMENT — SUFFICIENCY OF WRITING—LETTER.

A letter written by defendant to plaintiff wherein he promised to pay commissions as oral-

ly agreed, takes the contract out of the statute of frauds.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⟸43(3).]

9. TRIAL ⟸69 — REOPENING CASE — DISCRETION OF COURT.

It was not only within the discretion of the trial court to reopen the case to permit evidence by the plaintiff after a motion for nonsuit by defendant in order to clear up an uncertainty of the proof, but it was his duty to do so in order that the case might if possible be adjourned on its merits.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 164, 165; Dec. Dig. ⟸69.]

10. BROKERS ⟸86(4)—ACTIONS FOR COMMISSION—EVIDENCE—PERFORMANCE.

In an action by one broker against another for a share of the commission on lots sold, evidence *held* to show that plaintiff secured signed contracts from the various purchasers for the payment of the balances due on the purchase price of their lots.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 117; Dec. Dig. ⟸86(4).]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by G. B. Hellings against J. W. Wright. Judgment for the plaintiff, and defendant appeals. Affirmed.

Gerald C. Halsey, of San Francisco, for appellant. Frank A. Duryea, of San Francisco, for respondent.

BURNETT, J. The action was brought to recover commissions due under an oral agreement between plaintiff and defendant, both being real estate brokers. The agreement was that plaintiff, on behalf of defendant, should procure purchasers for lots in Richmond Tract No. 2, Contra Costa county, plaintiff to sell for cash, if possible, and if not, then on the installment plan, so much to be paid monthly by the purchaser and plaintiff's commissions to be paid by defendant at the rate of one-half of the monthly payments paid in on sales made by plaintiff individually, and one-third of the monthly payments on sales made by plaintiff jointly with any other salesman; settlement to be made between the parties on the first of every month until the whole of plaintiff's commission should be paid.

The defendant had a contract in writing, duly subscribed by the owner of the lots, for the sale thereof on a commission of 25 per cent. of the sale price, and plaintiff's commissions were to be 15 per cent. on sales made by him alone, and 7½ per cent. on sales made by him and any other salesman acting together. The plaintiff thereafter sold a certain number of lots and also a certain number in conjunction with one M. E. Dunn. Settlement between the parties was regularly had each month until about January 1, 1911, at which time plaintiff ceased selling said lots. Such settlement was made on statements rendered by defendant. One of these statements appears in full in the transcript, and it shows the names of the purchasers, a description of the lots sold, plaintiff's commissions, the amount theretofore paid plaintiff, and the amount due January 3, 1911. Said statement corresponds with that set out in the complaint herein, except in a few unimportant particulars. The testimony shows that from and after January 1, 1911, monthly payments were made by the purchasers of lots sold as aforesaid by plaintiff, and that the defendant received his commissions therefor in accordance with his written contract with the Central Richmond Land Company, but that he failed to pay plaintiff his commissions thereon. No evidence was offered by defendant, but it is insisted that the judgment is erroneous for several reasons, which we proceed to notice.

[1] 1. The first contention is that the contract being oral could not be enforced by reason of the statute of frauds. A sufficient answer to this claim is found in the following decisions: Gorham v. Heiman, 90 Cal. 346, 27 Pac. 289; Aldis v. Scheicher, 9 Cal. App. 372, 99 Pac. 526; Casey v. Richards, 10 Cal. App. 57, 101 Pac. 36; Saunders v. Yoakum, 12 Cal. App. 543, 107 Pac. 1007; Baker v. Thompson, 14 Cal. App. 175, 111 Pac. 373; Johnston v. Porter, 21 Cal. App. 97, 131 Pac. 69; Hageman v. O'Brien, 24 Cal. App. 270, 141 Pac. 33.

In the Gorham Case, supra, it is said, in reference to the complaint, that:

"It shows an agreement to co-operate in obtaining authority to sell, and in selling a mine for an equal share of the commissions. It shows that the agreement was acted upon. It shows performance on the part of plaintiffs, collection of the commissions by appellants, and refusal to divide. Certainly this establishes a cause of action if the agreement was valid, and we know of no ground upon which it can be held invalid. Counsel seem to rely on section 1624 of the Civil Code, subdivision 6. But, clearly, that provision was only designed to protect owners of real estate against unfounded claims of brokers. It does not extend to agreements between brokers to co-operate in making sales for a share of the commissions."

In the Aldis Case it is said:

"Conceding that the compensation recoverable by a broker for selling real estate is the subject of an oral contract between him and another, under which agreement the latter is to recover the commission for effecting the sale, nevertheless, a complaint, in order to state a cause of action upon such oral contract must allege that the one from whom it is sought to recover was by his principal authorized in writing to effect a sale."

So in the Casey decision it is said:

"The contract of employment by an authorized broker of the plaintiff as an assistant under an agreement to share commission is not required to be in writing under the statute of frauds."

In the Hageman Case it was held that, while the agreement between the brokers was to pay a definite commission, it was in effect an agreement to share commissions, and hence was enforceable.

Some of the foregoing cases probably attach conditions to the enforcement of such claim that a just view of the law does not exact, but there can be no question that the facts here meet every requirement of the rule. It clearly appears, in the first place, that defendant had a written contract with the owner for the sale of said property and for the payment of a specific commission, and that he employed plaintiff to assist in the sale of said property.

[2] Furthermore, that he agreed to pay him a certain commission for every lot that he sold. This amounted, of course, to an agreement to share the commissions since defendant was to obtain 25 per cent. from the owners, and of this the former was to pay to plaintiff 15 per cent. In other words, it was to be divided in the ratio of 15 to 10 between plaintiff and defendant. To share does not demand necessarily an equal division. Defendant was to share with plaintiff because he was to receive from the owner the whole of the commission, and he was to divide it in a certain proportion with plaintiff. It further appears that the lots were sold by plaintiff, that defendant received the commission from the owner, and failed to divide as he agreed. We know of nothing more required to entitle plaintiff to recover, and we do not hesitate to say that the statute of frauds, as interpreted by the courts, has no application to this case.

[3] 2. Appellant contends that the complaint fails to state a cause of action in consequence of the omission of an allegation that plaintiff "obtained agreements from purchasers to pay the balance in monthly installments," etc. The contention is based upon the familiar principle of practice that the complaint must aver a performance of the acts required of plaintiff to entitle him to relief.

While the complaint could have been more explicit in the respect indicated, we are emphatically of the opinion that it is sufficient as against a general demurrer. There is an allegation that:

"Thereafter and prior to January 1, 1911, plaintiff, under and by virtue of said agreement between himself and said defendant, sold by himself 61 of said lots on the said monthly payment plan," etc.

It simply amounts to this: Plaintiff alleges that he had a certain agreement with defendant to sell land upon a certain plan, and that he did sell it on the said plan. This necessarily implies that he complied with the terms contained in the plan. Moreover, a certain Exhibit A is made a part of the complaint, and it is alleged that it contains a "description of said lots so sold by plaintiff individually, and of such lots so sold by plaintiff in conjunction with said M. E. Dunn separately listed and described, together with the sale price of each lot; the commissions earned by plaintiff on such sale prices, and the monthly payments to be made on each such lots by the purchaser thereof." There is also an allegation that the said monthly payments were made by the purchasers. No one reading these averments in connection with the other parts of the complaint would have any trouble in drawing the inference that said purchasers agreed to make said monthly payments.

[4] Moreover, this objection is of such nature that it should have been made at the trial. When evidence was offered of the execution of said contracts this specific ground of objection was not pointed out, and appellant should not be heard now to urge this purely technical consideration. In Greiss v. State Investment Co., 98 Cal. 244, 33 Pac. 195, it is said:

"It is unfair for a party to withhold an objection founded upon a defect, which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient in order that he may have a fatal objection. Such course is a fraud upon justice and prevents a fair trial. It is therefore not tolerated."

See, also, section 475, Code Civ. Proc., and First National Bank v. Henderson, 101 Cal. 307, 35 Pac. 899.

[5] 3. It seems that the complaint was not signed by the plaintiff or his attorney, and of this appellant complains, but it is too late to take advantage of it where no objection was made in the lower court. It is a mere matter of form and could and would of course, have been remedied if attention had been called to it below.

In Meyer v. Del. R. R. Const. Co., 100 U. S. 457, 25 L. Ed. 593, the complaint was filed in the state court, but was not signed by either the plaintiff or his counsel. The cause was removed to the federal circuit court, and the objection that the complaint was not signed was first raised there. On appeal the Supreme Court said:

"No objection was made on this account in the state court; and it came too late in the circuit court. If it had been made in the state court, the defect—if in fact there was one—would, no doubt, have been cured at once by the signature of counsel."

In Railway Co. v. Peck, 99 Ind. 68, it was said:

"The statute requires that pleadings shall be subscribed by the party or his attorney, but as there was no motion to strike out or reject the paragraph, and the defect is one that might have been cured by amendment below, it will not be regarded on appeal."

In Sims v. Dame, 113 Ind. 127, 15 N. E. 217, it is said:

"The failure of both a party and his attorney to subscribe the complaint constitutes only a formal or clerical defect, which is amendable in the nisi prius court."

Here it is to be noted that the amended complaint is verified by the attorney for plaintiff, and defendant could therefore be in no doubt as to his identification nor could he have suffered any detriment by the omission complained of.

In Canadian Bank of Commerce v. Leale, 14 Cal. App. 309, 111 Pac. 759, it is said:

"While there is some authority in other jurisdictions to the effect that an unsigned pleading is a nullity, * * * the weight of authority is to the effect that the omission of the signature to a pleading is but an irregularity that does not affect the jurisdiction of the court, and may be cured by amendment." (Citing cases.)

We think there can be no doubt that said defect is not jurisdictional, that appellant waived it by making no objection in the court below, and that it would be manifestly unjust to take cognizance of it at this time.

[6] 4. The contract between plaintiff and defendant was not void by virtue of subdivision 1 of section 1624 of the Civil Code concerning "an agreement that by its terms is not to be performed within a year from the making thereof." As pointed out by respondent, appellant confuses said agreement with the contracts procured by plaintiff from the purchasers. Plaintiff's contract could be performed within a year. He could sell for cash or on the installment plan for a sufficient amount so that his commissions could be paid within the year, as the buyer on the installment plan was to pay not less than $5 per month.

The statute does not declare void a contract which may not be performed within a year, or which is not likely to be performed within that period. It includes only agreements which, fairly and reasonably interpreted, do not admit of a valid execution within the year. Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976; Stewart v. Smith, 6 Cal. App. 152, 91 Pac. 667; Blair Town Lot Co. v. Walker, 39 Iowa, 406; Plimpton v. Curtiss, 15 Wend. (N. Y.) 336. In the last-mentioned case it is said:

"The agreement set forth in the declaration in this case is not for the building of a house after the expiration of one year, but that it shall be performed at the farthest within fifteen months. There is nothing in the agreement prohibiting the defendant from completing the contract within six months or a shorter period. Suppose he had done so, and sued the plaintiff for compensation for his labor and materials found, would it have been permitted to the plaintiff to have said that the contract was not to be performed within a year, and therefore it was not obligatory upon him? Most clearly not. And if obligatory upon one party, it is equally so on the other. The defendant might have performed the contract within a year, and therefore it is not within the statute."

[7] As a matter of fact, plaintiff here performed his contract within the year, and so nothing was left but the payment of the consideration. "When a contract has been so far performed that nothing remains to be done but the payment of the consideration for the performance, the fact that the contract does not require the payment within a year furnishes no defense to an action for the price." 20 Cyc. 296, note 13, and cases there cited.

[8] Moreover, our attention is called to the evidence of a letter written by appellant wherein he promised to pay respondent's commissions. Thus unmistakably was the case taken without the operation of said statute of frauds.

[9] 5. Appellant complains because the court reopened the case and allowed plaintiff to offer additional evidence after a motion had been made for a nonsuit. The purpose was to clear up any uncertainty as to whether plaintiff had obtained the required contracts from the purchasers to whom he had sold the lots on the monthly installment plan. Such action was not only within the discretion of the trial judge, but it was plainly his duty to see that the cause should not be defeated by the mere inadvertence of counsel for respondent. It seems sometimes to be thought that the highest prerogative of the trial court is to conduct the proceedings so that the cause may be won or lost by virtue of some technical advantage. The truth is, of course, that the trial court should see, if possible, that the case is tried upon its merits and decided fairly and justly.

[10] 6. But the main contention of appellant seems to be that the evidence was insufficient to support the findings and particularly the one that respondent secured contracts of purchase on the installment plan from the various purchasers. Appellant insists upon this point both in his opening and reply briefs. In the latter he declared:

"The plaintiff agreed as part of his bargain with defendant to obtain agreements from all of the purchasers to pay the balance in monthly installments of not less than $5 until the whole sale price should be paid. Plaintiff offered no evidence whatsoever to show that he had actually done the work of securing signed contracts from the various purchasers to pay the purchase prices on the installment plan at the sale prices designated by the defendant for the sale thereof. There was absolutely no evidence that it was the plaintiff who induced all of the various purchasers to enter into written contracts on the installment plan at the sale prices designated by the defendant. There was absolutely no evidence introduced to show that the plaintiff had ever obtained any contracts whatsoever for the defendant or that he had ever turned over to the defendant any contracts whatever."

This sweeping statement is certainly entitled to some consideration because it will not be disputed that therein is involved a vital element of the cause of action.

The record, however, furnishes a complete refutation of appellant's claim in that regard. Plaintiff testified:

That the defendant "said he would employ me to sell lots on the basis of 15 per cent. of the selling price and I was to receive one-half of the first payment and one-half of the subsequent payments that were paid in by the purchaser; a statement was to be rendered on the first of every month by him to me. * * * He gave me instructions on the terms of sale, to accept from $10 to $25 down or thereabouts and generally $5 per month."

Furthermore, that he consented to these terms and started to work right after that to sell lots; that the exhibit attached to the complaint showing the names of all purchasers of lots sold by him individually and in conjunction with M. E. Dunn, the descrip-

tion of the lots, amount of commission and the amount of the monthly payments, was correct; that statements were rendered him by defendant each month up to January, 1911 (the last one being set out in full in the transcript) and that said list contained "the names of purchasers of lots" to whom he had sold himself and in conjunction with M. E. Dunn, together with a description of the lots he had sold for defendant.

Certainly it is a fair inference from the foregoing that plaintiff had fully complied with the conditions of his contract. But the evidence is even more specific as to the contracts of purchase. One of these contracts is set out in full, having been executed by George Twigg, who is shown in plaintiff's exhibit to have been one of the purchasers. The other contracts were all received in evidence, and they were identified by plaintiff as those obtained by him. That no question may remain, we quote from the record of the testimony of witness Rihn and of plaintiff after they were recalled:

"Q. Mr. Rihn, have you got, as secretary of the Central Richmond Land Company, the contracts in writing between the Central Richmond Land Company and the purchasers of lots as shown in this statement as prepared by you and which you submitted a few minutes ago? A. Yes. Q. Will you produce them, please? (The witness here produces certain papers.) Q. The contract with George Twigg—is that the contract you have in your hand there? A. Yes. Q. They are all in the same form, Mr. Rihn? A. Yes. Mr. Duryea: You know the signature of the president of the Central Richmond Land Company? A. Yes. Q. Are these the signatures of the president and secretary of the Central Richmond Land Company? A. Yes."

Mr. Hellings' testimony then appears as follows:

"Q. I will ask you, Mr. Hellings, if you saw George Twigg sign that document? A. I did. Mr. Halsey: I will admit those signatures are genuine."

Mr. Rihn, furthermore, in his testimony gave the names "of the purchasers under each of those contracts and the numbers of the contracts, all of which contracts were considered read in evidence." Then the examination of plaintiff continued:

"Q. Are those the contracts which were delivered to you in blank at the time you made the agreement? (Referring to contracts of sale identified by witness Rihn and read in evidence.) A. The same contracts. Q. Were those the contracts you used in obtaining purchasers for the lots? A. They were."

In view of the foregoing, how it is possible for any one to maintain that there is no evidence that plaintiff obtained contracts of purchase from the purchasers is not readily apparent.

We do not feel called upon to pursue the subject any further. We are convinced that none of the points made by appellant possesses any substantial merit, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(29 Cal. App. 589)

CALARA VALLEY REALTY CO. v. SMITH et al. (Civ. 1491.)

(District Court of Appeal, Third District, California. Feb. 7, 1916. Rehearing Denied by Supreme Court April 6, 1916.)

1. APPEAL AND ERROR ⟸681— RECORD — PLEADINGS—PROPOSED AMENDMENTS.

The court cannot review an order denying permission to file a proposed amended answer not incorporated in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2883, 2884; Dec. Dig. ⟸681.]

2. PLEADING ⟸146—COUNTERCLAIM AS ANSWER—STATUTE.

Under Code Civ. Proc. § 437, subd. 2, providing that the answer of the defendant shall contain a statement of any new matter constituting a defense or counterclaim, defendant in an action on an open book account may set up a counterclaim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 294–296; Dec. Dig. ⟸146.]

3. SET-OFF AND COUNTERCLAIM ⟸42 — COUNTERCLAIM — SUBJECT-MATTER—STATUTE.

Under Code Civ. Proc. § 438, providing that the counterclaim which the answer of a defendant may contain must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, in an action against two defendants on an open book account, the counterclaim of one, that plaintiff employed him and the other defendant to sell realty, whereby plaintiff owed them $1,800 as commission, was proper.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 80; Dec. Dig. ⟸42.]

4. PLEADING ⟸146 — PLEADING COUNTERCLAIM.

In an action on an open book account, defendant, answering by counterclaiming, should expressly admit his indebtedness, and then set up the counterclaim as a special defense by way of avoidance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 294–296; Dec. Dig. ⟸146.]

5. PLEADING ⟸146—COUNTERCLAIM — FAILURE TO DENY DEBT SUED ON—STATUTES.

Under Code Civ. Proc. §§ 437(2), 438, providing what the answer shall contain and what counterclaims may be set up, in an action on an open account, defendant was authorized to set up a counterclaim as an offset to the indebtedness sued on, though he did not deny such indebtedness, and though his counterclaim exceeded it, since his failure to deny the indebtedness was an admission that he owed it, while the purpose of section 438 was the settlement in one action of all matters that might be litigated between the parties.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 294–296; Dec. Dig. ⟸146.]

6. PLEADING ⟸262—AMENDMENTS — LEAVE OF COURT.

To avoid multiplicity of actions, a defendant having a proper counterclaim not barred by limitations should be permitted to present it by amended answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 801; Dec. Dig. ⟸262.]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Calara Valley Realty Company against C. B. Smith and another. From

a judgment for plaintiff, the named defendant appeals. Reversed.

Gavin McNab and R. P. Henshall, both of San Francisco, for appellant. Ross & Ross, of Redwood City, for respondent.

HART, J. This is an appeal, by the alternative method, by the defendant Smith from the judgment entered in the above entitled action. The action is for the recovery of the sum of $729.30, a balance due the plaintiff from the defendants upon an open book account for goods, wares, and merchandise sold and delivered by the former to the latter. The defendant Smith, answering for himself, without expressly denying the allegations of the complaint, set up a counterclaim, and in this behalf alleged that the plaintiff "was, and now is, indebted to this defendant and to one George O. Rich, upon an open book account, for commissions due and unpaid by said plaintiff to said Smith and Rich, and for and on account of services rendered by them to said plaintiff, in the sum of eighteen hundred dollars; that no part of said sum has been paid," etc. As and for "a further and separate answer and defense" to plaintiff's cause of action, the defendant Smith pleads another counterclaim in detail, setting out in substance the contract whereby he and Rich were employed to sell the real property of the plaintiff, for which they were to receive from the plaintiff, as compensation, commissions upon the gross selling price of the property sold by or through them and their agents and employés; that the said Smith and Rich performed the services called for by said contract; and that by reason of said services there accrued to their credit the sum of $1,800, no part of which has been paid, etc. This answer was verified. Smith asked for no affirmative relief, the prayer of his answer merely reading:

"Wherefore, said defendant prays that plaintiff take nothing by this action, and that he have judgment for his costs."

Several months after Smith filed his answer to the complaint, the defendant Rich, for himself, filed an answer, in which he expressly admitted "each and all the allegations of the complaint," and "prays judgment that the plaintiff recover in accordance with the prayer of his complaint and that he have judgment against his codefendant for one-half of the indebtedness mentioned in said complaint." The defendant Smith, at the opening of the trial, asked leave of the court to amend his answer by "setting forth another counterclaim as a defense, showing certain moneys had and received by plaintiff." The proposed amended answer, the counsel stated, was then in course of preparation. The court said: "When we get to it, you can file it if it is sufficient." The proposed amended answer was subsequently, during the progress of the proceedings, offered by the attorney for Smith, and the court refused to permit it to be filed on the ground that it was not in proper shape to tender an issue.

The respondent first objects that, inasmuch as there is not in the transcript as certified to this court the testimony offered by the defendant and excluded by the trial court, there is before us no record justifying a review of the assignments of error upon which the appellant relies.

[1] It is true that certain documentary evidence offered by the defendant Smith, which the court would not admit, and the proposed amended answer of the said defendant, are not incorporated in the record. Since it is true that the proposed amended answer is not incorporated in the record of the proceedings of the trial as it is presented to us, it manifestly cannot be determined by this court whether the trial court was right or wrong in its ruling refusing permission to file it.

As to the documentary evidence offered by the defendant Smith, it is to be remarked that, while Smith's attorney explained, when he offered it, that its purpose was to support the special defense or counterclaim, and that it would have the effect of showing the authority, in writing, in the form of a memorandum contained in the books of the plaintiff, and signed by the latter, in the defendants to sell real property for the plaintiff, thus invalidating any objection which might be raised by reason of the provisions of the statute of frauds prescribing the mode of vesting and attesting authority in a party to sell the real estate of another, the court not only refused to admit the testimony, but would not permit counsel to read the entries from the books into the record.

The question to be decided here, however, does not hinge upon the proposition whether the court erred in disallowing Smith to file his proposed amended answer, or upon the question whether the evidence offered and rejected was or was not relevant, material, and competent, but wholly upon the construction which (it is clear from the record before us) the court put upon the answer as filed by the defendant Smith, and upon which construction the court would not admit evidence in support of the defense so pleaded. The ground upon which the court excluded all evidence submitted by Smith in support of his counterclaim is repeatedly stated and given in the record, and it is manifest that the action of the court in that regard amounted in legal effect to a ruling that said answer does not state facts sufficient to constitute an answer or defense to the complaint.

The court in effect held that, inasmuch as the said defendant, by his answer, made no direct answer to the allegations of the complaint, no issue was tendered by his said answer, notwithstanding that therein Smith set up a counterclaim, growing out of contract, as an offset to the indebtedness pleaded in

the complaint. That this was the ground upon which the court excluded evidence offered in support of the counterclaim is, as before declared, clearly shown by the statement, repeatedly made by the court, in its rulings sustaining objections to testimony offered by Smith, that the answer raised no issue, as the following colloquy between the court and the attorneys for the respective parties will show:

"Mr. Ross (attorney for plaintiff): If you will notice, your honor, they set up a counterclaim of $1,500 and in their prayer they do not ask for that. Mr. Mordicai (attorney for Smith): We set up a counterclaim. We do not have to ask for an affirmative judgment. The Court: Now, let us see, gentlemen. The plaintiff claims there is $729.30 due. Mr. Mordicai: Yes, sir. The Court: And do you deny it? Mr. Mordicai: No, sir. The Court: And you do not ask for anything in your prayer. You do not ask anything but your costs. That is all you ask, and you admit there is $729.30 due the plaintiff and you do not ask anything. * * * The prayer of the complaint is that they have judgment for $729.30, isn't it? Mr. Mordicai: Yes, your honor. Court: And you admit that? Mr. Mordicai: Oh, no. Court: Where is your answer to it? Mr. Mordicai: Why, these counterclaims are an answer to it. Court: Where is your denial? Mr. Mordicai: There is no denial. They say that they sold us goods to the amount of some $900, and that we paid a couple of hundred dollars on it, leaving some seven hundred. Now, we do not deny that, but we say that in turn they owe us on another bill which we seek to offset against that as a defense but not as an affirmative judgment. Now that is our answer to the $729.30. We could not deny that they sold us those goods and that we only paid a certain amount on that bill, but we say they owe us for other things upon other contracts which we now counterclaim as a defense. Court: I may be obtuse in my mind to-day; I have a cold. But I really cannot see any merit in your answer, Mr. Mordicai. I have tried to, but I cannot see that your answer amounts to anything at all; I cannot. I cannot see that you have any answer that raises any issue whatever. Your answer is not worded properly to raise an issue to act as a counterclaim. Mr. Mordicai: Of course, there has been no point made by counsel here that it does not state facts sufficient to constitute a counterclaim or defense. Court: He gets in under his objections."

Subsequently, while the defendant Rich was on the stand, and after he had testified that he was president of the plaintiff corporation, the attorney for Smith asked said Rich a question to which the attorney for the plaintiff objected, and the court, sustaining the objection, said:

"Mr. Mordicai, I will say frankly to you that I think there was a chance for you to raise an issue in your pleadings here and bring the matter properly before the court, but as the pleadings now stand I do not think you have any show in court."

Thus it will be seen that the court would not permit the defendant Smith to make any showing whatever upon his alleged counterclaim, the ground of the rulings in all instances being in effect that said defendant had not raised an issue by his answer; and after repeated unavailing efforts to prove his defense, Smith, through his attorney, stated to the court that he had nothing further to offer. Thereupon the court gave the plaintiff judgment on the pleadings.

We think the court's construction of the answer and its rulings based upon its theory of said pleading were erroneous.

[2, 3] The defendant Smith was, of course, entitled to set up a counterclaim (section 437, subd. 2, Code Civ. Proc.) and that the counterclaim pleaded by him was one existing in his favor and against the plaintiff, between whom a several judgment might be had in the action, and arising out of a cause of action upon contract (Code Civ. Proc. § 438), there is no ground for doubting.

[4, 5] While unquestionably it would have been the better course for Smith to have expressly admitted the indebtedness pleaded by the plaintiff and then have set up his counterclaim as a special defense by way of avoidance, still it is well settled that, where a defendant fails to deny a material fact alleged in a complaint, such failure is tantamount to an admission of the fact so alleged. It follows that the failure of Smith to deny the indebtedness upon which the plaintiff declared amounted in legal effect to an admission by him that the indebtedness so pleaded existed against him. Under this view, Smith was authorized by the sections of the Code above referred to to set up a counterclaim as an offset to the indebtedness charged against him by the complaint.

A similar situation arose in the case of Valley Lumber Co. v. Wood, 4 Cal. Unrep. 1, 33 Pac. 343, although the precise point presented here was not raised. In that case, the complaint was in two counts, the first for $503.19, for goods sold and delivered, and the second for $83.20, for goods sold and delivered by another party and the claim therefor assigned to the plaintiff. The defendant made no denial of the first count, but denied that he is or was indebted to the assignor of the plaintiff in any sum exceeding $81.20, and, in addition to this and the denial of the assignment of the claim on which the second count was based, he pleaded a counterclaim to each of the counts of the complaint.

In Freeman v. Seitz, 126 Cal. 291, 58 Pac. 690, which was an action to recover a certain sum of money for beef furnished by the plaintiff to the defendant, the latter, without denying any of the allegations of the complaint, pleaded a counterclaim. The plaintiff demurred to the defendant's answer, but the demurrer was based solely upon the ground that the court was without jurisdiction to entertain the counterclaim because it involved in amount a sum less than three hundred dollars. The point presented here was not raised nor referred to in that case, the appeal therein having been taken by the defendant from the judgment entered by the trial court upon the order sustaining the demurrer to his answer on the ground above stated. But, notwithstanding that the point was not in those cases directly decided, it is

to be assumed that it was at least thought by the attorneys in the cases that the point was destitute of merit. At any rate, we are, as stated, of the opinion that the pleading of a counterclaim without directly denying the allegations of the complaint is sufficient to tender an issue upon the question whether the plaintiff is entitled to a judgment for the full amount of the claim or any part thereof upon which he has sued. Nor can we see that his right to support his special defense can in any manner be affected by the fact that his alleged counterclaim exceeds that of the debt sued for by the plaintiff and that he asks for no affirmative relief.

[6] If the defendant Smith, as his explanation of his proposition to file an amended answer would indicate is true, has another and distinct claim from the one pleaded by him against the plaintiff, growing out of contract, and which is not barred, he should be permitted to amend his answer by setting it up, and thus enable the court to settle in this action all the matters of difference existing between the plaintiff and Smith and sounding in contract. As the court said, in Freeman v. Seitz, supra:

"The law abhors a multiplicity of actions, and the evident intent of the Legislature in passing the code provision (above referred to) was that all matters that may be the subject of litigation between the parties within the limitations prescribed shall be settled in one action."

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

29 Cal. App. 634

WHITE v. MATHEWS, County Auditor.

(Civ. 1437.)

(District Court of Appeal, Third District, California. Feb. 10, 1916. Rehearing Denied by Supreme Court April 6, 1916.)

1. MANDAMUS ⊂⊃3(2) — RIGHT TO RELIEF — SPEEDY AND ADEQUATE REMEDY.

Mandamus should not issue if there is a plain, speedy, and adequate remedy at law.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 8; Dec. Dig. ⊂⊃3(2).]

2. COUNTIES ⊂⊃204(1)—CLAIMS AGAINST — DETERMINATION—STATUTE.

The courts can look only to the statute to determine the authority of any tribunal to fix the liability of the county for claims presented.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 312, 318–321; Dec. Dig. ⊂⊃204(1).]

3. COUNTIES ⊂⊃207(1) — CLAIMS AGAINST — AUTHORITY OF COURT.

Pen. Code, § 928, authorizing the grand jury to employ an expert to examine the books of the county at an agreed compensation to be first approved by the court, his compensation to be payable as other county charges, authorizes the court only to approve the employment of the expert not to audit his account or order its payment, and therefore does not, under Pol. Code, § 4091, requiring the auditor to issue warrants for all debts against the county allowed by the board of supervisors or which are fixed by law or authorized by law to be allowed by some person or tribunal other than the supervisors, require the auditor to issue a warrant to the expert on the order of the court without the claim having been submitted to the supervisors.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 335, 336; Dec. Dig. ⊂⊃207(1).]

4. COUNTIES ⊂⊃204(1) — CLAIMS AGAINST — AUTHORITY OF SUPERVISORS.

Under Pol. Code, § 4041, subd. 11, requiring the supervisors to examine, settle, and allow all accounts chargeable against the county, except the salaries of officers and demands authorized by law to be allowed by some other person or tribunal, it is the declared policy of the law to confide to the supervisors the general supervision and control over the financial affairs of the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 312, 318–321; Dec. Dig. ⊂⊃204(1).]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Petition for writ of mandamus by E. J. White against Jennie J. Mathews, as Auditor of the County of Mendocino. Judgment for plaintiff, and defendant appeals. Reversed.

Hale McCowen, of Ukiah, for appellant. Charles Kasch, of Ukiah, for respondent.

BURNETT, J. This was a petition for a writ of mandate to require the auditor to draw a warrant in favor of plaintiff for his services in experting the books of the county under employment by the grand jury. After the preliminary averments, the complaint sets forth that the grand jury, in pursuance of section 928 of the Penal Code, "deemed it necessary to secure the services of an expert to examine the books, records and accounts of all the officers of the county, and especially those pertaining to revenue for a period of 6 months ending December 31, 1914, and that the employment of said expert for said purpose was approved by the superior court in and for the county of Mendocino, it being provided that said expert should be employed for a period not to exceed 25 days at a compensation of $10 per day." It further appears that plaintiff performed said services beginning on February 3 and completing the work on March 24, 1915; that he made his report to said grand jury and presented to said body a statement showing the amount due him, to wit, the sum of $250; that thereafter this statement was presented to the judge of the superior court of said county, and it was duly approved by him; that thereafter said judge made an order directing defendant, as auditor, to draw her warrant on the treasurer of said county in favor of plaintiff for said sum; but that she refused, and still refuses, to do so. A general demurrer was interposed by the district attorney of the county representing the auditor, but this was overruled, and judgment directed to be entered requiring said auditor to draw said warrant, and from this judgment the appeal is taken. There is no difference between counsel as to the principle of law

involved; the controversy being rather as to the construction of said section 928 of the Penal Code.

[1-3] It is not disputed that the writ of mandate should not issue if there is a plain, speedy, and adequate remedy at law, and that we must look only to the statute to ascertain the extent of the authority of any tribunal to determine and fix the liability of the county for any claims that may be presented. The duty of the auditor is prescribed in section 4091 of the Political Code as follows:

"The auditor must issue warrants as provided in section four thousand and seventy-six, on the treasurer, in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county, which have been legally examined, allowed, and ordered paid by the board of supervisors. The auditor must also issue warrants on the treasurer for all debts and demands against the county, when the amounts are fixed by law, *or are authorized by law to be allowed by some person or tribunal other than the board of supervisors.*"

There can be no pretense that the present case falls within the foregoing enumeration unless it be included in the class of claims which we have italicized. This is, indeed, conceded, and respondent declares that:

"The only question in the appeal of this case is whether or not the judge of the superior court has a right to issue an order directing the auditor to draw a warrant in payment of the services of an expert employed by the grand jury. If the judge has such authority, so far as the auditor is concerned the claim is no different from a judgment. If the judge has such authority, the claim has regularly been presented, audited, and allowed just as a claim for witness fees, reporter's fees and for furnishing the courtroom are allowed. If it has been duly presented, allowed, and ordered paid, the action of the judge, in the absence of fraud, is conclusive, and the auditor cannot lawfully refuse to draw his warrant therefor."

He further insists that such authority for the judge to audit the claim and make the order for its payment is found in said section 928 of the Penal Code. Before analyzing said section we may examine the decisions cited by respondent in support of his contention.

The first of these is Ex parte Reis, 64 Cal. 233, 30 Pac. 806. Therein it was held that the superior courts in the city and county of San Francisco had the power to fix and order paid the compensation of phonographic reporters in criminal cases, and it was the duty of the treasurer of said city and county to pay the same upon the order of the court. It is apparent that such authority was clearly conferred upon said courts, for the law provided that:

"The compensation of the reporter must be fixed by the court, and paid out of the treasury of the county in which the case is tried on the order of the court." St. 1865–66, p. 232.

There was no room for difference of opinion as to the construction of the law; the only ground for debate being as to whether the statute was in force and as to the constitutional authority of the Legislature to confer such power upon the court.

In Aid Society v. Reis, 71 Cal. 627, 12 Pac. 796, it was seld that an order of the police court of the city and county of San Francisco for the payment out of the city and county treasury of the expenses for the maintenance of a minor convicted of a misdemeanor and committed to the custody of the officers of a nonsectarian charitable corporation is not an exercise of the right of taxation without representation, and that it was the duty of the treasurer to comply with such order, notwithstanding the demand had not been first approved by the board of supervisors. But the law therein explicitly provided that:

"Such court may further, in its discretion, direct the payment of the expenses of the maintenance of such minor during such period of two months, not to exceed in the aggregate the sum of twenty-five dollars," etc.

And the court said:

"To the judge of the proper court the statute commits the discretion of making the orders for such payments; where such a discretion is by law conferred upon a specific officer, such officer must exercise that discretion personally. * * * And when properly exercised, the board of supervisors is not required to supervise the action of the court."

McAllister v. Hamlin, 83 Cal. 361, 23 Pac. 357, involved the application of subdivision 6 of section 869 of the Penal Code, providing that:

"The reporter's compensation shall be fixed by the magistrate before whom the examination is had, and shall not exceed that * * * allowed reporters in the superior courts of this state, and shall be paid out of the treasury of the county, or the city and county in which the examination is had, on the certificate and order of the said magistrate."

Like the cases hereinbefore considered, the intention of the Legislature was plain. The statute clearly authorized the magistrate to fix the compensation and audit the claim of the reporter, and it was properly said:

"The Legislature did not intend, when it passed the section of the Penal Code, that, notwithstanding it authorized the fixing by the exercise of judicial discretion by the magistrate of the reporter's compensation, nevertheless it was left with the board of supervisors, in their discretion as a superior supervising body, to unfix what had been confided by the Legislature to the judicial tribunal. * * * The demands and accounts to be allowed by the board of supervisors are not those which the Legislature has expressly authorized the judicial branch of the government to certify to and order paid out of the treasury of the county, or that of the city and county. No such supervisory power over the courts of the state was ever intended to be lodged with the board of supervisors by the county government act."

In Ex parte Widber, 91 Cal. 367, 27 Pac. 733, the Supreme Court had under review section 144 of the Code of Civil Procedure, providing that, if the board of supervisors neglect to provide the same, the superior court or judge thereof might direct the sheriff to secure suitable rooms, etc., for the court, and that—

"the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof."

It was correctly said by the Supreme Court:

"It is not necessary that these demands should be audited by the board of supervisors; for the Legislature in the section of the Code itself provided that the judge should be the auditing officer."

The court also held that "the power of the court is limited and measured by the terms of the section," and that it had no authority to direct the imprisonment for contempt of the treasurer who refused to obey the order of the court directing him to pay the money out of the treasury, since there was nothing in the provisions of the Code giving the court any such power—

"and it certainly had not the inherent power to make the order, for such power was not a necessary incident to the court in order that its previous acts might fully and truly accomplish the results intended and desired. * * * Under the provision of the Code the court does not even audit the demand; that act is performed by the judge, and when performed, the power given under this section is exhausted."

This case, however, is strikingly different from those hereinbefore cited. We look in vain in said section 928 for any provision authorizing the court or the judge to audit the demand, to certify to its correctness, to make an order for its payment, or, in fact, to make any order whatever in the premises after the services are performed. We may quote the portion of said section relating to the subject, as follows:

"It shall be the duty of the grand jury annually to make a careful and complete examination of the books, records and accounts of all the officers of the county, and especially those pertaining to the revenue, and report as to the facts they have found, with such recommendations as they may deem proper and fit; and if, in their judgment, the services of an expert are necessary, they shall have the power to employ one at an agreed compensation, not to exceed ten dollars a day, to be first approved by the court. * * * Such compensation of expert to be payable as other county charges."

It is thus to be seen that the only thing in the matter concerning which the court acts is the employment of the expert. The court must approve the employment, and this before the grand jury employs him. Said body has no power to employ him without said approval. There is not a syllable as to any further action by the court. Of course, any order of approval of the employment made by the court before the services are performed cannot amount to an audit or certification of the claim. The claim against the county does not mature until the work is done, and then it is to be paid "as other county charges." That can mean nothing else than that it stands upon the same footing as ordinary claims against the county. The approval of the court gives validity to the contract, but the power to fix the amount due after the services are performed does not follow from the exercise of the authority to permit a legal charge to be incurred against the county. As stated by appellant:

"The sheriff and district attorney each has the right to incur expenses legally chargeable against the county for the detection of crime; yet no one would argue that either of those officials has the power to direct the auditor to draw a warrant for those expenses."

The matter of the expenses of the district attorney was, indeed, considered by the Supreme Court in County of Yolo v. Joyce, 156 Cal. 429, 105 Pac. 125. Therein is quoted section 228 of the county government act of 1898 (Stats. 1897, p. 575), as follows:

"The following are county charges: * * * The traveling and other personal expenses of the district attorney, incurred in criminal cases arising in the county, and in civil actions and proceedings in which the county is interested, and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases, and in civil actions and proceedings and all other matters in which the county is interested."

And it was held that this must be considered in connection with subdivision 1 of section 25 of the county government act, providing that:

County charges "are to be paid out of the county funds under a claim presented to and allowed by the board of supervisors."

[4] It is, no doubt, the declared policy of the law to confide to the board of supervisors the general supervision and control of the financial affairs of the county. It is made their duty:

"To examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and such demands as are authorized by law to be allowed by some other person or tribunal, and order warrants to be drawn on the county treasurer therefor." Subdivision 11, § 4041, Pol. Code.

Here, as we have seen, there is no other tribunal authorized to allow the claim. When the employment is approved by the court and the services are performed they become a legal charge against the county, but, there being no special mode provided for the payment of said claim, it is "to be submitted to the board of supervisors as other claims against the county are submitted." Murphy v. Madden, 130 Cal. 674, 63 Pac. 80.

The propriety of submitting said claim to some tribunal to be audited and allowed must be apparent. As we have seen, the only authority committed to the court is to approve the employment, and it may be said that the only power of the grand jury is to enter into an agreement for the employment at an agreed compensation per diem. In other words, the court and grand jury can authorize the employment of an expert and fix his daily compensation, but their power extends no further. If it had been the intention of the Legislature to clothe the court or the grand jury with the authority to audit the demand and direct its payment after the services had been performed, it must be presumed apt language for that purpose would have been used.

In conclusion we may say that there should be no difficulty in securing favorable action by the board of supervisors if the work was actually performed. There seems to be time

yet for petitioner to present his claim as suggested, and we feel satisfied that such is the course to pursue.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 584

CRANE et al. v. ROACH et al. (Civ. 1734.)

(District Court of Appeal, First District, California. Feb. 7, 1916. Rehearing Denied by Supreme Court April 6, 1916.)

1. SPECIFIC PERFORMANCE ⟸75 — BUILDING CONTRACT.

Courts of equity will not specifically enforce building contracts, where performance cannot be consummated by one transaction, and when the contract, according to its terms, requires a succession of acts and a protracted supervision, with special knowledge and skill in its oversight and management.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 210; Dec. Dig. ⟸75.]

2. SPECIFIC PERFORMANCE ⟸10(2)—CONTRACT OF SALE.

When a contract of sale of realty is for any reason incapable of specific performance, it cannot form the basis of a valid claim to an interest therein, and, when such claim is asserted, the owner of the realty is entitled to a decree quieting his title.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 24, 50; Dec. Dig. ⟸10(2).]

3. SPECIFIC PERFORMANCE ⟸126(3)—PRAYER FOR RELIEF.

On a cross-complaint by the buyers of land against the grantees of the seller for specific performance of the latters' contract to erect a house, where the buyers' cross-complaint was for general as well as specific relief, the court was warranted in granting them any relief consistent with the facts pleaded and proven.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 401; Dec. Dig. ⟸126(3).]

4. SPECIFIC PERFORMANCE ⟸131—DECREE—LEGAL RELIEF.

Where the buyers of land assigned their rights to parties who agreed to build thereon, as security for their performance of the conditions of the contract to repurchase the lot with the building erected, and such building was not erected according to contract, the buyers not being entitled to specific performance because the contract could not be consummated in one transaction, a decree that the builders keep the house and lot and pay the buyers the amount of their outlay, plus the enhanced value of the lot, was fair and equitable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 426–435; Dec. Dig. ⟸131.]

5. SPECIFIC PERFORMANCE ⟸115—ACTION—PLEADING.

In suit to quiet title, by parties who contracted to erect a building for defendants, buyers of land, where defendants' answer and cross-complaint, setting up the plaintiffs' failure to perform their contract to build, in formal allegations set forth the facts constituting defendants' cause of action and the circumstances under which both parties entered into the contract, such pleadings, though not in terms alleging the adequacy of the consideration or fairness of the contract as to plaintiffs, were sufficient as against the demurrer that they did not show adequate consideration, and that the agreement, as to plaintiffs, was just and reasonable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 373; Dec. Dig. ⟸115.]

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Suit by Charles B. Crane and another against William H. Roach and another. From a judgment for defendants and an order denying their motion for new trial, plaintiffs appeal. Judgment and order affirmed.

C. L. Brown, of San Francisco, for appellants. Edward J. Martin, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by plaintiffs from a judgment against them and from an order denying their motion for a new trial.

A general statement of the facts of the case is as follows: In the month of July, 1908, the Berkeley Development Company was the owner of the land described in the complaint subject to a written contract to convey to the defendant Elizabeth D. Roach upon payment of the sum of $1,750; this sum being payable in installments. In the month of July, 1911, the defendant named had paid on account of this sum $1,088.83, leaving a balance of $661.17 unpaid. The lot of land it seems had during the two dates mentioned appreciated in value in the sum of $750, making the equity of Elizabeth D. Roach therein of the value of $1,838.83. At this time the defendant named made an assignment of her agreement with the Berkeley Development Company and conveyed all her right, title, and interest in and to the lot of land to the plaintiffs, whereupon the plaintiffs paid the balance due ($661.17) to the development company, and received from it a deed to the lot. As part of the transaction between Elizabeth D. Roach and the plaintiffs they entered into a written contract, whereby the latter were to erect within 90 working days a dwelling house for the former according to certain plans and specifications. Under the terms of this contract the plaintiffs agreed to sell and convey to Elizabeth D. Roach (whom we will hereafter refer to as the defendant) the lot and house to be erected thereon for the sum of $5,515, upon which sum was to be immediately credited the amount previously paid by the defendant upon the lot, to wit, $1,088.83, the balance to be paid in monthly installments, together with interest, and upon the completion of the payments the plaintiffs were to convey the premises to the defendant by good and sufficient deed, free from incumbrances.

The complaint is in the usual form to quiet title. The defendants filed an answer and cross-complaint, denying in their answer some of the allegations of the complaint, and setting forth in their cross-complaint in le-

gal verbiage the details of the transaction between the parties. Demurrers to both the complaint and cross-complaint were overruled, and the plaintiffs put in an answer to the cross-complaint. The evidence introduced upon behalf of the defendants showed that the house erected by the plaintiffs under the contract above mentioned differed from the plans and specifications in many material and substantial respects; that omissions and deviations ran through the whole building, and are practically irremediable.

Judgment went for the defendants for the sum of $1,838.83, with interest thereon in the sum of $186.64, and for their costs; the court further decreeing that upon payment to the defendant of the judgment the plaintiffs would be entitled to have their title to the premises quieted against all claims of the defendants.

We cannot agree with the contention of the plaintiffs that the evidence fails to support the findings. The record teems with evidence that the plaintiffs, in the erection of the house contracted for, departed grossly from the specifications. The court found, and the evidence shows, that the second floor of the house is not eight feet in the clear as specified; that the basement is not seven feet in the clear; that the foundation wall in the rear of the building is not level with the footings; that the underpinning is not sixteen inches in centers; that the materials of which the building is constructed are not of the best kind, nor is it built in a workmanlike manner. An enumeration of the instances wherein the building as erected fails to comply with the plans and specifications fills about seven closely printed pages of the record; and the court concludes by finding that the house as constructed is less in value by $1,000 than it would have been if erected as agreed. Moreover, it appears to have been built in the improper manner described deliberately, and in spite of the constant protest of the defendants.

[1-4] It appears to be settled law that courts of equity will not specifically enforce building contracts where, as here, performance cannot be consummated by one transaction, and when the contract, according to its terms, requires a succession of acts and a protracted supervision, with special knowledge and skill in its oversight and management (Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334), and that, when a contract of sale of real estate is for any reason incapable of specific performance, it cannot form the basis of a valid claim to an interest therein, and that, when such claim is asserted, the owner of the real estate is entitled to a decree quieting his title thereto (Jolliffe v. Steele, 9 Cal. App. 212, 98 Pac. 544; Valentine v. Streeton, 9 Cal. App. 640, 99 Pac. 1107). But in this case, while the defendants set up in their cross-complaint the contract, which, as we have seen, provided, among other things, for the erection of a building according to certain plans and specifications, and prayed for its specific performance, it is also to be noted that they set forth other facts constituting their cause of action; and, as the prayer of the cross-complaint was for general as well as for specific relief, the court was warranted, it would seem, in granting any relief consistent with the facts pleaded and proven. From the outline of the facts already given it appears that the lot of land in question was conveyed to the plaintiffs as security for the performance by the defendant of the conditions of the contract to repurchase the lot with the dwelling house erected thereon; and certain it is, according to the evidence accepted by the trial court, that the plaintiffs failed to live up to the terms of their contract, whereupon the defendant had and claimed an interest in the real property adverse to the plaintiffs, which was a proper subject-matter for consideration and adjustment in this action. Inasmuch as the plaintiffs claimed that the building was erected according to the plans and specifications, and that the lot and building were well worth the contract price, while, on the other hand, it is the contention of the defendants that the specifications were not followed, resulting in the erection of a house of inferior value, and that the only way to remedy the defects therein would be to tear down and rebuild it, it seems to us that the decree of the trial court that the plaintiffs keep the house and lot, and pay to the defendant the amount of her outlay plus the enhanced value of the lot, is a judgment eminently equitable and just.

[5] We perceive no merit in the plaintiffs' further contention that their demurrers to the defendants' answer and cross-complaint should have been sustained for the reason that they do not show that the consideration moving to the plaintiffs under the agreement was adequate, and that the agreement as to them was just and reasonable. It is true that the defendants' pleadings do not in terms allege the adequacy of the consideration nor the fairness of the agreement, but they do in formal allegations set forth the facts constituting their defense and the circumstances under which both parties entered into the contract, and their statement of facts in this regard is sufficient proof against the objection raised by the demurrer now referred to. Windsor v. Miner, 124 Cal. 492, 57 Pac. 386.

We have examined the other assigned errors, but find nothing in them that would warrant this court in reversing the judgment or order appealed from.

Judgment and order affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(29 Cal. App. 563)

PEOPLE v. WILSON. (Cr. 454.)

(District Court of Appeal, Second District, California. Feb. 4, 1916. Rehearing Denied by Supreme Court April 3, 1916.)

1. HOMICIDE ⟹31—"MANSLAUGHTER."
Manslaughter is the unlawful killing of a human being without malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 52; Dec. Dig. ⟹31.

For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

2. HOMICIDE ⟹309(4)—"MANSLAUGHTER"—INSTRUCTIONS.
In a prosecution for murder, in view of the evidence, instructions should have permitted a verdict of "manslaughter," defined by Pen. Code, § 192, as an involuntary killing in the commission of an unlawful act not amounting to felony.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 653; Dec. Dig. ⟹309(4).]

3. CRIMINAL LAW ⟹829(1)—INSTRUCTIONS—REPETITION.
The refusal of correct requested instructions pertinent to the case, substantially given in the court's instructions, is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⟹829(1).]

4. HOMICIDE ⟹341—APPEAL AND ERROR—PREJUDICIAL ERROR.
In a prosecution for murder, the court's refusal to instruct that the jury might find defendant guilty of manslaughter was prejudicial error entitling him to new trial where there was testimony tending to show that he killed involuntarily and without malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 721; Dec. Dig. ⟹341.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

John A. Wilson was convicted of murder, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order reversed.

Farnsworth & McClure, of Visalia, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted of the crime of murder in the second degree and sentenced to imprisonment for the term of 20 years. His appeal is from the judgment and from an order denying his motion for a new trial.

The principal assignment of error refers to the court's instruction to the jury that it might find the defendant guilty of murder in the first degree, or murder in the second degree, or not guilty, and the court's refusal to add to these alternatives an instruction that they might, if the evidence warranted it, find him guilty of manslaughter. The general rule is, as stated in the Penal Code, section 1159, that:

"The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

The Attorney General has called our attention to decisions of the Supreme Court which hold that in a prosecution for murder the refusal of the court to instruct the jury that they may return a verdict of manslaughter is not error, if the evidence clearly shows that the crime committed was not manslaughter. People v. Lee Gam, 69 Cal. 552, 11 Pac. 183; People v. Fellows, 122 Cal. 233, 54 Pac. 830, and other cases cited in those decisions. We do not question the rule as stated, but they are not applicable to the record in this case. Brinkley, the deceased, was about 23 years old, and an attachment had grown up between him and a 15 year old daughter of the defendant. The defendant had informed his daughter that he was opposed to her association with Brinkley, and had sent to the young man information to the same effect. On the morning of June 6, 1915, Brinkley went out riding on a motorcycle with defendant's daughter. The defendant purchased a revolver and started down the road in the direction they had taken. The defendant testified that he saw them coming toward him on the motorcycle and waved his hands, but they seemed to be coming faster. He testified further as follows:

"Then I thought if I would pull the gun out of my pocket and wave it at him, that he would surely stop then. * * * And when he passed me, just before he got to me, he said something to Dora, he says, 'I will, if I hit him,' * * * and he brushed me along the side here (showing) and on this rib, forearm, and kind of numbed that arm a little. * * * And at that time I struck at him with the gun in my hand, and the gun discharged. And whether I hit him or not I didn't know; I wasn't thinking about shooting at all; I never thought of shooting. But when I struck at him the gun discharged. * * * And directly I seen the motorcycle turn to one side and they tumbled off, and then I thought he had been shot when the gun discharged. Then I came on up, and Dora, she asked me if she should call a doctor, and I says, 'Yes, call one;' then I says 'Wait a minute.' Some other parties had come in an automobile, and I says, 'Wait, and maybe they can go quicker and call a doctor.'"

[1, 2] Manslaughter is the unlawful killing of a human being, without malice. One of the conditions described in the Code definition is that of an involuntary killing "in the commission of un unlawful act, not amounting to felony." Pen. Code, § 192. If the jury believed the testimony of the defendant, they might have reached the conclusion that in striking at the deceased the defendant was committing an unlawful act, amounting to an assault, but without intending to shoot. The firing of the pistol under the circumstances shown endangered the life of his daughter as well as the life of Brinkley. Her arm was around the young man and the bullet did in fact pass through the middle finger of her right hand. There is no evidence that the defendant had ever threatened the life of Brinkley or that he entertained animosity toward him beyond the mere fact that he was unwilling to have the young man paying attentions to his daughter,

who was still a young school girl. The testimony to which we have referred, with much other evidence to which we might refer, was abundantly sufficient to entitle the defendant to have the case go to the jury under instructions which would permit a verdict of manslaughter.

[3, 4] Counsel for defendant in their brief assert that the court erred in giving certain other instructions, and also in refusing to give sundry instructions requested by the defendant. These assertions are not accompanied by any argument or any reference to authorities bearing upon the questions involved; and we will not discuss these instructions more than to say that, on the face of the record, we perceive no error in the court's rulings concerning them. So far as the refused instructions were correct and pertinent to the case, the substance of them appears to have been given in the court's instructions to the jury. Nevertheless, the error which was committed and to which we have referred was sufficient to seriously prejudice the defendant with respect to an important right of defense, and he is entitled to a new trial.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

(29 Cal. App. 531)

PEOPLE v. WOODSON. (Cr. 340.)

(District Court of Appeal, Third District, California. Feb. 2, 1916. Rehearing Denied by Supreme Court March 30, 1916.)

1. LEWDNESS ⟸9 — ADMISSIBILITY OF EVIDENCE.

In a prosecution for living in a state of adultery, evidence that defendant was the father of a child born to his companion in crime while they were living together as husband and wife was admissible, the presumption of legitimacy having no application, where the mother was not cohabiting with her husband, but was, during all the time in question, cohabiting with defendant.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 14; Dec. Dig. ⟸9.]

2. BASTARDS ⟸3 — PRESUMPTION — LEGITIMACY.

A child born of a married woman is presumed to be legitimate, and this presumption is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by evidence showing that the husband was incompetent, entirely absent so as to have no intercourse or communication of any kind with the mother, entirely absent at the period during which the child must have been begotten, or only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 4, 5; Dec. Dig. ⟸3.]

3. CRIMINAL LAW ⟸407(1)—PROSECUTION—DECLARATIONS.

In a prosecution under Pen. Code, § 269b, declaring that two persons each being married to another, who live together in a state of cohabitation and adultery, shall each be guilty of a felony, and under Code Civ. Proc. § 1870, subd. 3, declaring acts or declarations of another in the presence and with the observation of a party and his conduct in relation thereto, admissible, evidence as to the introduction of defendant's purported wife as such in his presence without his objection or explanation was admissible to show his conduct and attitude at that time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898, 901, 949, 968, 970, 971; Dec. Dig. ⟸407(1).]

4. CRIMINAL LAW ⟸361(1) — EVIDENCE — CONVERSATION.

In such prosecution, testimony of a witness that the defendant's purported wife claimed that defendant was the father of the child, which was part of the conversation of the district attorney and necessary to make the defendant's statement in response thereto intelligible, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 802–803; Dec. Dig. ⟸361(1).]

5. CRIMINAL LAW ⟸448(3) — EVIDENCE — OPINION EVIDENCE.

In such prosecution, an objection to the question asked of the mother of defendant's purported wife as to the reason why she left home was properly sustained, as it called for an opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1036, 1037; Dec. Dig. ⟸448(3).]

6. LEWDNESS ⟸9—EVIDENCE—RELEVANCY.

In such prosecution, objection to such evidence was also properly sustained on the ground that defendant's purported wife was not on trial, and that her motive or intent in leaving home was not in issue.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 14; Dec. Dig. ⟸9.]

7. WITNESSES ⟸236(1) — QUESTIONS — MANNER OF TESTIFYING.

Where a witness appeared reluctant to answer, the court properly overruled the defendant's objection to a question to the witness why it was necessary for him to answer a question as to the general reputation of defendant by explaining that he had known defendant for three or four years and had seen him often, but in the last two or three years had not seen him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 817, 819, 824, 826; Dec. Dig. ⟸236(1).]

8. CRIMINAL LAW ⟸1170½(2) — HARMLESS ERROR—ADMISSION OF EVIDENCE.

In such case, error, if any, in permitting such question was harmless, where the witness gave a satisfactory explanation of his previous answers favorable to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3130; Dec. Dig. ⟸1170½(2).]

9. WITNESSES ⟸248(2) — IRRESPONSIVE ANSWER—STRIKING OUT.

In such prosecution, the testimony of the mother of defendant's purported wife in answer to a question if she, when visiting them, observed any improper conduct on the part of either, "No, sir; everything was perfect; he is a perfect gentleman; he is a Christian man," as to the second part of the answer, was irresponsive and properly stricken.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 862; Dec. Dig. ⟸248(2).]

10. CRIMINAL LAW ⟸1168(4) — HARMLESS ERROR—STRIKING OUT ANSWER.

In such case, error in striking out the first part of the question was cured, where the an-

swer was made to subsequent similar questions to the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3144; Dec. Dig. ⊂⊃1168(4).]

11. Criminal Law ⊂⊃1044—Objection—Remarks of District Attorney.

Where no motion was made that a remark of the district attorney be stricken out, or that the jury be instructed to disregard it, it could not be urged as error on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. ⊂⊃1044.]

12. Lewdness ⊂⊃6—Information—Time of Offense.

In a prosecution under Pen. Code, § 269b, making it an offense for two persons, each being married to another, to live together in a state of cohabitation and adultery, it was unnecessary that the information charge the precise date upon which the offense was committed, or to prove the offense to have been committed on the day charged.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 13; Dec. Dig. ⊂⊃6.]

13. Criminal Law ⊂⊃823(15)—Instruction—Reasonable Doubt.

In such prosecution, a charge that if the jury believed to a moral certainty and beyond a reasonable doubt that the defendant had done the acts charged in the information it was their duty to convict, was not objectionable as not confining the jury to the evidence and permitting them to derive the belief "from any source irrespective of the evidence," in view of other instructions that the jury could not go outside the evidence admitted by the court or arbitrarily reject the evidence of any witness, that they must fairly consider all the evidence, that guilt must be established beyond a reasonable doubt, and that unless so established defendant should be acquitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1994, 3158; Dec. Dig. ⊂⊃823(15).]

14. Criminal Law ⊂⊃823(1) — Instructions—Construction.

Instructions must be considered together to ascertain if the jury could have been misled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1994, 3158; Dec. Dig. ⊂⊃823(1).]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

B. F. Woodson was convicted of living in a state of unlawful cohabitation and adultery, and he appeals. Affirmed.

W. H. Briggs and A. H. Carpenter, both of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

BURNETT, J. Appellant was convicted of the offense denounced in section 269b of the Penal Code as follows:

"If two * * * persons, each being married to another, live together in a state of cohabitation and adultery, each is guilty of a felony, and punishable by imprisonment in the state prison not exceeding five years."

After a careful reading of the entire testimony we are led to say that the evidence is abundantly sufficient to support the verdict. We may accept the rule insisted upon by appellant that, in order to warrant a conviction, "there must be an assumption of the conjugal relations, such as sleeping together, occupying the same room or bed at night, having sexual intercourse with each other as though married, and many other relations that are summed up appropriately by the words 'cohabitating with,' and cohabitation alone is not enough under the Code; there must be sexual intercourse between them. Adultery and occasional acts are not enough," then the showing made by the people measures up fully to the requirement. Indeed, the evidence of guilt seems exceptionally strong when we consider the usual difficulty of establishing such a charge. The inculpatory facts and circumstances are marshaled and set out in his brief by the Attorney General, but we do not feel called upon to repeat them here.

[1, 2] Evidence was received that appellant was the father of a child born to his companion in crime while they were living together as husband and wife. The admission of appellant to that effect, evidence that the wife's husband had no opportunity for sexual relations with her within the requisite period and other circumstances were introduced which could leave little doubt as to the correctness of respondent's claim as to the parentage of the child.

Appellant contends that such evidence was not admissible and he cites, among other authorities, Estate of Mills, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175. But the rule stated therein has application to "the issue of a wife cohabiting with her husband." Here the evidence for the people showed that the woman was not cohabiting with her husband, but was, during all the time in question, cohabiting with defendant. In the Mills Case, supra, it was said:

"The modern rule was stated by Lord Langsdale in Hargrave v. Hargrave, 9 Beav. 552, as follows: 'A child born of a married woman is in the first instance presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.' And the same rule is supported by the authorities in this country [citing cases]. But the above rule does not allow either of the parents to testify to the fact of nonaccess during cohabitation. Nor is the rule inconsistent with the conclusive presumption that a child begotten and born while the husband and wife are living together as such, and the husband not impotent, is legitimate."

There was no violation here of the rule so stated. Indeed, the only questions to which an objection might have been made were allowed to pass without challenge, as shown by the examination of the husband as

to his sexual relations with his wife. The wife, it may be said, was not examined as a witness at all.

As to the criticism of the opening statement of the district attorney, it is to be observed that appellant wrests a sentence from its context and, besides, the portion to which an exception was taken was withdrawn from the consideration of the jury, by the instruction of the trial judge.

[3] Appellant claims that:

"It was error for the court to overrule defendant's objections to the following questions asked of the witness Jensen: 'Q. How did you introduce your wife (to the lady of the house)? Q. And what did the lady say, if anything, you introduced as Mrs. Woodson?' "

It is claimed that:

"What the witness said to the lady of the house, and what she replied to him was entirely immaterial and hearsay evidence and did not tend to prove that defendant was guilty of the offense charged and the same was prejudicial to defendant."

Appellant, however, overlooks the important circumstance that appellant was present, and the evidence was admissible and no doubt was received for the purpose of showing defendant's attitude and conduct when he heard his purported wife introduced as Mrs. Woodson. The principle is a familiar one and is set forth in subdivision 3 of section 1870 of the Code of Civil Procedure, and it may be said that the questions were followed by others whereby it was disclosed that appellant made no objection or explanation when she was introduced or spoken of in his presence as Mrs. Woodson.

[4] The court did not err in refusing to strike out the following testimony of the witness McAllister: "She claimed Mr. Woodson was the father of the child." This was a part of the conversation of the district attorney with the defendant himself. It was necessary to make intelligible the statement of the appellant in response thereto. In fact, it was an inseparable part of the interview and could no more be laid out of view than any other portion.

[5, 6] The court was correct in sustaining an objection to the question asked of the mother of the purported Mrs. Woodson as to the reason for the latter leaving home. It manifestly called for an opinion. Besides, the woman was not on trial and her motive or intent in leaving home was not at issue. The purpose of the question was to show that she had been mistreated by her husband, and for that reason she left him. Even so, it would throw no light upon the consideration as to her subsequently sustaining meretricious relations with appellant.

[7] Appellant complains because the court overruled his objection to a question asked of Senator Stuckenbruck why it was necessary for him to answer a question as to the general reputation of appellant by explaining that he "had known the man for three or four years, had seen him often; then in the last two or three years had not seen him." The witness, like most lawyers when called upon to testify, indulged in some circumlocution and appeared somewhat reluctant to answer categorically and emphatically. The interrogatory of the district attorney under the circumstances was quite natural.

[8] But if it be conceded that he should not have asked the question it is perfectly plain that no harm was done, as the witness gave a satisfactory explanation of his previous answers and one entirely favorable to appellant.

[9, 10] The mother was asked this question: "Did you, while you were there visiting them at the Madison street house, observe any improper conduct on the part of either your daughter or Mr. Woodson?" She answered: "No, sir. Everything was perfect; he is a perfect gentleman; he is a Christian man." The district attorney moved to strike the answer out as not responsive, and the motion was granted by the court. It is clear that the second part of the answer was not responsive, and the error in striking out the first part was cured for the reason that the answer appears to subsequent similar questions asked of the witness.

[11] The remark of the district attorney that he "was expecting just such trick as that to be attempted in this case" made while one of the counsel for appellant was addressing the jury is too inconsequential to merit serious attention. Moreover, no motion was made that the remark be stricken out or that the jury be instructed to disregard the same. People v. Ye Foo, 4 Cal. App. 743, 89 Pac. 450.

[12] The information against appellant was filed on June 5, 1915, and it charged him with having lived in cohabitation and adultery "on or about the 23d day of April, 1915, and prior to the filing of this information." The court instructed the jury to find him guilty if he lived in such cohabitation and adultery as defined in the instructions, "any time from about the month of November, 1912, up to the 27th day of April, 1915." The objection to this instruction made by appellant is answered by People v. Sheldon, 68 Cal. 434, 9 Pac. 457, and other decisions. In the Sheldon Case it is said:

"It is unnecessary to charge in the indictment the precise date upon which an offense was committed, or to prove the offense to have been committed on the day charged, except where time is of the essence of the offense."

See, also, People v. Squires, 99 Cal. 327, 33 Pac. 1092.

[13, 14] Appellant complains of the instruction, "If the jury believe to a moral certainty and beyond a reasonable doubt that the said B. F. Woodson did"—reciting the averments of the information—"then I charge you it will be your duty to bring in a verdict of guilty as charged," for the reason that it did not confine the jury to the evidence but permitted them to derive the belief "from any source irrespective of the evidence." But it

is fundamental that the instructions must be considered together to ascertain if the jury could have been misled. Keeping this in mind, it is impossible to conclude that the jury could have so understood the instruction. One of said instructions was:

"You have no right to go outside of the evidence admitted by the court, and you have no right to reject arbitrarily the evidence of any witness. You must fairly consider all of the evidence of the case."

Furthermore:

"In criminal cases guilt must be established beyond a reasonable doubt and to a moral certainty, and the burden of proof is upon the people. The defendant in a criminal case is by law presumed to be innocent until the contrary is satisfactorily proven by competent evidence."

They were further instructed that:

"If you are not satisfied that the prosecution has proven both cohabitation and adultery, as defined in these instructions, beyond a reasonable doubt and to a moral certainty, you should find the defendant not guilty."

We have noticed specifically all the objections of appellant, though it must be apparent that most if not all of them are quite trivial.

The defendant was fairly tried and justly convicted, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 193

PEOPLE v. TURNER. (Cr. 595.)

(District Court of Appeal, First District, California. Dec. 17, 1915. Rehearing Denied by Supreme Court Feb. 14, 1916.)

1. HUSBAND AND WIFE ⇐304 — MAINTENANCE OF WIFE—DUTY OF HUSBAND.

Under Pen. Code, § 270a, declaring that every husband having sufficient ability to provide for his wife's support or who is able to earn the means of her support, who willfully abandons and leaves his wife in a destitute condition or refuses or neglects to provide for her, unless by her misconduct he is justified in abandoning her, is guilty of crime, mere proof that defendant failed to support his wife, without any showing that he was able to find employment, though he searched for it, will not support a conviction, mere inability to support a wife not falling within the statute.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. ⇐304.]

2. CRIMINAL LAW ⇐371(1) — EVIDENCE — FAILURE TO SUPPORT WIFE.

In a prosecution under Pen. Code, § 270a, for failure to support his wife, proof of accused's subsequent conduct after the time he left his wife to secure employment is admissible, though the state be bound to prove that the offense was committed on or about the day charged in the information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. ⇐371(1).]

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Theodore Fulton Turner was convicted of crime, and from the judgment and an order denying new trial, he appeals. Reversed.

Rehearing in Supreme Court denied, 156 Pac. 382.

William R. Biaggi, of San Jose, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Dep. Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged by information with having violated the provisions of section 270a of the Penal Code. He was tried and convicted, and this appeal is from the judgment of conviction and from an order denying his motion for a new trial.

The section reads as follows:

"Every husband having sufficient ability to provide for his wife's support, or who is able to earn the means of such wife's support, who willfully abandons and leaves his wife in a destitute condition, or who refuses or neglects to provide such wife with necessary food, clothing, shelter or medical attendance, unless by her misconduct he was justified in abandoning her, is punishable. * * *"

The facts briefly are as follows: On January 8, 1914, the defendant was arrested upon a charge of rape alleged to have been committed by him upon the prosecuting witness in this case, who is now his wife, Blanche Turner. At that time she was pregnant, and notwithstanding that the defendant stoutly disclaimed responsibility for her condition, he, on the advice of attorneys whom he consulted at that time, and of the justice of the peace before whom the charge was pending, consented to marry the prosecutrix, the ceremony taking place upon the second day after his arrest, at the home of G. D. Webster, the girl's father, in Monterey, and who was familiar with all the circumstances of the case. At the time of the marriage the defendant had no money, and was compelled to borrow $2 to pay for the marriage license, which loan he obtained from the justice of the peace before whom the case was pending and who performed the marriage ceremony. G. D. Webster, the father of the prosecutrix, was a carpenter, the owner of the home in which he resided, and it seems to have been understood in a general way that the defendant and his bride were to make their home with him, and to that end a room was assigned to them. The defendant did not remain with his wife after the marriage, and the next day, after collecting $8, due him from a local concern, in which he had been employed, but which had ceased to do business before his arrest, he left Monterey and went to Oregon, looking for employment.

According to a line of authorities upon which the defendant in part relies for a reversal of the judgment, the defendant's wife having been cared for by her father (who was able to support her), she was not left by the defendant in a dependent and destitute condition within the meaning of the statute. People v. Selby, 26 Cal. App. 796, 148 Pac. 807; People v. Demos, 115 App. Div. 410, 100 N. Y. Supp. 969; State v. Thornton, 232 Mo. 298, 134 S. W. 519, 32 L. R. A. (N. S.)

841, 844; State v. Fuller, 142 Iowa, 598, 121 N. W. 3; State v. Loving, 184 Mo. App. 82, 168 S. W. 339; Goddard v. State, 73 Neb. 739, 103 N. W. 443; People v. Bos, 162 Ill. App. 454. While it is true, say those cases, that the husband is under a moral and legal obligation to support his wife, nevertheless it is only where she is dependent upon the charity of strangers, or likely to become a public charge, that his abandonment of her becomes a crime. 21 Cyc. 1611.

In People v. Selby, supra, it is said in reference to wife abandonment cases:

"The statute upon which the information is based was obviously intended to cover those cases where the husband, * * * has willfully abandoned his wife and left her without means or resources and in a condition of absolute want—a condition in which she is unable to procure for herself the ordinary or common necessaries essential to the sustenance of life. This is, indeed, the natural meaning of the word 'destitute' or 'destitution,' and the sense in which it is undoubtedly used in the statute. The uncontradicted evidence clearly shows that the wife in this case was not left in a 'destitute condition' by the defendant."

[1] Those cases also seem to hold that prosecutions for wife abandonment should be cautiously instituted, and are not intended to take the place of proceedings in civil courts in which the husband may, in accordance with the circumstances of any given case, be compelled to do his full duty. But however all this may be, this case must in our opinion be reversed upon another ground, viz., the absence from the record of any evidence that the defendant at any time after his marriage, had the ability to support his wife. While the evidence shows that he was strong and well and able to work, it also shows that he searched for employment, but there is no evidence that he obtained any, or was able to contribute to his wife's maintenance. Mere inability to support one's wife, if there is an honest effort to obtain work, is not sufficient to constitute abandonment and nonsupport. 21 Cyc. 1612; State v. Broyer, 44 Mo. App. 393; State v. Bess, 44 Utah, 39, 137 Pac. 829, 832. If the defendant had an opportunity to work and refused it, his conduct in that behalf would probably be regarded in conjunction with the fact of nonsupport as constituting a violation of the section of the Code in question. State v. Witham, 70 Wis. 473, 35 N. W. 934.

[2] The information alleges that the defendant abandoned his wife and left her in a destitute condition on the 11th day of January, 1914; and the failure to introduce evidence pro and con as to whether or not during any of the time from the marriage to the filing of the information the defendant was able to support his wife, was due to the theory, apparently entertained by both sides, that the prosecution was confined in its proof in that regard to the date alleged in the information. While under the allegations of the information the prosecution was doubtless bound to prove that the offense was committed on or about the date alleged, still we have no doubt that the defendant's subsequent conduct, and the question as to whether or not he secured employment and was able to support his wife, would throw some light on his intention when he left his wife on the 11th day of January, and therefore those matters were proper subjects for the consideration of the jury.

The judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

PEOPLE v. TURNER. (Cr. 1999.)

(Supreme Court of California. Feb. 14, 1916.)

In Bank. Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Theodore Fulton Turner was convicted of crime, and, the judgment being reversed by the District Court of Appeal (156 Pac. 381), the state petitions for rehearing. Denied.

William R. Biaggi, of San Jose, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Dep. Atty. Gen., for the People.

ANGELLOTTI, C. J. The petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal for the First Appellate District is denied.

LAWLOR, J. I concur in the order upon the second ground discussed in the opinion, considered in connection with the rule of decision on appeal in cases where appellate jurisdiction is conferred upon the District Courts of Appeal by the Constitution. Const. art. 6, § 4; People v. Davis, 147 Cal. 346, 81 Pac. 718; Matter of Zany, 164 Cal. 724, 130 Pac. 710; Burke v. Maze, 10 Cal. App. 211, 101 Pac. 438, 440; People v. Vaughn, 25 Cal. App. 736, 147 Pac. 116, 117. I thus qualify my concurrence because of the apprehension that from the extended reference in the opinion to the first point, and the failure to cite the many authorities which hold the contrary view, the conclusion may be drawn that by denying a rehearing this court thereby approves what is said in that regard.

(172 Cal. 311)

PERRY et al. v. ANGELUS HOSPITAL ASS'N. (L. A. 3608.)

(Supreme Court of California. March 14, 1916. Rehearing Denied April 12, 1916.)

1. MASTER AND SERVANT ⟸125(6)—INJURIES TO SERVANT—APPLIANCES.

It is the duty of a master employing a servant to operate a laundry mangle to use ordinary care to furnish reasonably safe machines, and he cannot be heard to say that he did not know of defects that he might have ascertained by reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 248; Dec. Dig. ⟸ 125(6).]

2. MASTER AND SERVANT ⟸121(5)—INJURIES TO SERVANT—APPLIANCES.

Where a servant feeding cloth into a laundry mangle had to push the cloth over a board to a point where it would be caught by revolving rollers, and to do this she had to pass her fingers and hands under a pipe set for a guard till they were practically in contact with the rollers while they were rapidly revolving, and there was no guard to keep the hands from being caught, except the pipe, which was set so high that the hands would pass under it, the master failed to perform his duty to use ordinary care to furnish a reasonably safe machine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 229; Dec. Dig. ⟸ 121(5).]

3. MASTER AND SERVANT ⟸258(1)—INJURIES TO SERVANT—ACTIONS—PLEADING.

A complaint for injuries to a servant showing that they were caused by defects in the laundry mangle which she was required to operate, that the mangle was an unsafe and dangerous machine to operate, is not subject to demurrer, though it does not expressly allege that the master's conduct was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 816; Dec. Dig. ⟸ 258(1).]

4. MASTER AND SERVANT ⟸293(11) — INJURIES TO SERVANT — ACTIONS — INSTRUCTIONS.

In an action for injuries to a servant from a laundry mangle which was not suitably guarded, where there was undisputed evidence that a safer guard was in common use than that employed by defendant, the court could assume that fact and charge that, if the machine was obviously unsafe, then its continuous use by defendant would indicate negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1150; Dec. Dig. ⟸ 293(11).]

5. MASTER AND SERVANT ⟸108—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a servant, it is not error to instruct that the fact that an obviously unsafe machine, or an unsafe machine from which the danger could be easily eliminated, had been in use for a long time without injury to the employé, did not relieve the employer from the imputation of carelessness.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 203, 212, 255; Dec. Dig. ⟸ 108.]

6. MASTER AND SERVANT ⟸293(11) — INJURIES TO SERVANT—INSTRUCTIONS.

An instruction that to authorize a servant to recover for injuries from a laundry mangle she must prove that the mangle was not safe, that sufficient appliances were not provided to protect her as an operator, that the employer either knew of the defect, or as a reasonably prudent person should have known, and that the employé was injured, and the defective machine contributed to the injury, is not objectionable as stating that the absence of sufficient appliances fully to protect the servant in the operation of the machine would be negligence, nor as failing to charge that the defective machine must be shown to be the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1150; Dec. Dig. ⟸ 293(11).]

7. APPEAL AND ERROR ⟸171(1)—PRESENTING QUESTIONS IN TRIAL COURT — THEORY OF TRIAL.

Where a cause was tried throughout on the theory that contributory negligence of plaintiff was alleged as a defense, the parties are precluded from raising on appeal the objection that the pleading is insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1055; Dec. Dig. ⟸ 171(1).]

8. MASTER AND SERVANT ⟸234(5)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—CONTINUING IN EMPLOYMENT.

A servant's continuance in employment after being warned that there was danger from a defective machine was not contributory negligence, though it might have shown assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 684; Dec. Dig. ⟸ 234(5).]

9. DAMAGES ⟸132(8)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Where plaintiff's right hand was burned so that she endured great torture, the hand paining her at the time of trial, nearly a year after the accident, and the injury caused a hemorrhage in the hand a few weeks after the accident, and plaintiff was confined to the hospital for more than four months, and numerous operations on the hand were necessary during the year following the injury, and the fingers are stiff and almost immovable, and the hand would probably always be practically useless, an award of $11,500 is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 379; Dec. Dig. ⟸ 132(8).]

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by May Perry and husband against the Angelus Hospital Association. From a judgment for plaintiffs and an order denying new trial, defendant appeals. Affirmed.

Avery & French, of Los Angeles, for appellant. E. A. Meserve and Hanson, Hackler & Heath, all of Los Angeles, for respondents.

SHAW, J. The plaintiff May Perry was employed by the defendant to operate an ironing machine, commonly called a "mangle," in the laundry of the hospital conducted by the defendant. The action is for personal injuries sustained by her while so engaged. She being a married woman, her husband is made a nominal party plaintiff. There was a trial by jury, a verdict being given for plaintiff for $11,500, for which amount the court entered judgment. The defendant appeals from the judgment and from an order denying its motion for a new trial.

The mangle operated by plaintiff consist-

ed of a large hollow drum or roller which is heated with steam to a degree sufficiently hot to iron and dry linen and other clothing brought in contact with it by means of two or three smaller rollers rapidly revolving immediately above it. In front of these rollers there was a flat polished board leading up nearly to the point of contact of the upper and lower rollers, upon which board the articles to be ironed were placed. Across the board about six inches from the point of contact of the rollers there was a one-inch iron pipe intended for a guard, but set high enough above the board to enable the plaintiff's hand to pass under the pipe far enough to come in contact with and be drawn between the rollers. The contrivance was defective, because it often became necessary to push the wet cloth under the guard with the hand in order to make it reach the rollers. While plaintiff was in the act of passing a towel over the table and into the mangle her fingers were caught and drawn between the rollers, where, before the machine could be stopped, or her hand could be withdrawn, the palm of her hand and fingers were severely burned.

[1-3] The appellant first contends that the demurrer to the complaint should have been sustained because the complaint did not sufficiently aver negligence, and fails to allege the master's knowledge of the alleged defective condition of the machine. The complaint, in substance, alleges that in feeding the cloth into the mangle the cloth had to be pushed over the board to a point where it would be caught by the revolving rollers and thus pulled in between them; that to do this the operator had to pass her fingers and hands under the pipe set for a guard until they were practically in contact with the two rollers while they were rapidly revolving, one above the other; that there was no guard "that would in any way keep the hands and fingers of the operator from being caught between the rollers," except said pipe, which was set so high that the hands would pass under it; and that because it was without a "guard that tended to keep the fingers and hands of the operators out of the rollers, the said mangle was an unsafe and dangerous machine to operate." It was the duty of the master to use ordinary care to furnish reasonably safe machines to the servant with which to do the work. He "cannot be heard to say that he did not know of defects and dangers that he might have ascertained by the exercise of reasonable care." Roche v. Llewellyn, etc., Co., 140 Cal. 569, 74 Pac. 150; Sterne v. Mariposa Co., 153 Cal. 522, 97 Pac. 66; Alexander v. Central, etc., Co., 104 Cal. 539, 38 Pac. 410. The above allegations clearly show that the defendant failed to perform this duty. The dangerous character of the machinery, if these averments are true, was patent to ordinary observation. Ordinary care to perform the duty would have resulted in the discovery of the danger. The defendant cannot be heard to say it did not know that which the ordinary observation, which its duty required it to make, would have made known. While the complaint does not expressly say the defendant's conduct causing the injury was "negligent," the facts stated show that the defendant failed to use ordinary care. This is the proper office of a pleading. The demurrer was properly overruled.

[4] Appellant complains of numerous instructions which were given on behalf of the plaintiff. The first instruction criticized, being No. VI, is as follows:

"You are instructed that, if the appliance or machine furnished by the defendant to the plaintiff was obviously unsafe or dangerous, then its continued use by the defendant would indicate negligence."

What has been said in regard to the sufficiency of the complaint disposes of this objection. The instruction, as applied to the facts of this case, was correct as far as it goes. It would not be negligence to continue the use of this unsafe machine if no safer machine could be found with reasonable diligence. But there was abundant evidence that a safer guard was in common use and well known at the time. The fact was not disputed at the trial. The court was authorized to assume it to be true. Under these circumstances the continued use of the unsafe mangle was negligence of the employer. In this connection it should be noted that at the time of the accident the Employers' Liability Act of 1911 (Stats. 1911, p. 796) was in force, providing that the fact that the employé had assumed the risks of danger from the employment should be no defense in such cases, and that the contributory negligence of the employé should not bar a recovery where his negligence was slight and that of the employer gross, in comparison. The jury was fully and correctly instructed on the point that the duty of the employer required the exercise by him of no more than ordinary care in the discovery and selection of safety appliances on the machinery.

[5] There was no error in the instruction that the fact that an obviously unsafe machine, or of an unsafe machine from which the danger could be easily eliminated, had been in use for a long time without injury to the employé, did not relieve the employer from the imputation of carelessness.

If, as we have said, it was negligence for the defendant to provide an obviously unsafe machine for its employés, then it must follow that its continuous use thereafter is nothing less than continuous negligence, and cannot relieve defendant from the charge. We know of no authority for the proposition that by continuing in a careless performance of duty a party transforms its negligence into due care. Silveira v. Iverson, 125 Cal. 266, 57 Pac. 996.

[6] Complaint is next made of instruction numbered VIII, which was as follows:

"In order to recover, the plaintiff was called upon to prove: First, that the mangle in question was not safe, or was defective, and that sufficient appliances thereon were not provided in order to protect the plaintiff as an operator on the same; second, that the defendant either knew of the defect and the lack of the safety appliance, or as a reasonably prudent and careful person, under the same circumstances and conditions as are here shown, should have known the condition of the mangle and as to its safety and appliances or lack of appliances, as the case may be; third, that the employé was injured, and that the defective machine contributed to the injury, the measure of plaintiff's damages being stated in another instruction."

The contention is that this is a charge upon a matter of fact, that it tells the jury the absence of sufficient appliances fully to protect the plaintiff in the operation of the machine would be negligence, and, further, that it does not charge that the defective machine must be shown to be the proximate cause of the injury. The appellant is wrong in its contention. The instruction does not go to any such lengths as claimed, but correctly states in general terms the burden cast upon the plaintiff in the conduct of her case.

[7, 8] It is next insisted that the court erred in giving instruction numbered XVII, which was as follows:

"The court instructs you that the plaintiff's continuing to work on defendant's mangle after being warned of the dangerous character of the machinery was not an act of contributory negligence on her part, nor was she guilty of contributory negligence by reason of continuing to feed into the mangle the articles of laundry to be ironed by the mangle after getting her fingers pinched in the rollers of the mangle (if you should find she did get them so pinched)."

As an affirmative defense the answer alleges:

"That any injuries which may have been suffered by plaintiff in connection with the operation of the mangle referred to in said complaint were proximately caused by the negligence and carelessness of plaintiff herself."

The case was tried throughout upon the theory that contributory negligence of the plaintiff was alleged as a defense. Consequently it is not necessary to examine, critically, the above allegations to determine whether the defense was well pleaded, or whether it is faulty within the decision in Crabbe v. Mammoth, etc., Co., 168 Cal. 500, 143 Pac. 714. In such cases the parties are precluded from raising on appeal the objection that the pleading is insufficient. Illinois, etc., Bank v. Pacific Ry. Co., 115 Cal. 297, 47 Pac. 60; Gervaise v. Brookins, 156 Cal. 112, 103 Pac. 332. The instruction is correct. The issue was whether or not the plaintiff's negligence contributed to the injury complained of. This question depended on what occurred at the time of the injury and what she did at that time, if anything, tending to cause it. Her previous conduct in continuing in service after being warned that there was danger might have had some tendency to show that she assumed the risk, if that defense had been available to the defendant, but it had no tendency to show that she was careless in manipulating the mangle in its dangerous condition.

[9] Lastly it is insisted that the amount of the verdict is excessive. Appellant concedes that the rule is well established that upon appeal the decision of the trial court, and the verdict of the jury on the subject of damages cannot be set aside on this account unless the verdict is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Hale v. San Bernardino, 156 Cal. 715, 106 Pac. 84, and cases there cited. There was evidence that she endured great torture, the injured hand even paining her at the time of the trial, nearly a year after the accident; that the injury caused a hemorrhage in the hand a few weeks after the accident; that she was confined to the hospital for more than four months; that numerous operations on her hand were necessary during the year following the injury. The injured hand was her right hand, the fingers are stiff and almost immovable, and the hand is, and probably always will be, practically useless. Considering the nature of these injuries and their permanent character, together with the suffering already caused to the plaintiff, it cannot be said that the verdict was so excessive as to warrant the conclusion that it was the result of "passion or prejudice or corruption on the part of the jury."

The judgment and order are affirmed.

We concur: LAWLOR, J.; SLOSS, J.

172 Cal. 391

PEOPLE v. JORDAN. (Cr. 1973.)

(Supreme Court of California. March 24, 1916.)

1. STATUTES ⊂⊃114(3)—TITLE OF ACT—CONSTITUTION.

Const. art. 4, § 24, declares that every act shall embrace but one subject, which shall be expressed in its title; but if any subject shall be expressed in the act which is not expressed in the title, such act shall be void only as to such subject not expressed. Article 1, § 22, makes the provision of the Constitution mandatory and prohibitory. St. 1913, p. 722, entitled "An act to regulate the examination of applicants for license, and the practice of those licensed to treat diseases, etc., to establish a board of medical examiners and to repeal an act entitled 'an act for the regulation of the practice of medicine,' etc., approved March 14, 1907." *Held*, that the title of the act was sufficiently broad to include provisions prohibiting the practice of healing arts without a license, and to fix the requirements for obtaining the license.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 145; Dec. Dig. ⊂⊃114(3).]

2. STATUTES ⊂⊃109—TITLE OF ACT—SUFFICIENCY OF TITLE.

Under the constitutional requirement that acts shall embrace but one subject, which shall be expressed in the title, it is unnecessary that

the title of an act should embrace a catalogue of its contents; it being sufficient if it discloses the actual subject-matter, and a provision germane to the title will not be stricken.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136–139; Dec. Dig. ⟸109.]

3. CONSTITUTIONAL LAW ⟸208(1) — CLASS LEGISLATION—POWER OF LEGISLATURE.

Where from the facts before the court it was reasonable to assume there were sufficient causes for the Legislature to create a class, the courts will not disturb the act of the Legislature on the ground that it was discriminatory.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 665, 666, 669–674; Dec. Dig. ⟸208(1).]

4. STATUTES ⟸81 — SPECIAL LEGISLATION — WHAT CONSTITUTES.

St. 1913, p. 734, § 17, regulating the practice of healing arts, makes any one who shall practice any system of healing without a license guilty of a misdemeanor, while section 22 omits persons treating by prayer. A drugless healer of a class known as chiropractics contended that the act was discriminatory, as it made greater requirements of such healers than it did of spiritual healers. *Held*, that the statute was not subject to criticism on the ground that it was discriminatory and lacked uniformity of operation, for a drugless healer who adjusts his patient's anatomy might well injure him, while the prayers of an ignorant person would be of no injury.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 90; Dec. Dig. ⟸81.]

5. CONSTITUTIONAL LAW ⟸230(2) — PHYSICIANS AND SURGEONS ⟸2—CLASS LEGISLATION—WHAT CONSTITUTES—"DIAGNOSE."

St. 1913, p. 734, § 17, declares that any person who shall practice, or attempt to practice or hold himself out as practicing any mode of treating the sick, or who shall diagnose, treat, operate for, prescribe for, any disease without having a license shall be guilty of a misdemeanor. Section 22 omits persons healing by means of prayer. *Held*, that the act was not discriminatory because it required persons diagnosing disease to be licensed, for the word "diagnose" means to determine a disease from its symptoms and it is one of the most important functions of a physician, as the treatment follows from the diagnosis, while in case of one treating diseases by prayer, diagnosis is unnecessary as it is presumed that the Supreme Being is all-powerful.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. ⟸230(2); Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. ⟸2.]

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

George W Jordan was convicted of practicing a system of healing without a certificate, and from the judgment and an order denying a new trial, he appeals. Affirmed.

Allen & Weyl, of Los Angeles, and Bennett, Turnbull & Thompson, of Pasadena, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen. (Ray E. Nimmo, of Los Angeles, of counsel), for the People.

MELVIN, J. An appeal was taken by the defendant to the District Court of Appeal of the Second Appellate District. The learned justices of that court could not agree with reference to the constitutionality of the law for violation of which defendant was found guilty, and accordingly the appeal has been duly transferred to this court. We have adopted the opinion prepared by Mr. Justice Victor E. Shaw of the District Court of Appeal, in which Mr. Presiding Justice Conrey concurred. It is as follows:

"Defendant was charged with the commission of a misdemeanor in that, without having a valid, unrevoked certificate from the board of medical examiners authorizing him so to do, he engaged in the practice of a system or mode of treating the sick and afflicted. Upon trial he was convicted as charged in the information. He prosecutes this appeal from the judgment and an order denying his motion for a new trial.

[1, 2] "The statute under which the defendant was prosecuted herein is entitled: 'An act to regulate the examination of applicants for license, and the practice of those licensed, to treat diseases, injuries, deformities, or other physical or mental conditions of human beings; to establish a board of medical examiners, to provide for their appointment and prescribe their powers and duties, and to repeal an act entitled "An act for the regulation of the practice of medicine and surgery, osteopathy, and other systems or modes of treating the sick or afflicted, in the state of California, and for the appointment of a board of medical examiners in the matter of said regulation," approved March 14, 1907, and acts amendatory thereof, and also to repeal all other acts and parts of acts in conflict with this act.' Stats. 1913, p. 722.

"It is first contended that the title of the act is not sufficiently expressive of its contents, and that section 24 of article 4 of the Constitution is violated thereby. Analyzed further, the contention is that the title of the act does not suggest a purpose of the Legislature to regulate the business or practice of those who engage in healing or treating the sick or deformed, but to regulate only the matter of the examination of those who choose to apply for certificates, which documents are to merely certify that the holders thereof have been duly examined and licensed. This contention, if it were conceded to be well founded, would result in a construction to be given to the act which would permit all persons whomsoever to practice medicine or any mode or system of healing without being licensed, and would make the matter of procuring a license or certificate merely optional. Admittedly the body of the act is broad and comprehensive enough to regulate the practice of all persons who shall engage in the business of treating the sick or deformed. Section 24 of article 4 of the Constitution provides as follows: 'Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title.' Numerous decisions have been made in this state, where the sufficiency of the titles of acts was the question before the court. Under the old Constitution a provision like that quoted was held to be directory merely, but in the Constitution of 1879 there was incorporated section 22 of article 1, which declared: 'The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.' Recognizing the mandatory effect of the provision regarding the substance of the titles given legislative acts, the decisions have construed that provision in various cases. It has been said that the purpose of requiring the title to express the subject of the act was that legislators themselves, as well as the public, might not be deceived by false, misleading or deceitful titles, and so permit mischievous legislation to be unwittingly enacted. A liberal rule of construc-

tion has been adopted, however, in the interest of protecting meritorious legislation from being declared void through inartificially constructed titles. 'The main object of this provision is to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another. * * * It seems to be well settled that it is not necessary that the title of an act should embrace an abstract or catalogue of its contents.' Abeel v. Clark, 84 Cal. 226, 24 Pac. 383. Where the body of an act embraces provisions which are germane to the general subject stated in its title, the title will be held sufficient to comprehend all of the provisions of the act itself; and where the title suggests to the mind the field of legislation which the text of the act includes, the title will not be held misleading or insufficient, or the act restricted in its operation. This subject is fully discussed in the opinion in Ex parte Liddell, 93 Cal. 633, 29 Pac. 251. To our minds, by the title of the act here being considered, wherein is set forth the purpose to regulate the examination of applicants for license to treat the sick or deformed, there is suggested at once that the state has proposed to require examinations to be made and licenses to be issued to persons who shall engage in that business. The prohibition that persons not so licensed shall be denied the right to practice seems pertinent and germane to the subject expressed in the title. Several of the illustrative cases given in Ex parte Liddell, supra, are directly in point.

"Our conclusion on this branch of the case is that the objection as stated in the briefs that the title of the act is not sufficient in its expression of the purposes declared in the body of the act itself, is without merit.

[3, 4] "Section 17 of the act provides: 'Any person who shall practice or attempt to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who shall diagnose, treat, operate for, or prescribe for, any disease, injury, deformity, or other mental or physical condition of any person, without having at the time of so doing a valid unrevoked certificate as provided in this act, * * * shall be guilty of a misdemeanor.' Section 22 provides that the act shall not be 'construed so as to discriminate against any particular school of medicine or surgery, or any other treatment, nor to regulate, prohibit or to apply to, any kind of treatment by prayer, nor to interfere in any way with the practice of religion.' Appellant insists that the act violates certain constitutional provisions in that it is discriminatory in exempting from its provisions a certain class of drugless practitioners, namely: Those who resort to prayer as a means of treating persons afflicted with bodily ills.

"Clearly the purpose of the law is to protect both the individual and the public from the dangers and evils which might result from treatment by those not possessing the knowledge and skill requisite in the treatment of diseases with which mankind is afflicted. It is likewise clear that the degree of knowledge and skill, as well as the character thereof required, depends upon the treatment in the practice of which the practitioner engages. Thus, different qualifications are prescribed for those engaging in practice as physicians and surgeons (section 10 of the act) from those designated as drugless practitioners; the intention as to each class being that they shall qualify as possessing the knowledge and skill deemed necessary for the practice of the treatment in which the individuals of each class engage. The physician and surgeon is required to possess a knowledge of many subjects which it is not deemed necessary that the drugless practitioner shall possess. By reason of the different treatment, there is a rational and intrinsic distinction which clearly justifies the classification. Coming to the exempted class of drugless healers, namely, those who treat by means of prayer, here, too, there exists an obvious ground for the classification. The treatment practiced by many, though not all, of the drugless practitioners is by manipulation of the bones and kneading of the muscles and tissues of the person treated. It is apparent that without a proper knowledge of the human body, its organs and functions thereof, or lack of skill, grave consequences to the patient might follow as a result of their treatment. Not so, however, as to one who in prayer invokes divine power to afford relief to one afflicted by disease. The possession of the prescribed knowledge and skill, without which the chiropractic, osteopath and neuropath is denied the right to practice his treatment, in no wise renders the prayers of one thus treating bodily ills more efficacious in the curing of disease; nor can it be said the prayer of an illiterate person may, in the consequences to the subject thereof, be more productive of harm or less beneficial than that of one possessing the learning and skill of an educated physician. To our minds, it is obvious that no reason exists for requiring the class engaged in treatment by prayer to possess the knowledge and skill required of others engaged in drugless treatment. The ground for the classification is as obvious as is the distinction between physicians and surgeons on the one hand, and drugless practitioners on the other, and as to each of which classes a different rule applies. That the Legislature has the right to establish such classification and exempt one class from the operation of a general law, where the same is founded upon some natural, intrinsic, or constitutional distinction, is too well settled to require citation of authority therefor; indeed, its constitutional right so to do is conceded by appellant. In Ex parte King, 157 Cal. 161, 106 Pac. 578, it is said: 'The question whether the individuals affected by a law do constitute such a class is primarily one for the legislative department of the state, and it is hardly necessary to cite authorities for the proposition that when such a legislative classification is attacked in the courts every presumption is in favor of the validity of the legislative act. Where upon the facts legitimately before a court, it is reasonable to assume that there were reasons, good and sufficient in themselves, actuating the Legislature in creating the class, though such reasons may not clearly appear from a mere reading of the law, such assumption will be made, and the legislation upheld. To warrant a court in adjudging the act void on this ground, it must clearly appear that there was no reason sufficient to warrant the legislative department in finding a difference and making the discrimination.' In Hellman v. Shoulters, 114 Cal. 147, 44 Pac. 915, 45 Pac. 1057, the court, in discussing the question of the power of the Legislature to classify, says: 'It has been uniformly held that a law is general which applies to all of a class—the classification being a proper one—and that the requirement of uniformity is satisfied if it applies to all of the class alike. * * * The word "uniform" in the Constitution does not mean universal. The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law—that is, all the facts of whose cases are substantially the same.' In Ex parte Bohannon, 14 Cal. App. 321, 111 Pac. 1039, the question before the court was as to the validity of an act entitled 'An act for the regulation of the practice of medicine and surgery, osteopathy, and other systems or modes of treating the sick or afflicted, in the state of California,' etc. (Stats. 1907, p. 252), which act concluded with the provision: 'Provided that nothing herein shall be held to apply or to regulate any kind of treatment by prayer.' It was there claimed, as here, that the exemption so made rendered the whole act unconstitutional and void by reason of giving immunities

to those who treat physical ills by prayer. The court in its opinion said: 'If prayer can be regarded as practicing medicine and as an immunity, the act allows every person—man, woman or child—such immunity, and the right to pray for the sick and afflicted, and that is the only way that disease can be treated by prayer. Whether such treatment avails anything or not is not for us to say; but the privilege of practicing such treatment or such supplication is granted and allowed to all.' The scripture abounds with instances which, if accepted, tend to show that prayer in the treatment of disease was deemed efficacious and helpful. In the Epistle of James it is said: 'Is any sick among you? Let him call for the elders of the church; and let them pray over him, anointing him with oil in the name of the Lord.' To assume that treatment by prayer is less efficacious or more dangerous or harmful to the subject of the prayer by reason of the fact that the supplicant has failed to devote 260 hours to manipulative and mechanical therapy, or has neglected to study elementary bacteriology for a period of 60 hours, does violence to all legal or religious teaching. It is clear that it was the legislative intent to omit from the operation of the statute that class of persons engaged in the healing of the sick by the instrumentality of prayer; and, to our minds, it is likewise clear that a natural, intrinsic and reasonable ground exists for making the exemption. Since this is true, it must follow that the act is not violative of those constitutional provisions (section 21, art. 1; subdivision 19, § 25, art. 4; section 11, art. 1) having for their purpose the uniform operation of general laws and inhibition against granting immunities to citizens which, upon the same terms, shall not be granted to all alike."

[5] We feel that there is little which we can profitably add to the discussion quoted above; but as it is argued that the act is discriminatory because the prohibitory words thereof make it unlawful for any one of those who fall within its description to "diagnose" disease, we will further consider this contention. It is said that to "diagnose" disease does not necessarily involve an intention on the part of the diagnostician either to treat the afflicted person or to prescribe for him in any way, and that to require no diagnosis from those who profess to treat disease by prayer while prohibiting all other unlicensed persons from diagnosing various ailments is an unjust and unconstitutional regulation, favoring one class of citizens unduly. This whole argument rests upon a misconception of the meaning of the term "diagnose." As used in pathology the word means "to determine the diagnosis of; to ascertain, as a disease from its symptoms" (Century Dictionary). The word "diagnosis" is derived from the Greek prefix "dia," meaning "between," and "gignoskein," which signifies "to know thoroughly" or "to distinguish" or "to discern." Hence in its primary sense the word "diagnosis" is used to designate a "distinguishing between" things or a "definition." In pathology it means "the recognition of a disease from its symptoms." Some authorities add that the determination is based upon knowledge and experience. Diagnosis is as much a part of the practice of medicine as is the administration of remedies, and it is a vastly more important branch thereof because, generally speaking, the treatment of disease is governed by the practitioner's theory regarding its cause. Intelligent treatment may only follow correct diagnosis. It is argued that diagnosis is merely "guessing," but that is only partially true. It is matter of common knowledge that in the present development of microscopy, chemistry, bacteriology, radiography and kindred sciences there are some diseases which may be detected with absolute certainty by the accomplished diagnostician. For example, it would be impossible for the educated medical man of to-day to be deceived into mistaking a case of diphtheria for some throat affection of a less virulent type for the reason that, with modern methods, the specific germ of diphtheria may be easily discovered and recognized. But even where it depends partly upon conjecture, real diagnosis is the product of knowledge and experience. To diagnose a case is as much a part of the practice of medicine as the drawing of pleadings or the giving of advice are parts of the practice of law. No one would say that an attorney who devoted his efforts to the preparation of cases, but did not personally present them in court, was not practicing law. The Supreme Court of the United States has declared diagnosis to be a part of the practice of the healing art, even in systems of treatment which do not deal with administration of remedies, but with mechanical adjustment of parts of the human body. In Collins v. Texas, 223 U. S. 288–296, 32 Sup. Ct. 286, 288 [56 L. Ed. 439], Mr. Justice Holmes, speaking for the court, said:

"The plaintiff in error professes, as we understand it, to help certain ailments by scientific manipulation affecting the nerve centers. It is intelligible therefore that the state should require of him a scientific training. Dent v. West Virginia, 129 U. S. 114 [9 Sup. Ct. 231, 32 L. Ed. 623]; Watson v. Maryland, 218 U. S. 173 [30 Sup. Ct. 644, 54 L. Ed. 987]. He like others must begin by a diagnosis. It is no answer to say that in many instances the diagnosis is easy—that a man knows it when he has a cold or a toothache. For a general practice science is needed."

Viewed in the light of this language the objection which we have been discussing appears to have no weight. It is impossible to dissociate diagnosis from the practice of the art of healing by any physical, medical, mechanical, hygienic, or surgical means. It is therefore competent for the Legislature to permit only those persons who are proficient and who have been found to be educated up to certain standards to "diagnose" ailments.

The objection that those who profess to treat bodily afflictions by prayer are not required to be proficient in diagnosis, and that their exemption, under the law, is the extension of a favor to them which is withheld from others is met by the obvious answer that diagnosis is no part of such treatment. Those who believe that divine power may be invoked by prayer for the healing of the body believe also that God is all-powerful. Patients receiving their ministrations know

this, and therefore no fraud or injury may be practiced upon such persons by reason of any lack of skill by the healers in determining the nature of the diseases to be treated. But those who elect to depend upon some other system of treatment have a right to protection by the state from the ministrations of unskillful, uneducated persons. For example, a sufferer from a fever who summons a licensed physician holding himself out to the public as one qualified to treat the sick, is entitled to the services of a doctor who has been taught to discriminate between typhoid and smallpox. In other words, the right to practice medicine should carry with it some assurance to the public that the licensed practitioner possesses reasonable proficiency in the technique of his profession.

From the foregoing it follows that the judgment and order should be, and accordingly they are, affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; SHAW, J.; LAWLOR, J.

172 Cal. 401

PEOPLE v. RATLEDGE. (Cr. 1974.)

(Supreme Court of California. March 24, 1916.)

1. PHYSICIANS AND SURGEONS ⊜6(9)—PRACTICING WITHOUT CERTIFICATE — INFORMATION.

An information charging that accused did willfully and unlawfully practice, attempt to practice and hold himself out as practicing a system and mode of treating the sick, without having a valid unrevoked certificate authorizing him to practice, sufficiently charges a violation of Medical Practice Act (St. 1913, p. 734) § 17, declaring that any person who shall hold himself out as practicing any mode of treating the sick or attempt to practice without a license, shall be guilty of a misdemeanor, and is not subject to the criticism that it seeks to impute many defenses to accused.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 9; Dec. Dig. ⊜6(9).]

2. CRIMINAL LAW ⊜448(12) — PRACTICING MEDICINE WITHOUT CERTIFICATE—EVIDENCE —CONCLUSION OF WITNESS.

In a prosecution for practicing a system of healing without a certificate, witnesses may testify that they had received treatments from accused, though accused did not so term his ministrations, the witnesses using the accepted term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1036, 1042; Dec. Dig. ⊜448(12).]

3. PHYSICIANS AND SURGEONS ⊜6(10)—PRACTICING WITHOUT CERTIFICATE—EVIDENCE.

In a prosecution against a chiropractor for practicing a system of healing without a license, witnesses may detail occurrences on their visits to accused's office six months before prosecution.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 10; Dec. Dig. ⊜6(10).]

4. PHYSICIANS AND SURGEONS ⊜6(8)—PRACTICING WITHOUT CERTIFICATE—DEFENSES.

In a prosecution against a chiropractor for practicing a mode of healing without the certificate required by Medical Practice Act, § 17, it is no defense that the board of medical examiners had fixed no examinations for chiropractors.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. ⊜6(8).]

5. CRIMINAL LAW ⊜656(9) — PREJUDICE — WHAT CONSTITUTES.

Where a chiropractor contended that his practicing without a certificate was not in violation of the Medical Practice Act, a remark by the court when the chiropractor appeared for sentence that though repeatedly warned the chiropractor was of the opinion he was not violating the law, and that the transcript showed that he courted arrest to have the law tested, showed no prejudice on the part of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1533; Dec. Dig. ⊜656(9).]

6. CONSTITUTIONAL LAW ⊜70(3) — POLICE POWER—POWER OF LEGISLATURE.

The Legislature has a very broad police power, and unless the legislative conclusion upon police regulations for public health is obviously unfair, the courts will not interfere.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. ⊜70(3).]

7. PHYSICIANS AND SURGEONS ⊜2—MEDICAL PRACTICE ACT—VALIDITY.

Though chiropractors are drugless healers, only manipulating the bones and tissues to effect their results, Medical Practice Act, § 17, fixing certain educational requirements to enable persons to practice the healing arts, is not invalid as unreasonable because including such subjects as toxicology, etc., for they might be of great benefit to chiropractors and their patients.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. ⊜2.]

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

T. F. Ratledge was convicted of practicing healing arts without a certificate from the medical board, and from the judgment and order denying a new trial, he appeals. Affirmed.

Ingall W. Bull, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen. (Ray E. Nimmo, of Los Angeles, of counsel), for the People.

MELVIN, J. The main questions involved in the appeal herein from the judgment are the same as those which arose in the appeals in People v. Jordan (Cr. 1973) 156 Pac. 451 (opinion filed March 24, 1916). Some exceptions appearing in the record on this appeal which are not discussed in the opinion in that case we will here briefly consider them.

[1] The information is attacked upon the ground that it charges "the crime of practicing medicine without a certificate from the medical board," the contention being that no such crime is denounced by the law. It is true that the statute does not contain the quoted words, but clearly they are used merely for purposes of general description of the offense as they are followed by the averment that the crime was—

"committed as follows: That the said T. F. Ratledge on the 30th day of October, 1914, at, and in the county of Los Angeles, state of California, did willfully and unlawfully practice, attempt to practice and advertise and hold himself

out as practicing a system and mode of treating the sick and afflicted in the state of California, without then and there having a valid, unrevoked certificate authorizing him to practice a system or mode of treating the sick and afflicted in this state from the board of medical examiners of the state of California."

This sufficiently charges a violation of section 17 of the Medical Practice Act (St. 1913, p. 734), and is not open to the criticism that it seeks to impute many offenses to defendant because any one of the acts or omissions averred and conjunctively pleaded would suffice as the basis of an information. People v. Frank, 28 Cal. 507; People v. Harrold, 84 Cal. 567, 24 Pac. 106; People v. Gosset, 93 Cal. 641, 29 Pac. 246; People v. Gusti, 113 Cal. 177, 45 Pac. 263; Commonwealth v. Eaton, 15 Pick. (Mass.) 273. This information does not fall within the rule declared in People v. Plath, 166 Cal. 227, 135 Pac. 954.

[2, 3] The appellant complains of the court's refusal to strike out parts of certain answers of witnesses who stated that they had received "treatments" from him. It is regarded by him as an unwarranted conclusion of a witness that certain acts constitute a "treatment." The objection is without force. Doubtless the witnesses used the word in its well-understood signification; that is, the application of some supposed curative agency to the person seeking relief. A witness was permitted over defendant's objection to detail the occurrences upon the occasion of a visit by her to his office nearly six months before the time set forth in the information. The objection was upon the usual grounds of incompetency, etc., and that the time was too remote. The evidence was competent as tending to show the intent and motive of the defendant in the commission of the acts charged in the information, and it was not too remote. Courts are allowed a wide discretion with respect to the periods of time covered by such testimony.

[4] The defendant offered to prove that the state board of medical examiners held no examination for chiropractors, but the court sustained objections to questions tending to develop that fact. The proffered proof was properly rejected. The only question with which the court was concerned was whether or not the defendant was practicing without a license. The fairness or unfairness of the board of medical examiners was not a question before the court. If the defendant was unlawfully excluded from examination, that was something which he might have remedied by application to a court of equity, but it would be no defense to a charge of practicing without a license.

Other objections are based upon the giving of certain instructions and failure to give others. Without discussing them in detail we think it sufficient to say that they are without merit. The jury was fully and fairly instructed.

[5] It is stated in one of the briefs of appellant that the learned judge of the trial court was biased because the record discloses the use by him of the following language:

"I understand from the evidence in this case that Dr. Ratledge was of the opinion notwithstanding he was repeatedly warned that this was a violation of the law, that—" (We reproduce the quotation as it appears in the brief.)

Commenting upon this partial quotation the writer of the brief uses the following language:

"There is absolutely not one word of evidence in the record to show that the defendant had been repeatedly warned that he was violating the law, hence no evidence on which to predicate such a statement; so it follows that there were motives, bias, influences or statements other than such as might have been created by anything which occurred at the trial which actuated the trial judge in his actions toward the defendant."

The quotation, wrenched from its context, is not properly illustrative of the occurrence, and the comment by the writer of the brief was wholly unwarranted. The court's statement was made after the trial when the appellant appeared for sentence. A part of the colloquy was as follows:

"The Court: I understand from the evidence in this case that Dr. Ratledge was of the opinion, notwithstanding he was repeatedly warned that this was a violation of the law, that—I think the transcript in the lower court shows that he courted this arrest in order to have this law tested.

"Mr. Bull: Yes; to determine whether or not that does constitute a violation of the law, the acts which he did. He didn't endeavor to conceal any of the acts which he did, and as your honor saw in this trial, there was no attempt on our part to conceal the acts which he did, but he did not believe that constituted a violation of the law. It was not any desire to violate the law, but he didn't believe those acts constituted a violation of the law."

The court was speaking of facts disclosed by the record of the preliminary examination —not of facts appearing from the record of the trial in the superior court. Counsel at that time readily conceded the correctness of the court's belief that the defendant was a willing martyr to the cause of securing judicial interpretation of the Medical Practice Act. His willingness now to attribute bias and prejudice to the court because of the utterance of a conceded truth and his attempt to support his contention by a truncated quotation do not meet with our approval.

[6, 7] All of the other questions of any moment which are raised on this appeal have been answered by the opinions in the case of People v. Jordan cited above, but because of the earnest insistence of counsel in all of these cases upon one point, perhaps further attention may with profit be given to it. The argument is made that because the law includes such subjects as histology, elementary chemistry, toxicology, physiology, elementary bacteriology, and pathology in the examinations to be taken by applicants for certificates to practice as drugless healers, it is unfair, because these are standard courses of study in the preparation of physicians and surgeons, but are not needed in the art of those who intend to alleviate human suffer-

ing by manual and mechanical means only. The answer is that to the Legislature is committed the duty of determining the amount and quality of scientific education necessary for the individual to possess before he may hold himself out to practice the healing art. Unless the legislative conclusion upon that subject is obviously unfair we may not interfere, for the scope of the police power is very extensive and the discretion of the Legislature in exercising such power is very broad. It is not for us to substitute our discretion and judgment for those of the Legislature, although we may say in passing that the wisdom of some of the requirements for practice mentioned above would strongly appeal to us, even if we did possess a broader power than is given to us. For example, the importance of a knowledge of toxicology will be evident to every one. Without it the drugless practitioner might apply his manipulations to one suffering from the effects of a poison and might continue his efforts until time for the successful administration of an antidote had passed. All that we have said in the Jordan Case about diagnosis applies to this branch of the discussion. Many years ago this court, speaking through Mr. Chief Justice Wallace, announced the rule that in matters relating to public health the scientific correctness of the legislative body in imposing certain restrictions deemed to be for the public good is, generally speaking, not open to review. Johnson v. Simonton, 43 Cal. 242–249. To be sure in that case there was a collateral attack upon a statute and not a direct one, but we cite the authority to illustrate the unwillingness of courts to interfere with legislative discretion exercised in the passage of laws pertaining to public health. In Ex parte Lacey, 108 Cal. 326–329, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93, the rule of Johnson v. Simonton was given application in a proceeding on habeas corpus involving a direct assault upon the constitutionality of a law designed for the promotion of public hygiene. The state has the right to specify and lay out a course of study and to establish a standard of efficiency. In Ex parte Gerino, 143 Cal. 412–417, 77 Pac. 166, 66 L. R. A. 249, this court sustained a provision of the medical law requiring that as one of the steps towards securing a certificate to practice medicine and surgery the applicant must produce a diploma issued by a medical college, the requirements of which should be equal to those prescribed by the Association of American Medical Colleges. In Ex parte Whitley, 144 Cal. 167–177, 77 Pac. 879, 1 Ann. Cas. 13, this court approved the Dental Practice Act, which prescribed among other things certain elementary educational qualifications in those seeking certificates to practice dentistry. It was held that the necessity for education, its nature and its extent, depends, primarily upon the judgment of the Legislature which may not be controlled by the courts, so long as it is reasonably exercised. And it is not necessary that to be within reason a required study must be one pertaining immediately to the branch of the healing art which an applicant for a license wishes to practice. For example, the algebra studied by a dental practitioner in his high school course may not bear directly upon his practice, but the study of mathematics is undoubtedly one of the means of culture by which his mind is better fitted to cope with professional problems and to acquire a mastery of stomatology sufficient for its practice by him without danger to the public. Further illustrations we think are not necessary to direct attention to the exercise of the power of legislative bodies in prescribing educational tests which must be met and passed by those seeking to secure licenses to practice medicine and other professions over which the state exercises control. Again let us call attention to the words of Mr. Justice Holmes quoted in the Jordan Case:

"The plaintiff in error professes, as we understand it, to help certain ailments by scientific manipulation affecting the nerve centers. It is intelligible therefore that the state should require of him a scientific training. * * * For a general practice science is needed." Collins v. Texas, 223 U. S. 288–296, 32 Sup. Ct. 286, 288 (56 L. Ed. 439).

We conclude that there is nothing unreasonable in the curriculum prescribed by the Medical Practice Act for those wishing to secure licenses to practice the art of drugless healing.

No other questions raised in the briefs require attention.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; SHAW, J.; LAWLOR, J.

172 Cal. 816

PEOPLE v. WILLIAMS. (Cr. 1975.)

(Supreme Court of California. March 24, 1916.)

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

S. S. Williams was convicted of crime, and from the judgment and conviction, and order denying new trial, he appeals. Affirmed.

D. F. Glidden and A. T. French, both of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., and D. V. Mahoney, Dist. Atty., of San Diego, for the People.

MELVIN, J. The questions involved in the appeals herein from the judgment and from the order denying defendant's motion for a new trial are the same as those which arose in the appeals in People v. Jordan (Cr. 1973) 156 Pac. 451 (opinion filed March 24, 1916), and upon the authority of that case the judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; SHAW, J.; LAWLOR, J.

172 Cal. 815

PEOPLE v. EILERSFICKEN. (Cr. 1976.)

(Supreme Court of California. March 24, 1916.)

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Frederick R. C. Eilersficken was convicted of crime, and from the judgment and conviction, and order denying a new trial, he appeals. Affirmed.

D. F. Glidden and A. T. French, both of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., and D. V. Mahoney, Dist. Atty., of San Diego, for the People.

MELVIN, J. The questions involved in the appeals herein from the judgment and from the order denying defendant's motion for a new trial are the same as those which arose in the appeals in People v. Jordan (Cr. 1973) 156 Pac. 451 (opinion filed March 24, 1916), and upon the authority of that case, the judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; SHAW, J.; LAWLOR, J.

172 Cal. 289

MINERAL PARK LAND CO. v. HOWARD et al. (L. A. 3633.)

(Supreme Court of California. March 13, 1916.)

1. CONTRACTS ⟸303(1) — EXCUSE FOR NONPERFORMANCE—IMPOSSIBILITY.

Where a party has agreed without qualification to perform an act not in its nature impossible, he is not excused by difficulty of performance or by becoming unable to perform.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1411; Dec. Dig. ⟸303(1).]

2. CONTRACTS ⟸303(1)—EXCUSE FOR NONPERFORMANCE—NONEXISTENCE OF SUBJECT-MATTER.

Where a performance of a contract depends upon the existence of something whose existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or proves to be nonexistent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1411; Dec. Dig. ⟸303(1).]

3. CONTRACTS ⟸303(1)—EXCUSE FOR NONPERFORMANCE—"AVAILABLE."

Where defendants contracted with plaintiffs to take all the gravel and earth needed for certain work from plaintiffs' land and to pay therefor at specified rates, but it appeared that there was not enough gravel and earth on the land without taking that which was under water, which could only be done by means of a dredge, after which it would have to be dried so that its cost would be 10 or 12 times as much as that obtained dry, the contracting parties assume that the plaintiffs' land contained the necessary gravel available for use, and it was not available where it could be procured only at a prohibitive cost, and defendant was not liable for the contract price of a gravel needed for the work, but not taken from the land.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1411; Dec. Dig. ⟸303(1).

For other definitions, see Words and Phrases, First and Second Series, Available.]

4. CONTRACTS ⟸303(1)—EXCUSE FOR NONPERFORMANCE—INCREASED COST.

While the existence of conditions which make the performance of a contract more expensive than anticipated or which entail a loss upon the party do not excuse nonperformance of a contract, where the increased cost is so excessive as to make it impracticable, it is in legal contemplation impossible, and nonperformance is excused.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1411; Dec. Dig. ⟸303(1).]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by the Mineral Park Land Company against P. A. and C. H. Howard. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

G. P. Adams, of Los Angeles, for appellants. Amend & Amend, of Los Angeles, for respondent.

SLOSS, J. The defendants appeal from a judgment in favor of plaintiff for $3,650. The appeal is on the judgment roll alone.

The plaintiff was the owner of certain land in the ravine or wash known as the Arroyo Seco, in South Pasadena, Los Angeles county. The defendants had made a contract with the public authorities for the construction of a concrete bridge across the Arroyo Seco. In August, 1911, the parties to this action entered into a written agreement whereby the plaintiff granted to the defendants the right to haul gravel and earth from plaintiff's land, the defendants agreeing to take therefrom all of the gravel and earth necessary in the construction of the fill and cement work on the proposed bridge, the required amount being estimated at approximately 114,000 cubic yards. Defendants agreed to pay 5 cents per cubic yard for the first 80,000 yards, the next 10,000 yards were to be given free of charge, and the balance was to be paid for at the rate of 5 cents per cubic yard.

The complaint was in two counts. The first alleged that the defendants had taken 50,131 cubic yards of earth and gravel, thereby becoming indebted to plaintiff in the sum of $2,506.55, of which only $900 had been paid, leaving a balance of $1,606.55 due. The findings support plaintiff's claim in this regard, and there is no question of the propriety of so much of the judgment as responds to the first count. The second count sought to recover damages for the defendants' failure to take from plaintiff's land any more than the 50,131 yards.

It alleged that the total amount of earth and gravel used by defendants was 101,000 cubic yards, of which they procured 50,869 cubic yards from some place other than plaintiff's premises. The amount due the plaintiff for this amount of earth and gravel would, under the terms of the contract, have been $2,043.45. The count charged that plaintiff's land contained enough earth and gravel to enable the defendants to take therefrom the entire amount required, and that the 50,869 yards not taken had no value to the plaintiff. Accordingly the plaintiff sought,

under this head, to recover damages in the sum of $2,043.45.

The answer denied that the plaintiff's land contained any amount of earth and gravel in excess of the 50,131 cubic yards actually taken, and alleged that the defendants took from the said land all of the earth and gravel available for the work mentioned in the contract.

The court found that the plaintiff's land contained earth and gravel far in excess of 101,000 cubic yards of earth and gravel, but that only 50,131 cubic yards, the amount actually taken by the defendants, was above the water level. No greater quantity could have been taken "by ordinary means," or except by the use, at great expense, of a steam dredger, and the earth and gravel so taken could not have been used without first having been dried at great expense and delay. On the issue raised by the plea of defendants that they took all the earth and gravel that was available the court qualified its findings in this way: It found that the defendants did take all of the available earth and gravel from plaintiff's premises, in this, that they took and removed "all that could have been taken advantageously to defendants, or all that was practical to take and remove from a financial standpoint"; that any greater amount could have been taken only at a prohibitive cost, that is, at an expense of 10 or 12 times as much as the usual cost per yard. It is also declared that the word "available" is used in the findings to mean capable of being taken and used advantageously. It was not "advantageous or practical" to have taken more material from plaintiff's land, but it was not impossible. There is a finding that the parties were not under any mutual misunderstanding regarding the amount of available gravel, but that the contract was entered into without any calculation on the part of either of the parties with reference to the amount of available earth and gravel on the premises.

[1] The single question is whether the facts thus found justified the defendants in their failure to take from the plaintiff's land all of the earth and gravel required. This question was answered in the negative by the court below. The case was apparently thought to be governed by the principle—established by a multitude of authorities—that where a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by difficulty of performance, or by the fact that he becomes unable to perform. 1 Beach on Contracts, § 217; Klauber v. S. D. S. C. Co., 95 Cal. 353, 30 Pac. 555; Wilmington Trans. Co. v. O'Neil, 98 Cal. 1, 32 Pac. 705; The Harriman, 9 Wall. 172, 19 L. Ed. 629.

[2] It is, however, equally well settled that, where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent. 1 Beach, Contr. § 217; 9 Cyc. 631. Thus, where the defendants had agreed to pasture not less than 3,000 cattle on plaintiff's land, paying therefor $1 for each and every head so pastured, and it developed that the land did not furnish feed for more than 717 head, the number actually put on the land by defendant, it was held that plaintiff could not recover the stipulated sum for the difference between the cattle pastured and the minimum of 3,000 agreed to be pastured. Williams v. Miller, 68 Cal. 291, 9 Pac. 166. Similarly, in Brick Co. v. Pond, 38 Ohio St. 65, where the plaintiff had leased all the "good No. 1 fire clay on his land," subject to the condition that the lessees should mine or pay for not less than 2,000 tons of clay every year, paying therefor 25 cents per ton, the court held that the lessees were not bound to pay for 2,000 tons per year, unless there was No. 1 clay on the land in such quantities as would justify its being taken out. In Ridgely v. Conewago Iron Co. (C. C.) 53 Fed. 988, the holding was that a mining lease requiring the lessee to mine 4,000 tons of ore annually, and to pay therefor a fixed sum per ton, or, failing to take out such quantity, to pay therefor, imposed no obligation on the lessee to pay for such stipulated quantity after the ore in the demised premises had become exhausted. There are many other cases dealing with mining leases of this character, and the general course of decision is to the effect that the performance of the obligation to take out a given quantity or to pay royalty thereon, if it be not taken out, is excused if it appears that the land does not contain the stipulated quantity. Brooks v. Cook, 135 Ala. 219, 34 South. 960; Muhlenberg v. Henning, 116 Pa. 138, 9 Atl. 144; McCahan v. Wharton, 121 Pa. 424, 15 Atl. 615; Boyer v. Fulmer, 176 Pa. 282, 35 Atl. 235; Bannan v. Graeff, 186 Pa. 648, 40 Atl. 805; Gribben v. Atkinson, 64 Mich. 651, 31 N. W. 570; Blake v. Lobb's Estate, 110 Mich. 608, 68 N. W. 427; Hewitt Iron M. Co. v. Dessau Co., 129 Mich. 590, 89 N. W. 365; Diamond I. M. Co. v. Buckeye I. M. Co., 70 Minn. 500, 73 N. W. 507.

[3] We think the findings of fact make a case falling within the rule of these decisions. The parties were contracting for the right to take earth and gravel to be used in the construction of the bridge. When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity, available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were "available," we must view the conditions in a practical and reasonable way. Although there was

gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for defendants to take it.

[4] "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost." 1 Beach on Contr. § 216. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But, where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel.

On the facts found, there should have been no recovery on the second count.

The judgment is modified by deducting therefrom the sum of $2,043.45, and, as so modified, it stands affirmed.

We concur: SHAW, J.; LAWLOR, J.

172 Cal. 306

PARMENTER v. McDOUGALL.

(L. A. 3600.)

(Supreme Court of California. March 14, 1916.)

1. MUNICIPAL CORPORATIONS ⟸706(6)—USE OF STREET—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Where defendant was driving a motor car at a rapid rate and made a sudden sharp swerve to the wrong side of the street, where her car struck the plaintiff, the question of defendant's negligence was for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⟸706(6).]

2. TRIAL ⟸333 — VERDICT—DAMAGES—CONFORMITY TO PLEADING.

It cannot be said because the verdict exceeds the amount of damages alleged in the complaint it is invalid, where during trial the parties stipulated for an amendment of the complaint to conform to the facts proved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 784, 786; Dec. Dig. ⟸333.]

3. NEGLIGENCE ⟸93(1)—INJURIES TO PERSONS — IMPUTED NEGLIGENCE—PASSENGERS.

Negligence of the driver cannot be imputed to a guest or passenger.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147, 148; Dec. Dig. ⟸93(1).]

4. NEGLIGENCE ⟸68—INJURIES TO PERSONS —CONTRIBUTORY NEGLIGENCE—PASSENGERS.

A passenger or guest of a driver of a motorcycle must look out for his own safety, and if he could prevent injury to himself it is negligence to fail to do so.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 92, 94, 95; Dec. Dig. ⟸68.]

5. MUNICIPAL CORPORATIONS ⟸706(7)—USE OF STREETS — INJURIES TO PERSONS—CONTRIBUTORY NEGLIGENCE—PASSENGERS.

Evidence that plaintiff when injured in a collision was a passenger on his brother's motorcycle, that they were riding at a high rate of speed approaching a street intersection at which there was a wall and hedge shutting off view of the turn which it was their intention to make, required submission to the jury of the issue of contributory negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⟸706(7).]

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Foster W. Parmenter against Mrs. Mary B. McDougall. From judgment for plaintiff, and order denying motion for new trial the defendant appeals. Reversed.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles (Lyle Pendegast and Arthur F. Coe, both of Los Angeles, of counsel), for appellant. Ticknor & Carter, of Pasadena (Leonard L. Riccardi, of Pasadena, of counsel), for respondent.

SLOSS, J. This action was brought to recover damages for personal injuries. The plaintiff, while riding on a motorcycle in company with his brother, Benjamin Parmenter, was struck by an electric automobile owned and driven by the defendant. The accident occurred at the intersection of Fremont avenue and Columbia street in the city of South Pasadena. Fremont street runs in a northerly and southerly direction. At its northerly end it connects with Columbia street, which runs easterly and westerly. The defendant was driving her car northerly along Fremont avenue, intending to turn to the left and go westerly on Columbia street. The plaintiff and his brother were coming westerly along Columbia street, and approaching the intersection with Fremont avenue. The motorcycle belonged to Benjamin Parmenter, plaintiff's brother. Benjamin was operating the machine, the plaintiff being on the rear seat. As they reached Fremont avenue, they turned to go southerly down that avenue, and the collision took place at or near the intersection of the two streets. The plaintiff charged that the defendant had negligently made a sharp and sudden turn to the left on coming to Columbia street, without first crossing to the further side of said Columbia street, and alleged that this negligence was the cause of the accident. The defendant denied the averments of negligence, and asserted in her answer that the plaintiff had been guilty of contributory negligence.

The action was tried before a jury which returned a verdict in favor of the plaintiff for $7,265. The defendant appeals from the judgment entered on the verdict, and from an order denying her motion for a new trial.

[1] There is no merit in the appellant's claim that the evidence was insufficient to support a finding of negligence on her part. We shall not undertake to detail the testimony of the various witnesses. As is usual

in cases of this character, there was more or less conflict. But, beyond a doubt, there was testimony to the effect that the defendant had made a sudden and unexpected turn to the left, thus bringing her car into collision with the motorcycle. Whether she did act in this way, and whether under the circumstances it was negligence to so act, were questions for the jury.

[2] The appellant makes the point that the verdict exceeds the amount of damages alleged and demanded in the complaint. But it appears that during the trial the parties stipulated that the court might, and the court did, permit plaintiff to amend his complaint to conform to the proof with regard to the amount of damage. While no formal amendment was made, it is apparent that the case was tried upon the theory that the plaintiff might recover any amount of damages actually proven to have been sustained by him.

[3] Finally, it is claimed that the court erred in its instructions to the jury. Notwithstanding the plea of contributory negligence, the court instructed the jury that they did not have to consider this defense, and that the only question was whether the defendant was guilty of negligence which caused the collision. In its charge, the court used this language:

"The evidence shows without contradiction that the plaintiff was, at the time of the collision which caused his injuries, riding upon the motorcycle of his brother as his brother's guest, and there is no evidence to show that he had or could exercise at the time in question any control over the action of his brother. Any negligence of that brother which contributed to cause the injury, if there was any, is not a bar to the plaintiff's action."

The part of the instruction just quoted is unquestionably correct. It embodies the well-settled rule that a guest or passenger in a vehicle driven or operated by another is not, ordinarily, bound by the negligence of the driver or operator. In other words, the negligence of the driver is not, as matter of law, to be imputed to the passenger. Bresee v. L. A. T. Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; Thompson v. L. A. & S. D. R. Co., 165 Cal. 748, 134 Pac. 709; Tousley v. P. E. Ry. Co., 166 Cal. 457, 137 Pac. 31; Fujise v. L. A., etc., Ry. Co., 12 Cal. App. 207, 107 Pac. 317; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.

[4] But the court did not content itself with telling the jury that the negligence, if any, of the plaintiff's brother was not to be imputed to plaintiff. It took from the jury the issue of plaintiff's own negligence. This was error. True, the plaintiff was not his brother's keeper, but he was bound to use due care to keep himself from injury. As we said in Thompson v. L. A. Ry. Co., supra, after declaring that the negligence of the chauffeur of an automobile was not to be imputed to the plaintiff, a passenger in the automobile:

"It is, of course, true, that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety."

Likewise, in the Fujise Case, cited above, the Court of Appeal said that:

"The rule [that the negligence of the driver is not imputed to the passenger] does not absolve the passenger or guest from the duty of using ordinary care for his own safety. No one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care."

The same principle is declared in Bresee v. L. A. T. Co., supra, and has been applied by courts of other jurisdictions in many cases, a few of which we cite. Adler v. Met. St. Ry. Co., 84 N. Y. Supp. 877; Davis v. Chicago Ry. Co., 159 Fed. 10, 88 C. C. A. 488, 16 L. R. A. (N. S.) 424; Walsh v. A. & L. V. E. R. Co., 232 Pa. 479, 81 Atl. 551; Ewans v. W. C. Ry. Co., 7 Pen. [Del.] 458, 80 Atl. 634; Wachsmith v. B. & O. Ry. Co., 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; Brommer v. Pa. Ry. Co., 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; Trumbower v. L. V. T. Co., 235 Pa. 397, 84 Atl. 403; City of Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315; Bush v. U. P. Ry., 62 Kan. 709, 64 Pac. 624; Brickell v. Ry. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; Canter v. City of St. Joseph, 126 Mo. App. 629, 105 S. W. 1.

[5] All of these decisions, while recognizing that the negligence of the person operating the vehicle is not imputed to the passenger, hold that the passenger is bound to exercise ordinary care for his own safety, and that whether or not he exercised such care is a question of fact. Unless the evidence is all one way, this question must be submitted to the jury. We entertain no doubt that the evidence in the case at bar was such that the jury might have found against the plaintiff on the issue of his contributory negligence. There was testimony tending to show that the plaintiff and his brother were riding at a high rate of speed as they approached the intersection of Fremont avenue, at which they expected to turn southerly. It was testified, further, that on the line of the property at the corner of Columbia street and Fremont avenue there was a wall and hedge which shut off Fremont avenue from the view of any one approaching the intersection of the two streets as the plaintiff and his brother were approaching it. It might fairly have been inferred from the evidence that the plaintiff knew that his brother intended to make the turn to the south on reaching Fremont avenue. If the jury believed the facts to be as just outlined, they would certainly have been justified in concluding that ordinary prudence should have suggested to the plaintiff that he and his brother were incurring grave risk in running rapidly to the point of turn-

ing into another street, upon which other vehicles, which they could not see, might be approaching the crossing. If the jury had reached this conclusion, it might very well have found that the obligation to exercise ordinary care for his own protection required the plaintiff to request his brother to moderate the speed of the motorcycle before the place of danger was reached. The defendant was entitled to have the issue of contributory negligence answered by the jury. How it would have been answered we cannot of course know. We cannot, therefore, say that the error committed in withdrawing this issue from the consideration of the jury was not prejudicial to the substantial rights of the appellant.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

172 Cal. 230

CURTIS v. CITY OF LOS ANGELES et al.

(L. A. 3609.)

(Supreme Court of California. March 6, 1916.)

1. LIVERY STABLE AND GARAGE KEEPERS ⟸1—REGULATION.

The business of a livery stable keeper, while in and of itself legitimate, is peculiarly the subject of police regulation.

[Ed. Note.—For other cases, see Livery Stable and Garage Keepers, Cent. Dig. § 1; Dec. Dig. ⟸1.]

2. MUNICIPAL CORPORATIONS ⟸589—POLICE POWER—REGULATIONS.

While the power to regulate a legitimate business does not contain as a part of itself the power to suppress it, yet it does contain the power to prohibit within limited areas and districts, if reasons appear for so doing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1308, 1319; Dec. Dig. ⟸589.]

3. MUNICIPAL CORPORATIONS ⟸625—POLICE POWER — ORDINANCES — CONSTRUCTION BY COURT.

Where ordinances regulating or prohibiting the carrying on of a legitimate business are asserted to be unreasonable and oppressive on their very face, courts show the utmost liberality in upholding such ordinances if any substantial reason can be found in their justification, since the power of regulation rests with the legislative branch with whose power the courts will not interfere unless the case presents a clear invasion or denial of a legal right.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. ⟸625.]

4. MUNICIPAL CORPORATIONS ⟸626—ORDINANCES—REGULATION OF LIVERY STABLES—VALIDITY.

An ordinance of the city of Los Angeles, declaring it unlawful to maintain a stable or corral within the limits of a district established after the stable had been built, while in other districts, more thickly populated and exclusively devoted to residence purposes, permits for the maintenance of such stables were liberally granted, was oppressive and discriminatory, and hence invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1380; Dec. Dig. ⟸626.]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by George R. Curtis for an injunction against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals. Reversed.

Geo. P. Adams and Haas & Dunnigan, all of Los Angeles, for appellant. John W. Shenk, George E. Cryer, Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., all of Los Angeles, for respondents.

HENSHAW, J. Plaintiff brought this action to enjoin the enforcement against himself of an ordinance of the city of Los Angeles prohibiting the establishment or maintenance of cattle or horse corrals within a certain district of the city (No. 26473, New Series). Rejecting from consideration the charges in the complaint reflecting upon the motives of the legislative body of the city in adopting the ordinance, the facts undisputed, or found, are that the city of Los Angeles by its original ordinance (No. 24466, New Series) divided a part of its territory into eight districts, declaring it to be unlawful for any person to conduct a feed stable, livery stable, or sales stable within this territory saving under permit from the health commissioner of the city. Plaintiff purchased a piece of property in the city of Los Angeles, outside of the boundaries of the eight districts delimited by the ordinance, for the purpose of erecting stable buildings and maintaining thereon a stable for mules. He did construct his stable and housed and maintained therein 24 or 26 mules used by him in his business. The stable was so maintained in October, 1912. In November, 1912, the council of the city passed an ordinance (No. 26195, New Series) amending the earlier ordinance by creating a new district, the boundaries of which surrounded plaintiff's stable. The condition then existing was that in the nine delimited districts such stables could be maintained under permit from the health officer of the city, and plaintiff made application for such permit. It was refused, for the reason that immediately following the passage of the amendatory ordinance in November another ordinance of the city was adopted in December, 1912 (No. 26473, New Series), which declared it to be unlawful to establish, conduct, or maintain any such stable within the limits of district nine—the new district in which plaintiff's stable was situated. He continued to conduct his business, and, being exposed to frequent arrests and prosecutions for violations of the ordinance, brought this action to secure an injunction, urging the unreasonable, oppressive, and discriminatory nature of the ordinance itself. As to the physical condition, plaintiff pleaded that there was a school building, which would

not be completed for more than a year, situated more than 500 feet from his barn; another situated more than 700 feet; a third more than 1,000 feet; that the nearest hospital and the nearest public park are a quarter of a mile distant from the barn; that within the distance of 1,000 feet upon one side of the stable there are but four residences, and upon the other side but seven; that most of the territory is vacant, unoccupied property; and that the barn itself is situated a mile from the easterly limits of the city. Some of the denials to these allegations are quite inconclusive. Thus, there is no denial as to the number of residences, but there is a denial that any considerable portion of the territory in the immediate vicinity of the barn is vacant and unoccupied. The denial as to the distances of the schools is a denial merely "that said school is situated more than 500 feet from the said barn," and as to the other school the denial is that "it is situated more than 1,000 feet from said barn." There is no denial as to the distance of the park or hospital. The court's finding in this particular is that "most of the territory in the immediate vicinity of the barn of plaintiff is occupied with private residences, except as otherwise admitted by the pleadings herein," and further that "there are several schools and hospitals in the immediate vicinity of said corral." But these findings are coupled with a declaration that such is the situation "except as otherwise admitted by the pleadings herein," and, as we have seen that the pleadings admit the physical conditions alleged in the complaint, the findings are without efficacy to overthrow these admissions, even if it be thought that they were intended to do so. The court proceeded further to find that the district in which plaintiff's stable is situated "does not differ in density of population or physical characteristics or character of use from the eight districts created and described in Ordinance No. 24466 (New Series), nor from districts 1 to 9 described in Ordinance No. 26195 (New Series), in which said districts so created it has been and is by the defendant made lawful to keep more than six horses in a single barn or stable upon obtaining a permit so to do and complying with certain sanitary regulations." And the court finds that:

"There is no apparent reason and no reason whatever in so far as respects the physical conditions, density of population, or character of use why the prohibition against horse corrals as defined in Ordinance No. 26473 (New Series), might not have been extended to the said eight districts hereinabove referred to as described either in Ordinance No. 26195 (New Series), or Ordinance No. 24466 (New Series), nor why any different regulations as to the keeping of horses should be applied in the district described in Ordinance No. 26473 (New Series), from that which the defendant city may see fit to apply to the said eight districts described in either Ordinance No. 24466 (New Series), or 26195 (New Series)."

The court then proceeded to declare the number of permits granted for the keeping of such stables in the other districts, and it is shown that, besides permits to individuals to keep horses for private purposes, 51 permits had been granted to maintain livery stables, without limitation as to the number of animals kept therein, in the remaining eight districts, "and in portions of the city of Los Angeles more thickly populated or densely settled than the district described in Ordinance No. 26473 (New Series), and which said districts are as exclusively devoted to residence purposes as the district described in Ordinance No. 26473 (New Series)." Next the court found:

"That the stable as maintained is offensive to the residents in the vicinity; that it is a source of offensive smells and odors which are perceptible for a distance of several hundred feet; that said stable and corral are breeding places for flies; that the people in the immediate vicinity of said stable are annoyed and disturbed by the noises made and produced during the nighttime and in the early morning hours by the mules kept by the plaintiff in his barn, and by the boisterous conduct of the laborers employed as teamsters by the plaintiff."

But further the court found that:

"The corral or stable of the plaintiff is kept in as sanitary, safe, and careful a manner as it is reasonably practicable to keep said corral or stable in the absence of connection with the sewer in compliance with the other sanitary requirements mentioned in Ordinance No. 24466 (New Series), and 26195 (New Series). That it is kept in as careful, safe, and sanitary manner as livery stables are ordinarily kept in the city of Los Angeles."

And the court further finds that:

"The sanitary condition of plaintiff's said corral or stable, that is, its tendency to attract or breed flies and the odor emanating from said stable, could be greatly improved by connecting the same with the sewer and by proper arrangements for the drainage into said sewers and otherwise complying with the sanitary requirements and regulations specified in said Ordinance No. 24466 (New Series), or said Ordinance No. 26195 (New Series)."

And the court further finds that:

"The plaintiff is ready and willing to connect his said stable with the sewer and to make proper arrangements for drainage into said sewer and to comply with all the sanitary requirements and regulations specified and required by the city in the district where the keeping of more than four horses is permitted under the provisions of either of the said two ordinances last hereinbefore referred to."

The obvious meaning of these findings is that the plaintiff, under the refusal of the health officer to grant the permit, is not allowed to improve the sanitary conditions of his stable, though willing and desirous so to do. The last finding of the court, to the effect that the ordinance "is not unreasonable nor is it an attempt to regulate in an improper manner the keeping of horses or mules in residence districts of the city of Los Angeles," is plainly a conclusion of law and is based upon the opinion of the court—for the soundness of which respondent contends—that, notwithstanding all the facts found, it was still within the power of the city of Los Angeles to forbid this occupation within the

inhibited district, and this is the vital consideration in the case.

[1-3] In dealing with it, one is embarrassed rather with the multiplicity than with the paucity of authorities, and it would be a waste of time to undertake a review of them. However, certain propositions applicable to this consideration merit brief statement. Plaintiff's business, while in and of itself legitimate and beneficial, is one of a class peculiarly the subject of police regulation. Ex parte Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93. And while the power to regulate a legitimate business does not contain as a part of itself the power to suppress (In re Dart, 155 Pac. 63), yet it does contain within itself the power to prohibit within delimited areas and districts, if reason appears for so doing. Ex parte Hadacheck, 165 Cal. 417, 420, 132 Pac. 584; In re Wilson, 32 Minn. 148, 19 N. W. 723. Also, it may be noted that, when ordinances such as the one here in question are asserted to be unreasonable and oppressive upon the very face of the instrument and without other evidence than the terms of the ordinance itself, courts have shown the utmost liberality and gone to great lengths in upholding such enactments if any substantial reason can be thought out in their justification. And very properly have the courts done this, because the power thus to regulate rests with the legislative branch of the government, and with its exercise the courts are naturally most reluctant to interfere, and do not interfere unless the case presents a clear invasion or denial of a legal right. But, upon the other hand, the courts have unhesitatingly overthrown such attempted exercises of the police power when no just ground for its particular form of exercise is shown and where the result is undue oppression of the plaintiff or a confiscation in one form or another of his property. A few of the instances in which the courts have felt impelled to declare illegal such enactments will not be without value. In Ex parte Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618, it was held that an ordinance which in effect permitted burials in lots owned, but prohibited the sale of other lots for burial purposes, was discriminatory and unreasonable, and therefore void in denying the privilege to one class, intending lot purchasers, while granting it to another, the owners of cemetery lots. In Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75, an ordinance permitting burials, but prohibiting the establishment of new or the enlargement of existing cemeteries except under permit, was held unreasonable, amongst other grounds, because it limited the unrestricted privilege of burial to one class of citizens and denied it to another. In Re Smith, 143 Cal. 368, 77 Pac. 180, an ordinance prohibiting the maintenance of gasworks in a district found to be sparsely settled, the enforcement of which ordinance had the direct effect of stopping the operation of an existing gasworks was held unreasonable and void. In Matter of the Application of Throop, 169 Cal. 93, 145 Pac. 1029, an ordinance prohibiting the maintenance of a stone crusher within a district containing more than 2,000 acres and sparsely settled, while it allowed the maintenance of such a crusher in another district containing less than 12 acres situated in the heart of the city, was held to be unreasonable, discriminatory, oppressive, and void. In Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, a complaint similar to the one in the present case was filed, seeking to have declared void an ordinance of the city of Los Angeles. A general demurrer to this complaint was sustained by the trial court and its judgment in so doing affirmed by this court. Upon writ of error to the Supreme Court of the United States, the judgment of this court was reversed upon the ground that the complaint, taking, of course, its pleaded facts as true, stated a cause of action meriting equitable relief. The facts were that by municipal ordinance limits were fixed within which gasworks might be erected. Thereafter a permit was granted for the erection of such a plant. Very shortly thereafter another ordinance was adopted under which, in the territory in which the gasworks were in course of erection, such works were prohibited. There had been no material change in the neighborhood or conditions. The Supreme Court of the United States held under this state of facts that this was an arbitrary and discriminatory exercise of the police power amounting to a taking of property without due process of law.

[4] It is not, we think, debatable, under the principle of these authorities and under the findings made by the trial court, but that the ordinance here in question is also oppressive and discriminatory in creating a small district in which plaintiff has erected and is maintaining his stable and prohibiting him from longer maintaining it, while in other districts, "more thickly populated and densely settled and exclusively devoted to residence purposes," permits for the conduct of a like business are liberally granted.

The judgment appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

172 Cal. 268

In re CARPENTER'S ESTATE.
DYE et al. v. SHUTAN.

(Sac. 2371.)

(Supreme Court of California. March 8, 1916.)

1. WILLS ⇐108—STATUTORY REQUIREMENTS.
The privilege of making testamentary disposition of property is wholly statutory, and

compliance with the conditions imposed by statute is necessary to the validity of any will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 249–258; Dec. Dig. ⊂⊃108.]

2. WILLS ⊂⊃130—STATUTORY REQUIREMENTS —CONSTRUCTION.

The general rule that the provisions of Civil Code are to be liberally construed to effect its object, does not excuse lack of substantial compliance with the requirement of Civ. Code, § 1277, that an holographic will must be dated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338–340; Dec. Dig. ⊂⊃130.]

3. WILLS ⊂⊃130 — HOLOGRAPHIC WILL — "DATE."

An holographic will which has at the top the figures "10," followed by a space, and then the figures "1912," is not dated as required by Civ. Code, § 1277, since the date means the year, month, and day, and it cannot be told whether the figure means the 10th month or the 10th day of some other month.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338–340; Dec. Dig. ⊂⊃130.

For other definitions, see Words and Phrases, First and Second Series, Date.]

In Bank. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Contest by Mary Dye and others against Ethel Shutan as proponent of the purported will of Samuel Carpenter, deceased. Judgment for the contestants, and proponent appeals. Affirmed.

Roland Becsey, H. I. Stafford, and Stafford & Stafford, all of San Francisco, for appellant. W. A. Anderson, Taylor & Tebbe, of Yreka, and Black & Clark, of San Francisco, for respondents.

MELVIN, J. Ethel Shutan offered for probate a writing purporting to be the holographic will of Samuel Carpenter, deceased. The probating of said instrument was opposed by Mary Dye and a number of other persons who, admittedly, would share in the distribution of the estate of Samuel Carpenter in the event of intestacy. There were several grounds of contest, but the court sustained the opposition to the probate of the instrument upon the sole ground that the alleged holographic will was not dated. From the judgment which followed and from the order denying her motion for a new trial, the defendant and proponent appeals.

The document which was found to be in Samuel Carpenter's handwriting and signed by him was written upon a single sheet of paper and the first line was as follows: "Winters Yo lo Co 10 1912." The sole question presented to this court, therefore, relates to the sufficiency or insufficiency of the quoted words, abbreviation, and figures as a date, in contemplation of the requirement of section 1277 of the Civil Code that an holographic will must not only be entirely written and signed by the testator, but must also be dated.

[1, 2] The authorities without exception hold that the privilege of making testamentary disposition of property is not an inherent or even a constitutional right; that it is wholly statutory; and that since the Legislature has seen fit to impose certain requirements looking to the execution of a will, compliance with these exactions is absolutely necessary to the validity of any instrument offered as a testament. No citation of authority seems necessary to support a rule so well known and widely recognized, but if any were needed such cases as In re Walker, 110 Cal. 390, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104, and Estate of Price, 14 Cal. App. 463, 112 Pac. 482, settle the question in California beyond peradventure and the general rule that the provisions of the Code "are to be liberally construed with a view to effect its objects," has never been stretched to excuse lack of substantial compliance with the statutory requirement that an holographic will must be dated by the testator. Estate of Martin, 58 Cal. 532; Estate of Rand, 61 Cal. 474, 44 Am. Rep. 555; Estate of Billings, 64 Cal. 427, 1 Pac. 701; In re Plumel, 151 Cal. 79, 90 Pac. 192, 121 Am. St. Rep. 100.

[3] Appellant's first contention is that the figures "10 1912" might be read as meaning "the 10th month, the 19th day, and the year 1912," thus coming within the ruling in Estate of Chevallier, 159 Cal. 170, 113 Pac. 130, and Estate of Lakemeyer, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96. The doctrine of those cases is merely that well-known abbreviations may be used in compliance with the Code provision in reference to holographic wills as for example "4–14–07" meaning "April 14, 1907." But no such abbreviation was attempted in the will here considered. The photographic reproduction of the instrument which accompanies the record shows the figures "10," followed by a space, after which the figures "1912" are written in a group obviously intended to represent the year. It is impossible to determine whether the number "10" represented, or was intended to represent, the month of October or the 10th day of some other month.

In Estate of Price, supra, where the writing under examination had only the year written upon it, the District Court of Appeal held that the word "date" means the year, month, and day. Unquestionably that is the popular as well as the technical meaning. That case followed the well-known authority (Heffner v. Heffner, 48 La. Ann. 1089, 20 South. 281), wherein the reasons for the rule requiring a date to a will and the interpretation given to said rule by the French jurists and commentators upon the Code Napoleon are fully and ably discussed. In Estate of Anthony, 21 Cal. App. 157, 131 Pac. 96, it was held that the omission of the name of the month from the supposed date of an holographic will was fatal to its validity.

The alleged date as written by Mr. Carpenter lacked the most essential requisite of a date as defined by our decisions and that is

definiteness. From it we may not determine whether one making an attack upon the testamentary capacity of the writer would be compelled to confine his proof to the month of October, 1912, or in establishing Mr. Carpenter's lack of mental equipment, be required to establish the testator's disqualification on the 10th of each month of that year. We can see no escape from the logic of the ruling of the probate court that the alleged holographic will was not dated.

There is nothing in Estate of Fay, 145 Cal. 83, 78 Pac. 340, 104 Am. St. Rep. 17, in conflict with that which is written above. In that case there was upon the instrument offered as a will a date setting forth a day, month, and year. By an evident clerical blunder the year was written "1859" when probably "1889" was meant. This was held not fatal to the validity of the will because the statute required a "date," not necessarily one which might not have been corrected upon showing of a clerical error.

It follows that the judgment and order must be affirmed; and it is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.; LORIGAN, J.

172 Cal. 239

PABST v. SHEARER et al. (L. A. 3623.)

(Supreme Court of California. March 7, 1916.)

1. HUSBAND AND WIFE ⟸262(1) — CONVEYANCE TO SPOUSES—PRESUMPTIONS.

While a conveyance to a husband and wife under Civ. Code, § 164, presumptively makes them tenants in common, the presumption is not conclusive and may be rebutted.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 913; Dec. Dig. ⟸262(1).]

2. HUSBAND AND WIFE ⟸270(9) — CONVEYANCE TO SPOUSES—PRESUMPTION.

The presumption raised by Civ. Code, § 164, that a conveyance to a husband and wife created a tenancy in common is evidence of that fact, though disputable. Hence the introduction of contrary evidence raises a question of fact for determination.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 982; Dec. Dig. ⟸270(9).]

3. EVIDENCE ⟸80(1) — PRESUMPTIONS—FOREIGN LAWS.

In the absence of evidence as to the laws of a foreign state, it must be presumed that they are the same as the laws of the forum, and that property in the foreign state to which a married woman held title was her separate property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. ⟸80(1).]

4. HUSBAND AND WIFE ⟸264—COMMUNITY PROPERTY—EVIDENCE.

In an action where plaintiff claimed that property conveyed to him and his wife was not owned by them as tenants in common, but was community property, evidence *held* insufficient to establish that fact.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. ⟸264.]

5. EVIDENCE ⟸589—WEIGHT—TESTIMONY OF PARTY.

Where a surviving husband claimed that property to which his wife held title was community property his testimony that in permitting title to be taken in her name, he did not intend a gift to her, while competent, is not binding.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. ⟸589.]

6. HUSBAND AND WIFE ⟸264—COMMUNITY PROPERTY—EVIDENCE.

Where a husband claimed that property in the name of his wife was really community property, evidence of the wife's declarations that their property was fixed so that the surviving spouse would take it all does not show that the property was community property, but merely the wife's understanding of the rights of the spouses.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. ⟸264.]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Albert Pabst against Eliza Shearer and others. From the judgment, which denied part of the relief sought, and an order denying new trial, plaintiff appeals. Affirmed.

Geo. L. Keefer, of Los Angeles, for appellant. E. R. Young and Ben. W. Utter, both of Los Angeles, for respondents.

SLOSS, J. Margaret Pabst died in November, 1911. The plaintiff, Albert Pabst, is her surviving husband. Eliza Shearer, defendant and respondent, is the mother of Margaret Pabst. Plaintiff and Mrs. Shearer were the sole heirs of Margaret Pabst, entitled to share equally in any separate estate left by her. This action was instituted by Albert Pabst to quiet title to four lots of land in the county of Los Angeles. The contention was that these lots constituted community property of himself and his wife Margaret, and that upon her death he succeeded to the entire ownership. The answer of Mrs. Shearer asserted that she was the owner of an undivided one-half interest in the property, which, as she claimed, had been the separate property of Margaret. The court found that at the time of Margaret Pabst's death, she and Albert Pabst were the owners, as tenants in common of three of the lots, and that the fourth lot was the sole and separate estate of Margaret Pabst. Since the interest of Margaret Pabst passed equally to her husband and her mother, the court concluded that the plaintiff owned a three-fourths interest in the three lots which had been owned by the plaintiff and his wife as tenants in common, and that the plaintiff and Mrs. Shearer each owned an undivided one-half interest in the lot found to have been owned by Mrs. Pabst alone. Judgment was entered accordingly. Plaintiff appeals from the judgment, and from the order denying his motion for a new trial.

[1, 2] The principal point urged on the appeal is that the evidence does not support the findings in so far as they declare that any part of the property was the separate estate

of Margaret Pabst. Albert and Margaret Pabst were married in 1900 in Kansas City, Mo. They came to California a couple of years later. On January 24, 1906, lot 98 of the Hollywood Park Tract was conveyed by the Title Insurance & Trust Company to "Margaret Pabst and Albert Pabst, her husband." The effect of such deed was, presumptively, to vest the property in the husband and wife as tenants in common. Civ. Code, § 164. On November 6, 1907, Edward D. Silent, trustee, conveyed to Mrs. Margaret Pabst lot 33, Euclid Crest. On April 30, 1908, the same grantor conveyed to Mrs. Margaret Pabst lot 32 of Euclid Crest. On February 14, 1906, Fred L. Paul and wife conveyed lot 18 of Paul Place to "Margaret Pabst and Albert Pabst, her husband, joint tenants with right of survivorship." On May 25, 1908, Albert Pabst, the plaintiff, executed a deed describing the lot last mentioned. This instrument is most informal, and at first glance confusing, in its phraseology. We have no doubt, however, that it should be interpreted as purporting to convey to Margaret Pabst the one-half interest in the property theretofore held by Albert Pabst as joint tenant.

On the face of the conveyances above described, it will be seen that the title to the property stood as follows: The Hollywood Park lot had been conveyed to Albert Pabst and Margaret Pabst as tenants in common. The two Euclid Crest lots and the Paul Place lot had been conveyed to Margaret Pabst alone. Under the express provision of section 164 of the Civil Code, as amended in 1897, the presumption is, therefore, that the undivided one-half interest in the first lot, and the entire interest in the three other lots, was vested in Margaret Pabst as her separate property. The presumption thus declared is, of course, not conclusive. It may be overcome by evidence sufficient to satisfy the court that the property in question, although conveyed to the wife, was in fact community property. Fanning v. Green, 156 Cal. 279, 104 Pac. 308. The plaintiff endeavored to introduce such evidence, and contends that he did establish that all of the property was purchased with money earned by him after the marriage, and that he had not made a gift thereof to his wife. A painstaking and ingenious argument is made in this behalf, the appellant contending that the proof regarding the property owned by Albert and Margaret at the time of their marriage, and that acquired by them thereafter, leads inevitably to the conclusion that all of the money that went to buy these lots was community property. But we cannot agree with this contention. It must be remembered that a presumption declared by statute, although disputable, is itself evidence, and that it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose. People v. Milner, 122 Cal. 171, 54 Pac. 833; Sarraille v. Calmon, 142 Cal. 651, 76 Pac. 497; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Moore v. Gould, 151 Cal. 723, 91 Pac. 616; People v. Siemsen, 153 Cal. 387, 95 Pac. 863. As we said in People v. Milner, supra, 122 Cal. at page 179, 54 Pac. 837:

"Against a proved fact, or a fact admitted, a disputable presumption has no weight, but where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven; and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption."

In this case the court below was evidently not satisfied with the proof offered by plaintiff to overthrow the presumption arising from the face of the deeds. We cannot say that such proof was of so clear a character that the court was bound to accept it as supporting the conclusion which plaintiff sought to draw from it.

[3, 4] Before the Pabsts came to California they had owned a house and lot in Kansas City. The lot had been bought shortly after their marriage, and title had been taken in the name of Mrs. Pabst. In the absence of evidence to the contrary, we must assume that the law of Missouri is the same as our own. This lot was therefore presumptively the separate property of Mrs. Pabst. Furthermore, there was direct evidence to the effect that she had, at the time of the marriage, more than enough money to pay for the lot, and that she did in fact pay for it out of her own separate funds. A house was built on the lot, and some, at least, of Margaret's money went into the construction of this house. The court was therefore fully justified in believing that a considerable interest in the house and lot, if not the whole, was the separate estate of the wife. For several years before any of the property here in controversy was acquired, the house in Kansas City had been rented for $25 per month and the rents had been received by Margaret. The court had the right to believe that Margaret's one-half interest in the Hollywood Park lot, first acquired by the parties, was paid for with the separate property of the wife. Before the other parcels were bought, the property in Kansas City was sold for $2,500, of which $1,000 was paid to Mrs. Pabst in cash. The balance was payable in installments, and was subsequently paid. Here was a considerable sum of money, which belonged wholly or in large part to Margaret Pabst in her separate right, and which probably, under the evidence, went into the purchase of these three lots and the construction of such improvements as were put thereon. On the other hand, the elaborate computation by which plaintiff seeks to show that his earnings purchased all of this property is based entirely upon his own testimony relative to his income and expenditures—a statement which the court was not bound to accept as thoroughly accurate. No books of account had been kept, and the fig-

ures given by plaintiff rested largely on estimates made by him.

[5] Under these circumstances, it cannot be doubted that the court was authorized, upon the evidence introduced, to include that the plaintiff had failed to establish that the property was purchased with community funds. Even if it had been so purchased, the presumptions arising from the face of the deeds required the plaintiff to go further and show that he had not caused the conveyances to be made to the wife with the intention on his part to make a gift of the property to her. He did testify that he had no such intention. This testimony was no doubt competent, but the court was not bound to accept it as true if in its view of the circumstances these declarations of the plaintiff seemed to it to be improbable. Fanning v. Green, supra. Indeed the court would have been justified in going further, and finding that the two Euclid Crest lots were the separate property of the wife. It did not, however, do this, holding that the plaintiff had, at the time of his wife's death, a one-half interest in these as well as in the Hollywood Park lot. On the entire case, the findings were fully as favorable as the appellant had a right to demand.

[6] Several witnesses called by plaintiff testified that Mrs. Pabst had stated that she had the property fixed so that if she died first it would all belong to her husband, and if he died first it would all belong to her. We do not see that this testimony strengthened the plaintiff's case. It did not correctly represent the status which the property would have had if it had been community property. At most it evidenced Mrs. Pabst's opinion, correct or mistaken, regarding the legal consequences of the transactions between herself and her husband.

Some rulings on evidence are assigned as error, but we do not think that any of them was substantially prejudicial, if erroneous. The principal point made is that certain evidence designed to show the conduct of the husband and wife with reference to the purchase of these lots was excluded. But the material facts were fully brought out, it being made to appear that the wife handled all of the money and conducted all of the transactions without his interposition.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

(172 Cal. 332)

CITY OF OAKLAND v. PACIFIC COAST LUMBER & MILL CO. (S. F. 6250.)

(Supreme Court of California. March 16, 1916.)

1. EMINENT DOMAIN ⟸265(2)—PROCEEDINGS—COSTS—WHO TAXABLE.

In view of Const. art. 1, § 14, providing "that private property shall not be taken or damaged for public use without just compensation," the owner whose property is sought to be taken cannot be required to pay any portion of his reasonable costs necessarily incidental to the trial of the issues on his part, or any part of the costs of the condemning party, since to require him to do so would reduce the just compensation awarded by the jury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 691; Dec. Dig. ⟸265(2).]

2. EMINENT DOMAIN ⟸265(4)—PROCEEDINGS—COSTS ON APPEAL.

Const. art. 1, § 14, provides that private property shall not be taken or damaged for public use without just compensation. Code Civ. Proc. § 1255, applying specially to eminent domain proceedings, provides that costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court. *Held*, that the Code section is limited in its effect by the constitutional provision, and that the property owner cannot be required to pay the costs of the condemning party on appeal by the latter.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 693; Dec. Dig. ⟸265(4).]

3. EMINENT DOMAIN ⟸265(4)—PROCEEDINGS—COSTS ON APPEAL OF PROPERTY OWNER.

The discretion of the court to assess costs in eminent domain proceedings granted by Code Civ. Proc. § 1255, and the provision of section 1027 that the prevailing party on appeal shall be entitled to his costs in the absence of modification of the judgment, is not limited, in condemnation proceedings where the appeal is by the property owner and he is totally unsuccessful, by Const. art. 1, § 14, requiring just compensation for the taking of private property for public use, so that costs of the condemning party on appeal by the property owner may be assessed against the owner.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 693; Dec. Dig. ⟸265(4).]

4. APPEAL AND ERROR ⟸1185 — MODIFICATION OF JUDGMENT ON APPEAL—TIME.

Where the judgment of the Supreme Court is not objected to or modified within 30 days after its rendition, it becomes absolutely final, and cannot thereafter be modified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4636–4641; Dec. Dig. ⟸1185.]

5. APPEAL AND ERROR ⟸1218—REMITTITUR—RECALL.

The Supreme Court may at any time recall a remittitur which through mistake of the clerk incorrectly states the judgment rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4719; Dec. Dig. ⟸1218.]

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Condemnation proceedings by the City of Oakland against the Pacific Coast Lumber & Mill Company. Heard on motion to recall the remittitur (see 153 Pac. 705). Motion denied.

W. H. H. Hart, of San Francisco, and Snook & Church, of Oakland, for appellant. B. F. Woolner and Chas. A. Beardsley, both of Oakland, Paul C. Morf, of San Francisco, and J. J. Earle, of Oakland, for respondent.

ANGELLOTTI, C. J. This was an action in eminent domain. The jury's award of damages was not acceptable to defendant, which appealed from the judgment of the

superior court, and the order denying its motion for a new trial. On December 6, 1915, the judgment and order were affirmed by this court. The judgment by this court gave no direction as to costs. In the remittitur issued by the clerk of this court on January 6, 1916, there was inserted, as is done where there is no reversal or modification by this court of the judgment or order appealed from, and there is no direction by this court to the contrary, the words "respondent to recover costs of appeal." We have here a motion for an order recalling this remittitur, striking therefrom the words "respondent to recover costs of appeal," and inserting in lieu thereof a direction that the appellant have and recover its costs on appeal. The ground of the motion is substantially that the provision as to costs, inserted by the clerk without any special express direction by the court, is in violation of the Constitution of the state, particularly of section 14 of article 1 thereof, and in contravention of the laws of the state of California. This claim is based on the fact that the action is one for the condemnation of private property of appellant for public use, on account of which it is urged that appellant is entitled as a matter of right to its costs on appeal, notwithstanding that such appeal was held to be without merit.

[1] It is settled law in this state that, in view of the provision of section 14 of article 1 of our Constitution that "private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner," the owner whose property is thus sought to be taken cannot be required to pay any portion of his reasonable costs necessarily incidental to the trial of the issues on his part, or any part of the costs of the plaintiff; for to require him to do this would reduce the just compensation awarded by the jury by a sum equal to that paid by him for such costs. This was held to be the rule as to the costs in the superior court in the case of San Francisco v. Collins et al., 98 Cal. 259, 33 Pac. 56, where the trial court, following the provisions of section 1255 of the Code of Civil Procedure, had apportioned such costs between the parties on adverse sides. Said section 1255, specially applicable to actions in eminent domain, provided, as it still provides, that:

"Costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court."

It was held that this section was limited in its effect by the provision of section 14 of article 1 of the Constitution, hereinbefore set forth, and the order of the superior court was reversed. It is not questioned that this ruling was in accord with the decisions in other states, and its correctness has never been doubted. In San Joaquin & Kings River, etc., Co. v. Stevinson, 165 Cal. 540, 132 Pac. 1021, it was held that on a successful appeal by the party seeking to condemn, the judgment in favor of the owner being reversed, the constitutional provision precluded the recovery by the party seeking to condemn of its costs of appeal. This ruling was in accord with the overwhelming weight of authority in other jurisdictions, and we see no reason to doubt its correctness. But it does not determine the question presented on this motion, viz., whether on an appeal by the owner to an appellate court which is entirely unsuccessful the costs of the appeal may be imposed on the owner, in view of the constitutional provision referred to. This precise question has never been determined by this court, as we read the opinions.

[2] Section 1027 of the Code of Civil Procedure, one of the general provisions of our law relative to costs, provides that:

"The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court."

This provision is applicable to all appeals, except in so far as it may be inconsistent with other provisions of our law applicable to certain proceedings, and except also as it may be limited in its application to proceedings in eminent domain by the constitutional provision already referred to. We have already quoted section 1255 of the Code of Civil Procedure, specially applicable to such proceedings, the effect of which it may be conceded, in view of the decision in San Diego Land, etc., Co. v. Neale, 88 Cal. 50, 68, 25 Pac. 977, 982 (11 L. R. A. 604), is to authorize an appellate court, in its discretion, to require the condemning party, on an unsuccessful appeal by the landowner, to pay the costs of the appeal. In that case the court said:

"Whatever may be the constitutional rights of the parties, we think in this case, under section 1255, that it will be a proper exercise of discretion to require the company to pay costs."

And it was accordingly ordered, in affirming the order appealed from, that the court below tax the costs of the appeal against the condemning party. There may be some ground to doubt whether section 1255, Code of Civil Procedure, was intended to apply to costs other than those incurred in the trial court. This question does not appear to have been discussed in the case last cited. We assume, however, in view of the decision in that case, that it does authorize such action as was had therein. But in the absence of any direction by the appellate court as to costs, in the absence of any exercise of its discretionary power to make a special provision as to costs, it is plain that the general rule enunciated in section 1027, Code of Civil Procedure, that the prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, obtains, in so far as it is not limited by the constitutional provision relied on.

[3] We have, then, a statute purporting to allow the party seeking condemnation his costs on appeal, if such party prevails on the appeal, and the judgment is not modified, and the appellate court makes no special direction as to costs. Is this violative of the constitutional provision in a case like the one before us, a case where the owner appeals and his appeal is entirely unsuccessful?

In his work on Eminent Domain (3d Ed.), Mr. Lewis states the rule adopted by the overwhelming weight of authority as to the effect of such a constitutional provision in this regard, as follows:

"When the compensation has once been ascertained by a competent tribunal, at the expense of the condemning party, the law has done all for the owner which the Constitution requires. If the owner is given a right of appeal or review, it may be upon such terms as to costs as the Legislature may deem just. But, if the statute gives the condemning party a right of appeal, it cannot cast the costs upon the owner if the assessment is reduced." Section 812.

Again he says:

"Where the owner is dissatisfied with the amount of damages awarded him in the first instance, and takes an appeal or other proceeding to have a reassessment of the damages, it is usual to provide that he shall pay the costs of the appeal if he fails to secure an increase of damages, and such provisions are proper and valid." Section 815.

And as to this we find no case in which the contrary is actually decided. Directly in point on this proposition, are Kitsap Co. v. Melker, 52 Wash. 49, 100 Pac. 150; In re Board Park Com'rs, 87 Minn. 268, 91 N. W. 1111; Washburn v. Milwaukee, etc., Co., 59 Wis. 364, 18 N. W. 328; and Vice v. Eden, 113 Ky. 255, 68 S. W. 125. What Lewis says in section 815 was approvingly quoted in Los Angeles, etc., Ry. Co. v. Rumpp, 104 Cal. 20, 37 Pac. 859, in reply to the claim that a portion of section 1254, Code of Civil Procedure, was in violation of the constitutional provision relied on. It was provided in said section that:

"In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain a greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him."

It was held that the provision was valid. This decision is, in principle, directly in point. Where the appeal is by the party seeking to condemn, an entirely different situation is presented, as to which there is some conflict in the authorities, but the great weight of authority sustains the view expressed in Lewis on Eminent Domain (3d Ed.) § 815, to the effect that such a constitutional provision precludes the imposition of costs of appeal in such a case upon the landowner, whatever the outcome of the appeal. This is on the theory that no act of the landowner, who is presumptively entitled to the amount of the first award, forces the condemning party to appeal, that, if he chooses to do so, his appeal becomes merely another step in the process of ascertaining the just compensation, and that an appeal by him is a continuation of the proceedings instituted by him to ascertain the compensation payable to landowners and to acquire their land against their will. Most of the cases cited by learned counsel for appellant refer to appeals by the condemning party, and are therefore not in point here. This is true of our own case of San Joaquin, etc., Co. v. Stevinson, 165 Cal. 540, 132 Pac. 1021, particularly relied on by them. The appeal there was by the condemning party, and the decision was strictly in accord with the rule as enunciated in Lewis on Eminent Domain. In San Diego, etc., Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604, the constitutional question was not decided; the decision being based entirely on section 1255, Code of Civil Procedure. We repeat that we find no case in which it is decided that a recovery by the condemning party of his costs on an unsuccessful appeal by the landowner, when such recovery is authorized by statute, is precluded by such a constitutional provision. We are satisfied that it must be held that the contrary was practically decided by this court in Los Angeles, etc., Ry. Co. v. Rumpp, supra. We are further satisfied that the rule in this regard is correctly stated in the quotation from Lewis on Eminent Domain contained in the opinion in that case.

[4] In view of what we have said it is apparent that the provision in the remittitur "respondent to recover costs of appeal" was in accord with the law which gave to the respondent its costs.

It is suggested that, if we conclude that the claim of appellant on the matter we have discussed is untenable, we shall nevertheless award costs of appeal to it in the exercise of the discretionary power conferred on the court by section 1255, Code of Civil Procedure. This, however, we now have no power to do. The decision on the appeal was filed December 6, 1915, and became absolutely final and beyond our control 30 days thereafter, some weeks prior to the filing of the notice of motion herein. To now attempt to make any such provision would be to attempt to modify the judgment actually given on December 6, 1915.

[5] We have the power at any time to recall a remittitur that, through mistake, etc., of the clerk, does not correctly state the judgment actually rendered by the court, but we have no power after our judgment becomes final to change or modify the judgment actually given.

The motion of appellant that the remittitur be recalled is denied.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

(172 Cal. 254)

GORDON v. CADWALADER et al. (SOUTHERN PAC. R. CO., Intervener).

(Sac. 2238.)

(Supreme Court of California. March 8, 1916.)

1. STIPULATIONS ⟸14(4)—CONSTRUCTION.

Under a stipulation, in an action to quiet title, that the predecessor of the intervener began to operate trains as a common carrier in 1887 over its entire right of way, including the land in dispute, and that ever since it or the intervener had continued such use of the right of way the court was entitled to find on the issue whether the intervener or its predecessor was a common carrier, though the complaint in intervention did not formally plead that they were common carriers.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 27; Dec. Dig. ⟸14(4).]

2. PLEADING ⟸165 — INTERVENTION — PETITION—ANSWER—DENIAL.

In such action, where the answer admitted that the intervener occupied the land in dispute as a right of way, the denial therein that intervener had any right to such occupancy by reason of the facts there set up would be deemed to be controverted without pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 321, 323; Dec. Dig. ⟸165.]

3. QUIETING TITLE ⟸47(2) — PLEADING — PROOF.

In an action to quiet title, where the intervening railroad pleaded ownership in fee, it was competent for the court to find ownership of an exclusive easement for a railroad right of way, an ownership less than the fee.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 97; Dec. Dig. ⟸47(2).]

4. QUIETING TITLE ⟸43—PLEADING—VARIANCE.

In such action any variance between the intervening railroad's allegation of ownership in fee and its proof of an exclusive easement for a railroad right of way was immaterial, as defendants, admitting the fact of its occupancy and use of the property and denying only the right to such occupancy and use, were not misled thereby.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 84–87; Dec. Dig. ⟸43.]

5. EMINENT DOMAIN ⟸266—COMPENSATION —FORM OF ACTION.

Claimants of land occupied and used as a railroad right of way were limited to their action for damages, and they could not sue in ejectment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 694–696, 702, 703, 705; Dec. Dig. ⟸266.]

6. EMINENT DOMAIN ⟸284—COMPENSATION —RAILROAD RIGHT OF WAY—JUDGMENT.

A claim to damages for the taking of property for use as a right of way for a common carrier was a chose in action distinct from the interest in the land, and not necessarily going with the inheritance, and where there was neither pleading nor proof that such chose in action had been assigned or distributed to defendants, they showed no interest in the compensation paid, or which might be paid, for the taking for a right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 789, 790; Dec. Dig. ⟸284.]

Department 2. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Joseph Gordon against George Cadwalader and others, trustees of the real property of Eliza B. Cadwalader, deceased, Southern Pacific Railroad Company, intervener. Judgment for intervener, and defendants appeal. Affirmed.

G. Clark, W. A. Anderson, and Black & Clark, for appellants. Hudson Grant, of Woodland, for plaintiff (who took no part in appeal). Frank Thunen and W. M. Singer, both of San Francisco, for respondent.

MELVIN, J. Defendants appeal from so much of the judgment as determines that the Southern Pacific Railroad Company, intervener, has a right of way for railroad purposes across the land described in the complaint, and from that part of it which quiets intervener's title to said right of way without compelling compensation to defendants. This is the second appeal in this case. In the decision on the former appeal it was held that the deed from William Gordon to his son John Gordon of the property for and during his natural life, and after his death to descend to his heirs, was not subject to the rule in Shelley's Case although it was executed at a time prior to the adoption of the Codes, and when that rule was recognized in California. Gordon v. Cadwalader, 164 Cal. 509, 130 Pac. 18. Joseph Gordon, the plaintiff in the action, contended that the deed to John Gordon conveyed the fee simple. The intervener, claiming under a deed executed July 2, 1887, by John Gordon and purporting to convey the fee in the land occupied by it as a right of way to its predecessor, joined in the contention of plaintiff. Defendants asserted title under a purchase of Joseph Gordon's interest, at forced sale, during the life of John Gordon. Plaintiff and intervener were successful in the lower court, but on appeal this court held that defendants had succeeded to Joseph's undivided one-sixth interest in the land, for the reason that John Gordon's was a life estate only, and that defendants took Joseph's remainder through their predecessor, George Cadwalader. In their original answer defendants had admitted that intervener was in possession of the strip of land described in its complaint, using the same for a right of way, but had denied its right to use any portion of said premises. When the case went back for retrial an amendment to the answer was filed by permission of the court. In it defendants described in detail the strip of land occupied by intervener; alleged its value to be $900, averred that the damage due to the physical severance of the larger tract was $4,500; averred that they were entitled to one-sixth of such amounts; and prayed that the court order the intervener to pay them $900.

[1, 2] Appellants call attention to the fact that the intervener did not amend its pleadings after the first trial, and that there is no allegation and it may not be learned, they say, except by inference from intervener's pleadings, that the corporation was, or its predecessor was, a common carrier. Under the

stipulation of facts, however, it appears that the Vaca Valley & Clear Lake Railroad Company began to operate trains as a common carrier in 1887 over its entire right of way, including the strip of land here in dispute, and ever since that time it or its successor in interest, the intervener, has continued said operation and such use of the right of way and of all of it. There is a finding based upon this stipulation, and while the complaint in intervention does not formally plead that the railroad corporations were common carriers, the answer itself admits that intervener occupies the land in dispute as a right of way. The denial in the answer that the Southern Pacific Railroad Company has any right to such occupancy by reason of the facts there set up is deemed to be controverted without pleading, and, the nature of the corporation's use of the property being a part of the defense to the claim of defendants, the court was entitled to find upon that issue.

The court found that John Gordon acquired the life estate on June 3, 1872; that on July 2, 1887, he executed and delivered to the Vaca Valley & Clear Lake Railroad Company a deed, good and sufficient in form, purporting to convey to said corporation in fee simple the strip of land here in dispute; that said corporation immediately entered into possession, and either by itself or through its successor, the intervener here, has ever since occupied the said land for a part of its right of way; that G. Cadwalader (not defendant of that name, but his father), acquired Joseph Gordon's undivided one-sixth interest in remainder on September 25, 1882; that John Gordon, the life tenant, died on January 22, 1908, and that on or about March 6, 1908, defendants succeeded by mesne conveyances to, and are now the owners of, the vested undivided one-sixth interest of G. Cadwalader in and to the lands described in the complaint, subject, however, to the ownership and interest which intervener is found to possess of a right of way located upon the said strip of land. It was also found that there has never been any assignment or other transfer by G. Cadwalader, or by any person to defendants, or to any one, of any claim or right of action against intervener or its predecessor for any compensation arising from the taking or occupancy of the right of way, and that defendants have not, and never had, any claim or right of action against intervener for compensation of any sort. It was found that intervener was entitled to judgment against defendants, quieting its title to an exclusive easement for railroad purposes over the strip of land.

[3] Appellant insists that since the railroad company pleaded ownership in fee, the court went outside of the issues to find ownership of a right of way. But it was competent, under the allegation of ownership in fee, for the court to find ownership of an exclusive easement for railroad purposes—an ownership less than the fee. Tarpey v. Salt Co., 5 Utah, 205–214, 14 Pac. 338; Gillespie v. Jones, 47 Cal. 259–263.

[4] In any event, the variance between allegation and proof is immaterial because defendants were not misled thereby. Indeed as we have seen, defendants admitted the facts of intervener's occupancy and use of the property, denying only the right so to occupy and use the premises. If the facts establish an ownership less than a fee which entitles the intervener to possession and use as against defendants, they may not complain because the corporation received less than it prayed for. The pleading, therefore, was sufficient to support the finding of ownership of the easement.

Appellants admit that the Vaca Valley & Clear Lake Railroad Company had paid John Gordon, at the time of the execution of the purported deed to the right of way, the full, fair, and reasonable value of the fee of the land taken. But they say, since John Gordon could not dispose of the fee, and since the interest of their predecessor, G. Cadwalader, was not such as gave him any right to possession until the death of the tenant for life, G. Cadwalader was in position to demand, and they, as his successors in interest, are similarly entitled to claim, compensation for the taking of the land as if it had been occupied immediately after the death of John Gordon, instead of many years theretofore.

[5] Whatever rights defendants might have possessed if the deed of John Gordon had sought to confer title upon a private individual, under the facts presented by this record they are limited to their action for damages because public interests have intervened, owing to the purpose and use to which the land is dedicated. They may not sue in ejectment. Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185. This seems to be conceded because compensation for the land taken and the damage wrought is all that the Cadwaladers ask.

It is contended by respondent that, conceding G. Cadwalader's right to compensation for the taking of the strip of land growing out of his interest in the property, such right accrued when the Vaca Valley & Clear Lake Railroad Company went into possession, and that it is therefore barred by the statute of limitations. In brief, the argument in that behalf is this: Section 826 of the Civil Code provides that a remainderman may maintain an action for an injury to the inheritance, notwithstanding the fact that there is an intervening life estate. The injury resulting from the taking of the right of way by the railroad company was and is permanent. Southern Pacific R. R. Co. v. San Francisco Savings Union, 146 Cal. 290, 79 Pac. 961, 70 L. R. A. 221, 106 Am. St. Rep. 36, 2 Ann. Cas. 962; McDougald v. Railroad Co., 162 Cal. 1, 120 Pac. 766; Muller v. Railway Co., 83 Cal. 240, 23 Pac. 265. A remainder is an interest. Section 769, Civ.

Code. Any interest may be acquired for public use. Code Civ. Proc. § 1246. In the case of condemnation of lands in which there is a life estate followed by an interest in remainder, the remainderman's claim for compensation is a present one, and he is entitled to his proportionate share of the compensation awarded at the time of the taking. 10 Am. & Eng. Ency. of Law, 1194. The fact that his interest was contingent did not suspend the statute of limitations, and the rule with reference to actions of a possessory nature expressed in such cases as Pryor v. Winter, 147 Cal. 554, 82 Pac. 202, 109 Am. St. Rep. 162, is not applicable.

[6] There is much force in this position, but in view of our conclusion regarding the interest of the original Cadwalader, we need not discuss it because, whatever G. Cadwalader's interest may have been, and whether or not it entitled him to compensation, if at all, upon the taking of the property or upon the death of John Gordon, it was a chose in action distinct from his interest in the land. The interest in the real property passed first to his wife and then to his children, but there was neither pleading nor proof that the chose in action had been assigned or distributed to these defendants or to any one of them. It was entirely independent of the interest in the land itself, which passed to Eliza B. Cadwalader, and subsequently to appellants after the remainder had vested. In Sargent v. Machias, 65 Me. 591, the court was considering a situation in which, after the injury to the realty, the owner had transferred all interest in the property to another. The court said:

"The statute, giving this claim to damages, gives it to the owner. This must necessarily be understood to mean the owner at the time of the injury. No other person is or can be injured. It is from that time the claim dates and the statute of limitations begins to run. From that time the claim for damages and the land left are two separate and distinct things; a sale or conveyance of one would, in no respect, control or affect the other. In case of the decease of the owner after the claim accrues, so completely distinct are they that, while the land subject to the easement acquired descends to the heir, the damages goes to and may be recovered by the administrator as assets. Neal v. K. & L. R., 61 Me. 298, 300."

In Church v. Grand Rapids & Indiana R. R. Co., 70 Ind. 161–165, the following language was used by the court in the opinion:

"The damages alleged to have been inflicted in this case were such as inured to the benefit of the person who owned the lands when the railroad was constructed, and the simple averment that the plaintiff had afterward inherited these lands did not show him to be entitled to recover for such damages. The taking of the lands by inheritance did not necessarily carry with it any claim to damages to such lands, which had previously accrued, as has already been shown."

Taylor v. New Orleans Terminal Co., 126 La. 420, 52 South. 562, 139 Am. St. Rep. 537, is further authority for the rule that the right to recover compensation for the taking of property for use as a right of way for a common carrier is not connected with the title.

In McFadden v. Johnson, 72 Pa. 335, 13 Am. Rep. 681, plaintiff had been the owner of certain land through which a railroad had been constructed, damaging the property. Subsequently plaintiff contracted to sell the realty to one Scott, who assigned the contract to defendant Johnson. The railroad company settled with Johnson for the damage done. At the time, plaintiff was ignorant of such settlement, but, subsequently learning the facts, sued defendant for the amount paid to him by the railroad company. Defendant was successful in the trial court, but the judgment was reversed on appeal, the court saying, among other things:

"If the entry were lawful, the company acquired a right, for which the damages (so-called) are a compensation, enforceable in the statutory mode given to assess it. McClinton v. Railroad Co., 66 Pa. 409. In either case—quacunque via data—therefore, the right is personal, belonging to the owner of the land when the entry and injury took place, and could pass only by her assignment."

The same doctrine is declared substantially in Illinois Central R. R. Co. v. Lockard, 112 Ill. App. 423–426; Pomeroy v. Chicago & M. R. R. Co., 25 Wis. 641–643; Indiana, Bloomington & Western Ry. Co. v. Allen, 100 Ind. 409–414; Green v. South Bound R. R. Co., 112 Ga. 849, 38 S. E. 81; Warrell v. Railroad Co., 130 Pa. 600–609, 18 Atl. 1014; Smith v. Railway Co., 88 Tenn. 612, 613, 13 S. W. 128; Elliott on Railroads, §§ 1025, 1025a.

It follows that defendants, having failed to show any interest in the compensation paid or which might be paid for the taking of the land for intervener's right of way, are in no position to ask for a reversal of the judgment of the superior court.

The judgment accordingly is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

172 Cal. 250

BARANDUN et al. v. BARANDUN MIN. & MILL. CO. (Sac. 2281.)

(Supreme Court of California. March 8, 1916.)

1. MINES AND MINERALS ⇨54(2)—CONTRACT FOR SALE—CONDITIONS.

A contract for the sale of a mine, part of the purchase price being payable out of the proceeds, which required the purchaser to fit up the property with certain machinery and to continue development work on the property at such rate as to keep the mill in operation, and provided that abandonment of the work for a period of six months should operate as a forfeiture, and that the purchaser should make a report of its gross earnings to the vendors four times a year, required the development work to begin promptly after the purchaser took possession of the property, not after the machinery was installed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 150; Dec. Dig. ⇨ 54(2).]

2. MINES AND MINERALS ⟸54(4)—CONTRACT FOR SALE—FORFEITURE.

Even if the contract be construed as not requiring the development work to be done until the machinery was installed, a failure to install the machinery for more than six months, forfeited the contract.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 152; Dec. Dig. ⟸ 54(4).]

3. MINES AND MINERALS ⟸54(4)—CONTRACT FOR SALE—FORFEITURE.

In a contract for the sale of a mine, which required the purchaser to install certain machinery and continue development work at such rate as to keep the mill in operation, provided sufficiently valuable ore could be found with due diligence, and provided it should not be prevented from working by any unavoidable accident, and that abandonment of work for any period of six months except as above should operate as a forfeiture, the clause "except as above" did not except a delay in development resulting from failure to get the machinery installed, but only delay prevented by unavoidable accident.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 152; Dec. Dig. ⟸ 54(4).]

4. MINES AND MINERALS ⟸54(3)—CONTRACT OF SALE—REMEDIES OF VENDOR—EVIDENCE.

In a suit to quiet title against a contract for the sale of a mine, which required the purchaser to keep the property free from debts and liens, where the defendant alleged compliance with the contract in all particulars, evidence that debts were allowed to accumulate against the property is admissible, though such fact was not alleged in the complaint.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 151; Dec. Dig. ⟸ 54(3).]

5. MINES AND MINERALS ⟸ 54(3)—CONTRACT OF SALE—REMEDIES OF VENDOR—EVIDENCE.

In a suit to quiet title against a contract for the sale of a mine which required the purchaser to install certain machinery, letters written by the inventor of the machinery to the vendors are admissible to show lack of diligence by the purchaser.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 151; Dec. Dig. ⟸ 54(3).]

Department 2. Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Suit by Simon Barandun and another against the Barandun Mining & Milling Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

B. K. Collier, of Yreka, and C. A. Sheppard, of Portland, Or., for appellant. Taylor & Tebbe, of Yreka, for respondents.

MELVIN, J. Plaintiffs brought suit to quiet their title to certain real property and to have a certain contract between plaintiffs and defendant declared void. Judgment was given in favor of plaintiffs. Defendant appeals therefrom and also from an order denying its motion for a new trial.

There is no denial by defendant that the record title to the land is in plaintiffs. The contract between the parties to this suit was one with reference to the property, and it recited that a deed of conveyance had been executed by plaintiffs and placed in escrow, there to remain until the sum of $30,000 should be paid as set out in the agreement. This deed by its terms conveyed 165 acres of land in Siskiyou county to defendant. Upon the property was the "Little Maggie quartz mine." The purchase price was to be paid as follows: $1,200 on the execution of the contract, $800 in 60 days, and the balance out of 20 per cent. of the gross output of the mine. Payment was to be made in five years unless the veins and values of ore should not continue in depth, in which event defendant was to be allowed two years longer to complete the payment of the purchase price. There were certain important covenants, one to the effect that the Barandun Mining & Milling Company would "fit up the mill with ore bins, rock brakes and a complete set of Rossman's gold cleaning machinery" and would continue development work on the property at such rate as to keep the mill in operation, provided the corporation with due diligence should find ores sufficiently valuable, and provided it should not be prevented from such work by unavoidable accidents. This was immediately followed by a covenant reciting that "abandonment of work for a period of six months at any one time *except as above*, on said property," should operate as a forfeiture of the company's rights. (The italics are not in the original contract.) It was agreed that the property should be kept free from debts and liens on account of any development work or other work done by the mining company or its agent. The agreement also required the company to make a report of its gross earnings to Barandun and Rostetter four times a year. This agreement was executed November 14, 1911.

The court found among other things that defendant failed to perform work and labor on the property as agreed under the contract; that it neglected to place upon the land the improvements provided by the covenants of the agreement; that contrary to the contract the corporation permitted debts to accumulate against the property and attachments to be levied thereon; and that for more than a year defendant did not do any work or labor of any sort upon the land or any portion of it.

[1] The appellant attacks the finding that it covenanted to begin development work immediately after the execution of the contract. It is the contention of defendant that the agreement was merely to do sufficient development work to keep the mill in operation. Reading the contract as a whole, however, the court was justified in the conclusion that the parties to it contemplated development work from the time defendant took possession of the property, or at least very promptly following that event, because there were to be reports regarding the gross earnings every three months.

[2] Defendant also says that the evidence does not support the finding that no work or labor was performed in the development of the mine and that the mining company neglected to place upon the property the promised improvements specified in the contract. It is contended that the mill was first to be fitted with a complete set of Rossman's gold cleaning machinery before any development need be done, and that this machinery was ready for shipment when the lawsuit was commenced. The action was instituted about a year after the contract was signed. At that time no machinery was in place, and, even if it be conceded that the "development" was to follow the institution of Rossman's appliances, the failure to install said machinery and to have it at work upon the newly developed ore within six months was a violation of the contract.

[3] The contention that the words "except as above" in the covenant, relating to the results of abandonment of work for six months, had reference to an absence of the Rossman machinery, is without merit. The covenant does not mean that abandonment of work for six months will cause a forfeiture unless the delay shall be due to the absence of Rossman's machinery. It means that, "unless prevented by unavoidable accidents," the corporation will have no valid excuse for neglecting the work for half a year. The finding was amply supported, because it was shown that, while certain timber cutting had been done and other work had been accomplished upon the water system to be used at the mine, the promised machinery was not in place and no ore had at any time been produced from the mine by the defendant. It was in evidence that all work of every sort ceased in December, 1911.

[4] Certain evidence was introduced for the purpose of showing that defendant had violated the covenant to keep the property free from debt. Counsel for appellant say that this matter was not put in issue by the pleadings and that therefore the evidence was improperly admitted. In the answer defendant set out the contract and alleged compliance with it in all particulars. The evidence to which objection is now made was clearly responsive to the issue of full performance tendered by defendant and presumed to be denied by plaintiffs.

[5] Appellant objected to the admission in evidence of certain letters written by Rossman to one of the plaintiffs. These letters had reference to the machinery invented by Mr. Rossman and intended for the mine. Appellant's principal contention was that at all times it was diligently preparing to install this machinery, and that Mr. Rossman had accepted its orders calling for prompt action in that behalf. The court admitted the letters for the limited purpose of showing diligence or lack of it on the part of the Barandun Mining & Milling Company. For that purpose they were admissible.

Appellant's whole defense was based upon the assertion that due diligence had been practiced by it and that it had not been granted a reasonable time for the installation of the new machinery. The things done and omitted by the parties to the agreement were such that we cannot say that the trial court was not justified in deciding that appellant was in default when the suit was instituted.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(172 Cal. 440)

WOODRUFF v. COLYEAR. (L. A. 4638.)

(Supreme Court of California. March 6, 1916. On Denial of Rehearing of Motion to Dismiss, April 3, 1916.)

1. APPEAL AND ERROR ⟹2 — ORDERS APPEALABLE—STATUTE.

The amendment of the Code of Civil Procedure in 1915 (St. 1915, p. 209), abolishing the right of appeal from an order denying a new trial, is applicable in every case where such order was made subsequent to the date the amendment took effect, regardless of whether the proceeding for a new trial was initiated prior to or subsequent to such date, as it is the condition of the law at the time of the making of the order that controls.

[Ed. Note.—For other cases, see Appeal and Error, Cent.Dig. §§ 3–7, 1882, 2421; Dec.Dig. ⟹2.]

2. APPEAL AND ERROR ⟹2—NEW TRIAL — CONSTITUTIONAL PROVISIONS.

Such construction of the amendment does not deprive the party seeking a new trial of any right given by the state Constitution.

[Ed. Note.—For other cases, see Appeal and Error, Cent.Dig. §§ 3–7, 1882, 2421; Dec.Dig. ⟹2.]

In Bank. Action by Maggie L. Woodruff against Curtis C. Colyear. Judgment for plaintiff, and defendant appeals. Petition for rehearing of motion to dismiss denied.

H. O. Wackerbarth, of Los Angeles, for appellant. I. H. Harris, of Los Angeles, for respondent.

PER CURIAM. Motion to dismiss granted from the bench. No opinion.

On Denial of Rehearing of Motion to Dismiss.

ANGELLOTTI, C. J. [1] In denying the petition for a rehearing of the motion to dismiss the appeal in this case, we deem it proper to say what we have already substantially said several times from the bench, that we are satisfied it must be held that the amendment of our Code of Civil Procedure in the year 1915 (St. 1915, p. 209), abolishing the right of appeal from an order denying a new trial, is necessarily applicable in every case where such order was made subsequent to the date of the taking effect of the amendment, regardless of whether the proceeding for a new trial was initiated prior to or subsequent to such date. It is the condition of

the law at the time of the making the order that controls.

[2] We are unable to see that the effect of such a ruling can be in any case to deprive the party seeking a new trial of any right given him by the state Constitution.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; LAWLOR, J.

(172 Cal. 317)

FOSTER v. YOUNG. (L. A. 3527.)

(Supreme Court of California. March 14, 1916. Rehearing Denied April 12, 1916.)

1. APPEAL AND ERROR ⟸907(4)—REVIEW—PRESUMPTIONS — RECORD — OMISSION—EFFECT.

Where the statement or bill of exceptions was certified as not being a full, true, and correct statement, but that there was sufficient evidence to justify the verdict and sustain the findings, the assignment that the verdict of the jury and findings by the court were not supported by the evidence must be overruled, since under such certificate it will be presumed that, had all of the evidence been presented, it would appear therefrom that the evidence was so sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2911; Dec. Dig. ⟸907(4).]

2. APPEAL AND ERROR ⟸901—PRESUMPTION —AFFIRMATIVE SHOWING.

On appeal every presumption indulged is in favor of the regularity of the proceedings and judgment below, whereby it devolves on appellant to present a record affirmatively showing error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. ⟸901.]

3. APPEAL AND ERROR ⟸702(1)—RECORD—INSTRUCTIONS.

The assignment of error in giving certain instructions cannot be considered, where all the instructions given were not incorporated in the record, since there is nothing to show that the subject-matter involved in the instructions complained of was not fully covered by the instructions given and omitted from the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2936–2938; Dec. Dig. ⟸702(1).]

4. APPEAL AND ERROR ⟸706(3)—NEWLY DISCOVERED EVIDENCE—DEFECTIVE RECORD.

On appeal, the assignment that the court erred in refusing to grant a new trial for newly discovered evidence cannot be considered, where the affidavits in support of the motion were not incorporated in the record, nor any suggestion made of diminution of the record in accordance with rule 15 of the Supreme Court (119 Pac. xii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2946; Dec. Dig. ⟸706(3).]

5. EXECUTION ⟸9—JUDGMENT—NOTICE.

Where a cause was tried partly to a jury and partly to the court, and after a verdict for plaintiff the court did not make its findings for several months, and upon filing its findings and judgment in favor of plaintiff an execution was issued and a sale had thereunder, such execution and sale were not invalid on the ground that defendant was not notified of the court's decision and the entry of judgment, since such notice was not a condition precedent to the validity of the execution and sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 21–24; Dec. Dig. ⟸9.]

6. ATTORNEY AND CLIENT ⟸167(4)—ATTORNEY'S FEE—FINDINGS—CONSTRUCTION.

In an action by an attorney to recover a fee which he alleged was to be the agreed amount of 20 per cent. of the value of certain stock recovered, the jury found, in answer to an interrogatory, that defendant only agreed to pay a reasonable fee which was to be fixed by him, To the interrogatory, "Did the defendant in fixing the fee * * * act in good faith and upon * * * consideration and on advice * * *?" the jury answered, "No." *Held*, that such answer did not mean that defendant in fixing the fee did not act in good faith, in that he did not give the matter consideration or take advice, but was a general finding that defendant acted in bad faith.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. ⟸167(4).]

7. ATTORNEY AND CLIENT ⟸144—FIXING FEE—REASONABLENESS.

Where, in an attorney's action to recover a fee, the jury found that the contract between the parties left it to defendant to determine what would be a reasonable fee, and defendant in his answer alleged that the plaintiff had agreed defendant should only be required to pay a reasonable fee, and that the amount of such fee and what would be a reasonable fee would be left entirely to defendant, the power to fix such compensation was not plenary, but gave defendant power only to fix a reasonable fee in good faith, justifying a verdict for plaintiff as on a quantum meruit, where the jury found that in naming the fee defendant had, in bad faith, named an unreasonable sum.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333; Dec. Dig. ⟸144.]

8. ATTORNEY AND CLIENT ⟸165—FEE—ACTION—PLEADING—WHEN NOT NECESSARY.

It being the duty of the client to fix a reasonable sum in good faith under such allegation of the answer, a verdict for plaintiff as on a quantum meruit because of the bad faith of the client in fixing the fee was not invalid on the ground that, having failed to allege fraud, plaintiff could not recover therefor, since under the presumed denial by the plaintiff of the new matter set up in the answer, bad faith could be established.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 365–367; Dec. Dig. ⟸165.]

In Bank. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by E. L. Foster against C. S. Young. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appealed to the District Court of Appeals. Hearing before Supreme Court ordered on petition. Judgment and order affirmed.

James Donovan and Anderson & Anderson, all of Los Angeles, for appellant. Davis, Kemp & Post, of Los Angeles, for respondent.

MELVIN, J. These appeals were heard by the District Court of Appeal of the Second Appellate District. Upon petition a hearing before this court was ordered for the reason that, while a majority of the justices of this

court fully agreed with the learned District Court of Appeal in the discussion by that court of the denial of defendant's motion for a new trial, some doubt was entertained regarding the conclusions reached in the decision of the appeal from the judgment. After a hearing before this court and further study of the case, we still agree with our Brethren of the District Court upon the matter of the appeal from the order denying the motion for a new trial, and we hereby adopt the following part of the opinion prepared by Mr. Justice Victor E. Shaw:

"This was an action by plaintiff, who is an attorney at law, to recover for professional services rendered defendant in and about the prosecution of a certain action numbered 62590 in the superior court of Los Angeles county, entitled 'C. S. Young, Plaintiff, v. T. Spellacy, Defendant.' It is alleged that a judgment was obtained in said action on behalf of Young for the recovery from Spellacy of certain oil stocks of the value of $175,000. The complaint is in two counts; the first alleging the existence of a contract pursuant to which the services were rendered, whereby defendant agreed to pay plaintiff 20 per cent. of the value of said stock so recovered. The second count is upon a quantum meruit to recover the reasonable value of said services in the like sum of $35,000. The answer admitted the rendition of the services, but denied the making of the contract alleged in the complaint, and denied that the reasonable value of the services was in excess of the sum of $1,500. As a separate defense, defendant alleged that plaintiff was employed under an agreement whereby the latter was to receive for his services a reasonable compensation, and that it was agreed that as to what sum should constitute a reasonable fee should be and was, by the terms of said agreement, left to the sole determination of defendant; that defendant specified and fixed the sum of $1,500 as constituting a reasonable fee to be paid plaintiff for his services, and prior to the commencement of this action offered to pay said sum to plaintiff. Defendant also set up several counterclaims in defense of any recovery by plaintiff. The case came on for trial on March 29, 1911, at which time, pursuant to a stipulation filed, a jury was called, to which was submitted the issues as to what constituted a reasonable compensation for plaintiff's services, whether or not it was, as alleged by defendant, agreed that plaintiff's fee should be fixed and determined by defendant, and whether or not, as alleged by plaintiff, there was a contract made whereby defendant agreed to pay him for his services 20 per cent. of the value of the property recovered in the action of Young v. Spellacy; it being agreed the remaining issues should be tried by the court without a jury, and judgment rendered upon the verdict and findings so made by the court. Thereafter the issues, as stipulated, were submitted to a jury, which brought in a general verdict in favor of plaintiff in the sum of $8,750. The issues submitted to the court were tried November 3, 1911, and on March 18, 1912, the court filed its findings of fact upon the issues so tried by it, and upon which, and the verdict so rendered by the jury, the court gave judgment for plaintiff in the sum of $7,338. Defendant appeals from an order of court denying his motion for a new trial.

[1, 2] "As grounds for a reversal of the order denying defendant's motion for a new trial, appellant insists the evidence is insufficient to justify either the verdict of the jury or the findings made by the court. The condition of the record, however, is such as to preclude this court from reviewing these alleged errors, the reason therefor being that the trial judge, in settling and certifying the statement or bill of exceptions presented in support of the motion for a new trial, embodied therein a statement to the effect that the trial of the issues submitted to the jury on March 29, 1911, occupied six days and the trial of the issues submitted to the court in November, 1911, occupied more than two days; that the proposed statement and amendments thereto, without a transcript of the testimony other than disconnected extracts therefrom (defendant declining to have the same transcribed), was presented to him October 7, 1912; that by reason of the lapse of time and number of witnesses testifying at the trial, the court, without such transcript, was unable to determine upon a full and correct statement of the case, and hence the statement or bill of exceptions is not a full, true, and correct statement. The certificate closes with the following: 'There was, however, and the court so certifies, sufficient evidence to justify the verdict of the jury and sustain all the findings of the court. The foregoing bill of exceptions, as modified by the statement in this certificate, is settled and allowed.' Confronted by this certificate and the statements contained therein, we must presume, since the record does not contain all the evidence, that had all thereof been presented it would, as stated by the court, appear therefrom that the evidence was sufficient to justify both the verdict and findings. This court cannot indulge in the presumption that error was committed; indeed, every presumption indulged is in favor of the regularity of the proceedings and judgment. Hence it devolves upon an appellant to present a record which affirmatively shows the existence of the alleged error.

[3] "Neither can we consider the alleged error predicated upon the giving to the jury certain isolated instructions, since the instructions given are not incorporated in the record. Manifestly, an excerpt from an instruction might, as an abstract proposition of law, appear erroneous, but considered as a whole constitute a correct statement of the law. So as to the complaint that the court erred in refusing to give requested instructions, there is nothing of record to show that the subject thereof was not fully covered by the instructions given, and which are omitted from the transcript.

[4] "For like reasons we cannot consider the alleged error of the court in refusing to grant defendant a new trial upon the ground of newly discovered evidence. This evidence, according to the statement contained in counsel's brief, consisted of a stipulation filed in the action, whereby it is claimed plaintiff waived the failure of defendant to make demand for 10,548 shares of oil stock belonging to defendant, and which it was alleged plaintiff had converted. Such conversion thereof constituted the subject of a counterclaim by defendant. Appellant states in his brief that two affidavits were presented to the trial court at the hearing of the motion in support thereof. They are not, however, incorporated in the record; nor was any suggestion made of diminution of the record in accordance with rule 25 (119 Pac. xii) of the Supreme Court. It appears that had this stipulation been presented, then under the finding made by the court, to the effect that the 10,548 shares of stock (valued, according to plaintiff's testimony, at 50 cents per share) were held by plaintiff for defendant, to be delivered to him upon payment of $1, defendant would have been entitled, upon making the payment of $1, to a counterclaim in the sum of $5,274.

[5] "The record discloses an appeal from an order of court denying defendant's motion to vacate, set aside, and annul a sale of 19,400 shares of the capital stock of the Mascot Oil Company, made upon an execution issued upon the judgment herein prior to the appeal therefrom. It appears from the record that, although the trial was completed in November, 1911, the court did

not make and file its findings until March 18, 1912, on which day it rendered judgment, upon which, after entry thereof on March 25th, an execution was issued, and on March 27, 1912, as shown by his return, was delivered to the sheriff, pursuant to which he certifies that he did, on September 14, 1912, attach the personal property described in certificate No. 538 for 19,400 shares of stock in the Mascot Oil Company, and sold the same in one separate parcel for the sum of $1,940. The motion as made to vacate and set aside this sale was not based upon any claim of invalidity as to the acts of the sheriff in selling the stock, but upon the sole ground that notice of the making of said findings of fact, and the rendition and entry of the judgment upon which said execution issued, was never at any time served upon defendant, and that he had no notice thereof. The contention of appellant, as shown by the ground upon which his motion was made, is that no execution could be issued, no levy thereof made, and no sale of property made thereunder by the sheriff, in the absence of serving notice upon him or his attorney of the making of said findings and the rendition of judgment. We do not so understand the law. While notice is necessary to start the time running within which an appeal may be taken from a judgment or order, we know of no code provision existing at the time this trial was had, or any decision, requiring that a defendant shall be given notice of the rendition or entry of judgment or of the making and filing of findings, as a condition precedent to the issuance of an execution and a sale of property thereunder. Section 681, Code of Civil Procedure, provides that, 'The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.' The vitality of a judgment and the right to enforce the same by execution do not depend upon notice thereof being given to the adverse side. See Hastings v. Cunningham, 39 Cal. 144; Baum v. Roper, 1 Cal. App. 436, 82 Pac. 390; Los Angeles County Bank v. Raynor, 61 Cal. 145. Conceding that facts may exist which, upon being presented in a proper way, might justify the court in annulling the sale, no ground therefor is specified in the motion made by defendant."

In analyzing the appeal from the judgment we shall first examine the special interrogatories submitted to and answered by the jury. Regarding the agreement alleged in the first count of the complaint that Foster was to receive 20 per cent. of any recovery, the jurors found that there was no such contract. The second interrogatory was as follows:

"If you answer the first interrogatory in the negative, did the plaintiff herein, prior to the commencement of the said action of Young v. Spellacy, No. 26,590, agree to only charge a reasonable fee, and that what would be a reasonable fee and the amount of said fee should be left to the defendant herein, C. S. Young? Answer: Yes."

By their answer to the third interrogatory the jurors found that plaintiff's offer was accepted by Young, and that both parties acted upon it. The fourth and fifth interrogatories with the answers given by the jury were as follows:

"If you answer the last two questions in the affirmative, did the said defendant here, C. S. Young, in fixing the plaintiff's fee at $1,500, act in good faith, and upon and after full consideration, and on advice of those persons whom he had a right to believe and expect were qualified to advise him in said matter? Answer: No.

"If you answer either question No. II or No. III or No. IV in the negative, state what would be the reasonable value of the services of the plaintiff. Answer: $8,750.00."

[6] The learned District Court of Appeal interpreted the fourth question and the answer thereto to mean that defendant in fixing plaintiff's fee at $1,500 did not act in good faith, in that he did not seek the counsel of qualified advisers, and, interpreting the contract found by the answer to the second interrogatory as one not requiring that defendant should act upon such advice, held that plaintiff was bound by the offer of $1,500, and ordered the reduction of the amount of the judgment accordingly to $88, the difference between $1,500 and $1,412, the sum which the court found that plaintiff owed the defendant on his counterclaim. We are unable to agree with this interpretation of the jury's finding. If we concede that the latter part of the interrogatory contains matter not pertinent to the issues involved, the fact still remains that the question is compound. It contains really three parts: (1) Did the defendant act in good faith in fixing the fee at $1,500? (2) Did he act after full consideration? (3) Did he act upon proper advice? These parts are connected by the conjunction "and"; therefore each is of equal rank. Answers to the two last parts may be of no moment, but the general answer to the whole question is equivalent to a finding by the jury that in fixing the fee at $1,500 the defendant acted in bad faith.

[7] It is argued that the power to name the compensation was plenary, and that the matter of good or bad faith was not involved. In other words, that the defendant was empowered, under the contract, arbitrarily to name a fee without any reference to the bona fides. But the second finding of the jury establishes a contract that the charge should be reasonable. Even if the language of that finding might be interpreted as compelling reasonable conduct on the part of the attorney only, the pleadings on which the issue was submitted to the jury forbid such interpretation. The allegation of defendant (which under our system of pleading was deemed to be denied without written replication) was substantially as follows:

"Said plaintiff further at said time agreed that, if this defendant should employ plaintiff to bring suit against the said Spellacy, and if said plaintiff should bring such action against said Spellacy, he, the said plaintiff herein, would only require this defendant to pay him, plaintiff herein, a reasonable fee, and that the amount of that fee, and what would be a reasonable fee, would be left entirely with this defendant to determine, and that the said plaintiff herein, before and at the time of accepting the said employment from this defendant, and before bringing the said suit, promised and agreed to leave the amount of his said fee to be fixed by this defendant, and this defendant alleges that after carefully considering the matter, and being advised in the premises, he fixed the sum of $1,-

500 as a reasonable fee and compensation to the said plaintiff, and as a full and reasonable payment for all the work performed by the said plaintiff."

Admittedly, therefore, the defendant was bound to fix a reasonable fee. He named an unreasonable sum according to the special verdict of the jury, and in the state of the record we are bound to assume that the finding was amply supported by the evidence.

[8] Counsel for defendant argue that there was no pleading of fraud or bad faith—that fraud must be alleged and must be clearly established before it is of any avail. Whatever may be the rule in other states, this court is committed to the doctrine that bad faith may be established in an action under the presumed denial of new matter set up by way of answer or counterclaim. In Williams v. Dennison, 94 Cal. 540, 29 Pac. 946, the action was for money had and received. The statute of limitations was pleaded in the answer, and the court held that any proper evidence was admissible to meet and overcome the defense, including proof of fraud on the part of the defendant which would take the case out of the statute of limitations. See, also, Code Civ. Proc. § 462; Curtiss v. Sprague, 49 Cal. 301; Colton, etc., Co. v. Raynor, 57 Cal. 588; Sterling v. Smith, 97 Cal. 346, 32 Pac. 320; Moore v. Copp, 119 Cal. 433, 51 Pac. 630; Brooks v. Johnson, 122 Cal. 570, 55 Pac. 423; Clarke v. Fast, 128 Cal. 425, 61 Pac. 72; Lauricella v. Lauricella, 161 Cal. 70, 118 Pac. 430. It is not necessary to consult the decisions of other states upon this matter. Those of our own state are sufficient.

Both litigants cite Tennant v. Fawcett, 94 Tex. 112, 58 S. W. 824; defendant in support of the rule that a pleading of fraud is necessary even under a statute similar to our section 462, Code of Civil Procedure, and plaintiff upon the contention that good faith is an element to be considered in contracts of this sort. Upon the first matter our decisions are sufficient. Regarding the second point, we think it clear that the doctrine of that case, as well as that of Butler v. Winona Mill Co., 28 Minn. 205, 9 N. W. 697, 41 Am. Rep. 277, Walsh v. Board of Trustees, 17 Mont. 413, 43 Pac. 180, Taylor v. Brewer, 1 M. & S. 290, and others of like nature is that, as Lord Ellenborough said in the opinion in the case last cited, one may throw himself "upon the mercy of those with whom he has contracted." But even when such a contract has been made, the person having the power to fix the fee may not act fraudulently. Here the reasonableness of the proffered compensation was an element of the contract as pleaded and proved and found by the jury.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.

172 Cal. 285

CHAMBERLAIN v. AUGUSTINE et al.

(L. A. 3629.)

(Supreme Court of California. March 11, 1916.)

1. CONTRACTS ⇐117(1) — SALE OF STOCK — "SALE OF GOOD WILL"—EFFECT.

A sale of corporation stock does not constitute a "sale of the good will" of the corporation within Civ. Code, § 1674, permitting an agreement by one selling the good will of his business not to engage in the same locality for a given period.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554, 557, 569; Dec. Dig. ⇐ 117(1).]

2. CONTRACTS ⇐117(2)—CONTRACTS IN "RESTRAINT OF TRADE"—WHAT CONSTITUTES.

Under contract providing that the seller of corporation stock would forfeit the sum of $5,000 if he engaged in the same business in the same locality, the provision for liquidated damages was sufficient to constitute a "restraint of trade" prohibited by Civ. Code, § 1673.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 555, 556, 568; Dec. Dig. ⇐ 117(2).

For other definitions, see Words and Phrases, First and Second Series, Restraint of Trade.]

3. CONTRACTS ⇐117(2)—CONTRACTS IN "RESTRAINT OF TRADE"—WHAT CONSTITUTES.

That a contract to forfeit a certain sum of money, should the seller of corporation stock engage in the same business as the corporation in the same locality, was only a partial restraint of trade, would not remove it from the prohibition of Civ. Code, § 1673, prohibiting contracts in restraint of trade.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 555, 556, 568; Dec. Dig. ⇐ 117(2).]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Lee Chamberlain against U. G. Augustine and another. From an order sustaining demurrers to the complaint, plaintiff appeals. Affirmed.

Stuart M. Salisbury, of Los Angeles, for appellant. John H. Foley and G. H. P. Shaw, both of Los Angeles, for respondents.

SHAW, J. This is an action to recover of the defendant Augustine the sum of $5,000 as liquidated damages for the breach of an agreement. The defendant Buchanan is made a party defendant because of his refusal to join as a party plaintiff. The defendants filed separate demurrers to the complaint which were sustained by the court below, and, upon plaintiff's failure and refusal to amend his complaint, the court entered judgment in favor of the defendants. The plaintiff appeals from the judgment.

The defendant Augustine sold 60 shares of stock in the Los Angeles Foundry Company to Chamberlain and Buchanan at the price of $5,000. The contract of sale recited that this was more than the purchasers considered it would be worth, except for the agreement of Augustine embraced in the contract and presently to be stated. It also recited that Augustine had for a long time devoted

his energies to the establishment and development of the business of said corporation and was familiar with it in all its details and was experienced therein, and that he desired to withdraw therefrom. The agreement of Augustine above referred to was as follows:

"Said Augustine for the consideration aforesaid does hereby covenant and agree with said Chamberlain and Buchanan that in case he at any time within a period of three years from date hereof, while said corporation, its successors or assigns, shall continue in the business now and heretofore conducted by it, be or become either directly or indirectly interested in any business either as principal, or as agent, employé or otherwise, of any person or persons, corporation or corporations, or a stockholder of any corporation engaged in or carrying on any business, carried on or in any manner conducted in the state of California, Oregon or Washington, similar to that now or heretofore conducted by said corporation, he will pay to said Chamberlain and Buchanan the sum of $5,000.00 as liquidated damages."

There was a stipulation at the end of said contract that said Augustine might engage in the occupation as molder or laborer in several named corporations without violating the above contract.

The complaint alleges that during the months from September, 1911, to and including January, 1912, the defendant Augustine became financially interested in and assumed the control and charge of the Pacific Sashweight Foundry in the city of Los Angeles, and that the business of the said Pacific Sashweight Foundry, was similar to, independent of, and in competition with the business of the Los Angeles Foundry Company; that the defendant Augustine on or about October 1, 1912, became interested as a stockholder and in control and charge of the business carried on by the U. G. Augustine Foundry & Manufacturing Company which conducted a business similar to, independent of, and in competition with the Los Angeles Foundry Company, in the state of California.

The court below in sustaining the demurrers to the complaint held that said contract was in violation of section 1673 of the Civil Code, and therefore void and unenforceable. The correctness of the court's construction of the contract is the question now presented for consideration.

[1] Section 1673 of the Civil Code provides:

"Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void."

Section 1674 makes an exception in favor of one who sells the good will of a business whereby he may agree not to carry on a similar business within a specified county or city, or a part thereof, while the buyer, or his assigns, carries on a like business therein. Section 1675 refers to agreements between partners in relation to a dissolution of the partnership, and it has no application to this case.

It is not claimed, nor would such a claim be tenable, that the sale of the stock of the Los Angeles Foundry Company constituted a sale of the good will of the corporation so as to bring it within the purview of section 1674 of the Civil Code. See Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 57 Pac. 468, 46 L. R. A. 142, 71 Am. St. Rep. 94.

[2] It will be observed that defendant Augustine's covenant with respect to liquidated damages is not expressly cast in negative form, and because of this it is insisted by appellant that it is not a contract restraining Augustine from exercising a lawful business, but is merely an agreement that if he did engage in such business he would pay the sum of $5,000 as liquidated damages, and that the contract does not, therefore, violate the Code provision. In form, the agreement is as appellant claims. But none the less it is a contract which operates to restrain Augustine from carrying on the business mentioned. It imposes upon him a liability in the sum of $5,000 if he does engage in such business. If the contract is valid, he is not as free to do so as he would have been if he were not bound by it. To the extent that the necessity of paying $5,000 deters him from engaging therein, he would be restrained. This is clearly a restraint of a substantial character and the form in which it is cast does not make it less a restraint. As stated by the court below:

"The circumstances surrounding the transaction, the recitals in the contract, and the evident purpose thereof, the fact that the $5,000 was to be paid as liquidated damages—the recovery of which is applicable only to breaches of contract—indicate that the parties understood that Augustine was covenanting not to engage, in the state of California, Oregon, or Washington, in the business referred to in the covenant."

The covenant in question clearly operates to restrain the defendant from "exercising a lawful profession, trade or business," and as it does not fall within the exceptions given in section 1673, it is, therefore, void.

[3] Appellant insists that, even if there was an agreement not to engage in business, such covenant would be valid because, by its terms, defendant was permitted to act as laborer or molder in various foundries named in the contract and because it applied only to business carried on in the states of California, Washington, or Oregon, and that this constituted only a partial restraint. The obvious answer to this is the very language of section 1673 providing that:

"Every contract by which any one is restrained from exercising a lawful business * * * otherwise than is provided by the next two sections is to that extent void."

The statute makes no exception in favor of contracts only in partial restraint of trade.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 261

ELLIOTT et ux. v. FRANKFORT MARINE, ACCIDENT & PLATE GLASS INS. CO. OF FRANKFORT-ON-THE-MAIN, GERMANY. (L. A. 3635.)

(Supreme Court of California. March 8, 1916.)

1. INSURANCE ⟸378(3)—ESTOPPEL TO FORFEIT POLICY—KNOWLEDGE OF AGENT—PROVISIONS OF POLICY.

Under an accident insurance policy reciting that no agent may waive or alter its terms, the holder of the policy or beneficiary cannot vary the policy by proof of oral waivers, or claim estoppel because of the knowledge of the soliciting agent of the falsity of the warranties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 993; Dec. Dig. ⟸378(3).]

2. INSURANCE ⟸296—FORFEITURE FOR MISREPRESENTATION — OCCUPATION — "CAPITALIST."

A professional gambler who permitted the agent of an accident insurance company to represent his business as that of capitalist made a a material misrepresentation which gave the company the right to forfeit the policy, since, whether the term "capitalist" meant merely a person of large wealth or one having an income from investments, it involves an exclusive dependence upon accumulated property, and a gambler was not as good a risk as a capitalist would be.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 674; Dec. Dig. ⟸296.]

3. INSURANCE ⟸297—FORFEITURE FOR MISREPRESENTATION—HABITS.

A representation that an applicant for accident insurance who was living with a woman other than his wife was of good habits is a material misrepresentation, if for no other reason than that he was subjected to danger of vengeance from his wife or her kinsmen.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 676; Dec. Dig. ⟸297.]

Department 2. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Andrew Elliott and wife against the Frankfort Marine, Accident & Plate Glass Insurance Company of Frankfort-on-the-Main, Germany. Judgment for the plaintiffs, and defendant appeals. Reversed.

Haas & Dunnigan, Gray, Barker & Bowen, and Flint, Gray & Barker, all of Los Angeles, for appellant. Frank C. Hill and George S. Hupp, both of Los Angeles, for respondents.

MELVIN, J. Plaintiff Nellie Elliott, mother of C. A. Jewell, now deceased, was beneficiary of a policy of life insurance issued to said Jewell. She and her husband brought action, and judgment was given against the company for $5,000, the amount of the policy. Defendant appeals from the judgment and from an order denying its motion for a new trial. The term of the policy was from May 31, 1910, to May 31, 1911. The insured was killed by accident in Los Angeles on December 16, 1910, while driving an automobile. The insurance company defended against the claim of plaintiffs upon the grounds of fraud, misrepresentation, concealment, and breach of warranties on the part of the insured.

By the terms of the policy it was issued, not only in consideration of the premium, but also in consideration of the warranties indorsed on the contract and made a part thereof, which statements, it was provided, the insured made and warranted to be true by the acceptance of the policy. The agreements, warranties, and conditions contained in the policy were by its terms to be considered conditions precedent.

The consent of Jewell to insure his life with the defendant was obtained by one Paul Rowan, an employé of R. A. Rowan & Co., a corporation representing defendant in Los Angeles. Jewell's written application was forwarded to San Francisco, and the policy was issued from defendant's office in that city. This, as the court found, was in accordance with the power of R. A. Rowan & Co. The authority to issue policies was vested in the general agent Mr. Duncan in San Francisco. The blank used in preparing Mr. Jewell's application seems to have been designed for a report upon a person previously insured, rather than for an original request for insurance, but it was properly treated by the court as an "application for insurance." Evidently it was so understood by the signer. It contained this language:

"The following is an exact copy of the schedule of warranties in the policy delivered to the assured. It includes all entries made in said schedule and nothing more."

Then followed the name and height of the applicant, his residence, given as 239 West Forty-Ninth street, Los Angeles, the name of the beneficiary, his mother, and her residence, stated to be the same as his own. It is not necessary to specify all of the entries. For the purposes of this opinion we need quote only the fourth, fifth, sixth, and eleventh, which were as follows:

"(4) I am with capitalist (name of firm or corporation) Whose business is your own Located at Los Angeles street, city of Cal., state of Cal.

"(5) My occupation is that of a capitalist and the duties of my occupation are fully described as follows:

"(6) My income per week exceeds the gross amount of weekly indemnity under all accident or health policies carried by me. Yes. * * *

"(11) My habits of life are correct and temperate, and I am in sound condition mentally and physically, except as herein stated. Good all the time."

The closing part of this document was as follows:

"I recommend the risk, and state the schedule of warranties in the policy was filled out precisely as above, and the correct amounts stated in the policy, which was issued to the assured on the 31st day of May, 1910.

"General Agent, at R. A. Rowan Co.

"Subagent or Broker, at

"Paul Rowan.

"C. A. Jewell."

The court found that the word "capitalist" was inserted by Mr. Rowan without consulting Mr. Jewell, and that:

"The said Carl Jewell then said: 'Hold on, what do you mean by capitalist?' And Paul Rowan then said: 'Mr. Jewell, a man that has $20,000 to lend, that owns an automobile, and wears large diamonds, and dresses well, and lives around the best of hotels, and travels around Southern California, I would call a capitalist. A capitalist is a man who has money to lend, drives around in automobiles, lives in luxury, and spends money the way you do. I do not see how I could put it any other way.' C. A. Jewell then said: 'How much money does a capitalist have to have?' Rowan then said: 'Some of them have $500,000 or better, and others I know only have a few hundred dollars and are still called capitalists, and I cannot see why you should not go under that heading.' And thereupon Mr. Jewell said: 'All right, let her ride.'"

Similarly, as the court found, the words "Good all the time" were written by Mr. Rowan, whereupon the following conversation occurred:

"Said Jewell said: 'I do not know how to answer that question.' And the said Rowan said: 'That is the customary way that I answer those questions. I know you are not a drinking man.'"

The applicant then signed the paper and another blank which was not filled in. This latter writing was afterwards prepared by Mr. Rowan and sent to the general agent at San Francisco, but the two documents did not exactly correspond. The entries in the second paper with reference to occupation were made to read as follows:

"I am with capitalist (name of firm or corporation) Whose business is my own—loaning money. Located at Los Angeles street, city of Los Angeles, state of California.

"(5) My occupation is that of a capitalist and the duties of my occupation are fully described as follows: Taking up mortgages. Loaning money on real estate, here in Los Angeles and San Francisco."

The statement regarding habits was as follows:

"My habits of life are correct and temperate, and I am in sound condition mentally and physically, except as herein stated are always good as can be."

In preparing the policy the defendant's representative in San Francisco inserted the warranties identical with the representations contained in the paper sent to him—that is, the one which had been filled in by Mr. Rowan after it had been signed by the applicant—and the policy was received, accepted, and retained by Mr. Jewell. The policy contained the following clauses under the caption "General Agreements":

"No claim shall be valid under this policy if the claimant has concealed or misrepresented any material fact or circumstance concerning such claim, nor in case of any fraud or false swearing by the claimant touching any matter relating to his claim or insurance."

"If any of the statements made in the schedule of warranties indorsed hereon are untrue, this policy shall be void."

"The terms of this policy cannot be waived or altered by any agent or representative, and no modification or alteration of any of its provisions shall be valid unless expressed in a written indorsement hereon signed by the United States manager."

The defense was that Jewell had made false warranties in the following particulars: That he was not a capitalist; that he never was engaged in taking up mortgages on real estate; that his only business was gambling, making books, and selling chances in various games and "sporting events"; that his income was not as represented; that his habits of life were lewd and dissolute; and that his residence was not as represented, but that, although a married man, he lived in open and notorious fashion with a woman not his wife at a house in Ocean Park.

The court found that the subagent, Paul Rowan, had known well and had been on terms of intimacy with Jewell during the year prior to May 31, 1910; that Rowan had seen large sums of money in Jewell's possession, and had been informed by the latter that he desired to loan $20,000 upon a first mortgage. There are other elaborate findings with reference to the possession by Jewell of other evidences of wealth and of his habit of spending large sums on his personal expenses of living. Another finding which is in accord with a stipulation of fact by plaintiffs' counsel was as follows:

"That on said 31st day of May, 1910, and for a considerable time prior thereto, the said Paul Rowan knew, and the court finds it to be a fact, that the said C. A. Jewell was a man who was in the habit of making bets on various events, and that the said Jewell frequently had illicit sexual relations with women other than his wife, and that upon one occasion the said Jewell introduced to said Rowan as his wife a woman who was not in fact Jewell's wife, and that said Rowan knew before taking the application herein referred to that said woman was not the wife of said Jewell."

The court found Jewell's residence to have been at his mother's home as stated in the application, that his income exceeded $25 a week as therein set forth, and that the other representations were not made for the purpose of securing the policy. There were conclusions of law that Paul Rowan was the servant of R. A. Rowan & Co., the agents of defendant for soliciting applications, forwarding them to San Francisco; receiving the policies issued thereon by the general agent D. Duncan; delivering said policies; and collecting the premiums. There was also a conclusion of law to the effect that Rowan acted as the agent of the defendant company; that his knowledge was the company's; and that because of said knowledge the defendant was estopped from denying the truth of the warranties and representations made by Jewell in his application for insurance regarding his occupation and his habits of life.

Appellant contends that: (1) A mere soliciting agent may not bind his principal in such manner as to work an estoppel; and

that (2) the false representations of and suppressions of fact by Jewell were material.

[1] That such an agent as Rowen admittedly was—a mere soliciting agent—may not bind the insuring corporation in such manner as to estop it from defending upon the ground that the representations in the application are false and fraudulent is well settled in California. Madsen v. Maryland Casualty Co., 168 Cal. 204–206, 142 Pac. 51; Sharman v. Continental Insurance Co., 167 Cal. 117–125, 138 Pac. 708, 52 L. R. A. (N. S.) 670; Iverson v. Metropolitan Life Insurance Co., 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866; Fidelity & Casualty Company v. Fresno Flume & Irrigation Company, 161 Cal. 466–470, 119 Pac. 646, 37 L. R. A. (N. S.) 322. While it is true that a company issuing insurance may in some cases be bound by the representations of an ostensible agent, the principle announced by the authorities cited above is that where, as in this case, the policy recites that no agent may waive or alter its terms, the holder of the policy may not vary his contract, nor may his beneficiary do so, by proof or oral waivers by the soliciting agent. We must conclude, therefore, that the insurance company may take advantage of any false or fraudulent warranties made by the insured. As we have seen, several alleged misrepresentations and suppressions of the truth material to this controversy are pleaded by the answer, and we will now proceed to examine some of them.

[2] Most important of these was the false representation that he was a capitalist. Whether we take the application which he signed after it was filled or the one to which he subscribed his name and upon which Rowan made his interpretation of the meaning of the answers, the fact remains that he deliberately accepted the designation which Rowan furnished. It is not necessary to enter upon any refined discussion of the shades of meaning of the word "capitalist." Respondent insists upon a definition which merely involves possession of large wealth, and appellant upon one which signifies a person having an income from his investments. It makes no difference which definition we adopt. Either involves an exclusive dependence upon accumulated property, and the evidence in this case, some of it resting upon stipulation, is that the young man's occupation in life was that of a professional gambler. It is not material that Rowan suggested the style of "capitalist" in lieu of the shorter and less reputable one of "gambler." Jewell knew that the word was an euphemism behind which lurked his real business. Whether he had large sums of money from his mistress or from his gambling operations or from other sources and was in that sense a "capitalist" the potent fact remains that he failed to announce his principal occupation. The insurance company was entitled to a full disclosure upon this matter. It was highly material that the truth should be known; for it takes no expert in vital statistics to convince a court that a professional gambler who frequents pool rooms and like places and himself becomes a commissioner for bets upon horse races, prize fights, and similar events is not so good a "risk" as one who depends for support upon the proceeds or the principal of an ample fortune.

[3] It is argued that, although admittedly Jewell was morally not altogether upright, he was at least not a user of liquor or narcotics, and that his representation touching his good habits referred to his temperance in these particulars. Undoubtedly the purpose of eliciting information regarding the habits of life of an applicant for insurance is not a moral but a very practical one. The insurer does not desire policy holders whose habits tend to weaken their constitutions or to expose them to danger of death by violence. Courts should not and do not hold applicants to a lofty standard of morality in qualifying for life insurance. But here we are dealing with the case of an applicant whose promiscuity was admitted and whose adulterous relations with a woman whom he introduced as his wife were found by the court pursuant to solemn stipulation of counsel for plaintiff herein. Such a person is not a desirable subject of insurance from the standpoint of a company like the defendant if for no other reason because he may become at any time the subject of the vengeance of his deserted wife or her insulted kinsmen.

It is clear, therefore, that the applicant for insurance was guilty both of misrepresentation and of concealment regarding material facts, that is such facts, knowledge, or ignorance of which would materially influence the judgment of the insurer in making the contract or fixing the premium.

Our conclusions upon the branches of the case discussed above make it unnecessary to consider other alleged errors.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

(172 Cal. 271)

TWEEDALE et al. v. BARNETT.

(Sac. 2247.)

(Supreme Court of California. March 9, 1916.)

1. NEW TRIAL ⇐72—VERDICT CONTRARY TO EVIDENCE.

In suit to quiet title to realty claimed under deed executed by defendant's testatrix, superior court *held* justified in granting a motion for a new trial after verdict for the plaintiffs, on the ground that there was not a preponderance of evidence or sufficient clear proof of absolute and unconditional delivery to justify the verdict creating a trust deed vesting wholly in parol.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146–148; Dec. Dig. ⇐72.]

2. APPEAL AND ERROR ⟸854(6)—MOTION FOR NEW TRIAL—REASONS OF TRIAL COURT.

On appeal the Supreme Court is not bound by the assigned reasons of the trial court for the granting of a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3423, 3424; Dec. Dig. ⟸854(6).]

3. APPEAL AND ERROR ⟸977(3)—DISCRETION OF TRIAL COURT—MOTION FOR NEW TRIAL.

The discretion of the trial court in granting a motion for a new trial is very broad, and its order must be upheld by the Appellate Court, if it may be supported upon any of the assigned grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3862; Dec. Dig. ⟸977(3).]

4. APPEAL AND ERROR ⟸1015(2)—MOTION FOR NEW TRIAL—CONFLICTING EVIDENCE.

The Supreme Court may not disturb the trial court's order granting a motion for a new trial, where there was a conflict of evidence upon material issues, unless it can see that a verdict in favor of the moving party would not have found sufficient legal support in such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3866; Dec. Dig. ⟸1015(2).]

5. DEEDS ⟸194(2) — DELIVERY — PRESUMPTION.

In a suit to quiet title to realty claimed under a deed of defendant's testatrix, proof that she afterwards had the deed, and that it was not subsequently given to plaintiffs, or to any one for them, gave rise to the presumption of nondelivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 576, 577, 623, 634; Dec. Dig. ⟸194(2).]

6. EVIDENCE ⟸313—WEIGHT OF EVIDENCE—DECLARATIONS OF PERSONS SINCE DECEASED.

Evidence purporting to reproduce declarations of persons since deceased is the weakest sort of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1166, 1167; Dec. Dig. ⟸313.]

7. DEEDS ⟸208(1)—DELIVERY—EVIDENCE.

The fact that the grantor, under whose deed alleged to have been delivered to a third person for delivery to them plaintiff claimed, had herself subsequently dealt with the property as if it were her own, negatived the claim that she ever intended to pass title to plaintiff.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625, 630; Dec. Dig. ⟸208(1).]

8. DEEDS ⟸208(1)—DELIVERY—SUFFICIENCY OF EVIDENCE.

In a suit to quiet title to realty claimed under a deed executed by defendant's testatrix, evidence *held* sufficient to have supported a finding that the manual tradition of the instrument was without intent to pass title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625, 630; Dec. Dig. ⟸208(1).]

Department 2. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Suit to quiet title by Maud Tweedale and another against S. R. Barnett, as executor of the last will of Elizabeth Robinson, deceased. Judgment for plaintiffs, motion for new trial granted, and plaintiffs appeal. Order affirmed.

W. U. Goodman and Kenneth I. Jones, both of Fairfield, for appellants. Frank R. Devlin, of Fairfield, for respondent.

MELVIN, J. Plaintiffs sued to quiet title to certain real property in Solano county known as the "Robinson Ranch" and containing 315 acres. According to their pleading, they claimed title by reason of a deed executed by Elizabeth Robinson on January 22, 1908, and delivered to Peter Danuser on that date with instructions to him to transmit the said deed to the plaintiffs after the grantor's death. It was alleged in their complaint that Danuser failed to deliver the deed to plaintiffs after Mrs. Robinson's death and that the document had ceased to exist. On trial before a jury, the plaintiffs were successful; but the court granted defendant's motion for a new trial, and plaintiffs prosecute this appeal from its order so doing.

The testimony of one of the attorneys in this action, Mr. W. U. Goodman, was in effect that he had been summoned by Mr. Danuser on January 22, 1908, to the home of Mrs. Elizabeth Robinson, an aged woman. Mrs. Robinson told him, in Mr. Danuser's presence, that she wished to make a deed of the Robinson ranch to her niece and nephew (plaintiffs herein). She said it was her desire that they should "get the property without the necessity or expense of probate." Mr. Goodman went to his office, drew a bargain and sale deed, naming $10 as the consideration, and returned with Mr. Danuser to Mrs. Robinson's home, where she executed the deed and acknowledged her signature before Mr. Goodman as a notary public. He attached his seal and his signature as a notary. During his visit in the morning Mr. Goodman had told her, referring to the deed, "that in making this delivery it went beyond her power to recall it or withdraw it." She said that was just what she wanted. Mr. Goodman described the alleged delivery which occurred immediately after the acknowledgment of the instrument and the attaching of his signature and seal as follows:

"Then she turned and gave this to Mr. Danuser, and her directions were to Mr. Danuser as follows: That he was to take that deed and keep it for Edward Tweedale and Maude Tweedale until her death, that is, speaking of herself, Elizabeth Robinson, then for him to record it and turn it over to Maude Tweedale and Edward Tweedale. She turned it over. I don't remember the exact words, but that is the gist of it, and Mr. Danuser took that deed with these instructions at that time."

Upon cross-examination it appeared that subsequently Mrs. Robinson, without Mr. Goodman's knowledge, entered into an optional contract for the sale of this very property. Mr. Goodman was employed to see that a proper abstract was obtained for submission to Messrs. A. J. Rich & Co., the assignees of this contract bound under it to purchase the land. He forwarded the abstract to Messrs. Rich & Co. in April, 1913. It contained no mention of the deed to the Tweedales, and he said nothing to Mrs. Robinson with reference to their rights which were, he thought, in conflict with her asserted power to trans-

fer title to the Messrs. Rich & Co. Mrs. Robinson died before this contemplated sale was consummated.

Mr. Danuser, in describing the receipt of the deed by him, said:

"She said I was to keep this until she died and after that I was to record it, put it on record, and deliver it to Maude and Edward Tweedale."

He kept it for two months, and then she asked him to return it. He did so. Upon cross-examination, he said he was not sure whether or not Mrs. Robinson ever passed the deed to him; that he may have received it from the hand of Mr. Goodman after its execution. At the close of the cross-examination of this witness, the following occurred:

"Q. Mr. Goodman didn't say anything. You have testified about everything that you remember Mrs. Robinson said. Mr. Goodman didn't say anything to her at that time that she could never have this deed back, or anything of that kind? A. There was nothing said about that. Q. Nothing at all said that she could never have it back or could not recall it or anything of that kind? A. (No answer)."

Mr. Daniel T. Ambrose, who had known Mrs. Robinson for many years, testified that shortly after the date of the deed and before Miss Maud Tweedale had gone to the home of her aunt, where she was summoned by telegraphic invitation, Mrs. Robinson told him that she had made a deed granting the ranch to Miss and Mr. Tweedale, and that they were going to live with her and look after her the rest of her life. Mr. Ambrose understood that the consideration for the deed was to be the residing of the Tweedales with their aunt and their services to her.

Miss Maud Tweedale, one of the plaintiffs, testified that after her arrival in California in February, 1908, her aunt told her that the "Elmira ranch" was deeded to witness and her brother and the deed was ready to place on record at Mrs. Robinson's death.

The deed was not found among Mrs. Robinson's effects after her death.

[1, 2] The sole consideration presented to this court is whether or not the superior court was justified, under the evidence, in granting the motion for a new trial. We think that court was so justified for the reason which manifestly prompted the making of its order, namely, that there was not a preponderance of evidence nor sufficient clear proof of absolute and unconditional delivery as a deed of the instrument described in the pleadings to justify the finding creating a trust title in realty vesting wholly in parol. Of course, we are not bound by the assigned reasons of the trial court, but this particular reason seems to be a good one.

[3, 4] It is a rule so well understood that discussion of it seems almost superfluous, that the discretion of the court granting such a motion is very broad and the order will be upheld by the court to which an appeal is taken if it may be supported upon any of the assigned grounds. Morgan v. Robinson, 157 Cal. 348–351, 107 Pac. 695; Wurzburger v. Nellis, 165 Cal. 48–50, 130 Pac. 1052; Cahill v. Stone, 167 Cal. 126–129, 138 Pac. 712. We may not disturb such an order where there was at the trial a conflict of evidence upon material issues, unless we can say that a verdict in favor of the moving party would not have found sufficient legal support in such evidence. Empire Investment Co. v. Mort, 169 Cal. 732, 147 Pac. 960.

[5] In the case at bar there was a conflict of evidence upon the issue of the delivery of the deed with intent to pass title. In the first place, plaintiffs themselves traced possession of the deed into the hands of the grantor. While it was not found among her papers, nevertheless the proof furnished by plaintiffs that she had it and that it was not subsequently given to them nor to anyone for them gives rise to the presumption of nondelivery. 13 Cyc. 733; Devlin on Deeds, § 263a; Donahue v. Sweeney, 153 Pac. 708.

[6] The court in passing upon the motion was bound to consider this presumption and all the facts and circumstances surrounding the alleged delivery of the deed. Mr. Goodman's testimony would fully support the doctrine that Mrs. Robinson was instructed with reference to the law and that she used words sufficient to sustain a finding that the tradition of the instrument to Mr. Danuser was a "delivery" in contemplation of law. Mr. Danuser's testimony was in support of the contention of delivery. The statements of the two witnesses present when the alleged deed was prepared and signed is further buttressed by the accounts given by Mr. Ambrose and Miss Tweedale of their conversations with Mrs. Robinson regarding the deed; but the court doubtless took into consideration the fact that this court has characterized as the weakest sort of evidence that which purports to reproduce declarations of a person since deceased. Mattingly v. Pennie, 105 Cal. 514–523, 39 Pac. 200, 45 Am. St. Rep. 87; Austin v. Wilcoxson, 149 Cal. 24–29, 84 Pac. 417.

[7, 8] Opposed to this evidence was the very important fact proved by one of the witnesses for the plaintiffs that the alleged grantor, Mrs. Elizabeth Robinson, had demanded the return of the deed and that he had yielded its custody. There was the further circumstance that Mrs. Robinson herself had dealt with the property as if it were her own (Williams v. Kidd, 151 Pac. 1), thus negativing the theory that she ever intended to pass title to her kinsfolk. The grantor had never seen her niece or her nephew at the date given as that of the deed, and the court doubtless remembered that fact—indeed, the order granting a new trial recites it. The witness who had prepared the deed made no effort to notify either party to the contract of sale that in his opinion the vendor could not pass title. He explained his omission so to do, upon the ground that the contract had been made without his knowledge. Believ-

ing a lawsuit was inevitable, he had not disturbed the aged lady, Mrs. Robinson, by offering unsolicited advice. While we do not for a moment criticise him for his conduct in that regard, because his position was perhaps rather a delicate one, we must say that the judge of the trial court, who had heard all of the witnesses, was bound to consider the silence of this one at a time when he might well have spoken if he was not justified by the age and feebleness of Mrs. Robinson in making no effort to enlighten her regarding her obligations. In other words, the propriety of his conduct in the premises was a question for the trial court. The superior court was also bound to consider and to give to it such weight as was proper in the estimation of the judge thereof the statement of Mr. Danuser that he remembered no advice by Mr. Goodman to Mrs. Robinson to the effect that when once delivered the deed might not lawfully be recalled. From this discussion it is apparent, we believe, that there was a conflict of testimony upon the material question of delivery, and that the court's action in granting the motion may be supported upon well-established principles declared in such cases as Williams v. Kidd, 151 Pac. 1, and the authorities cited in the opinion therein. There was evidence sufficient to have supported a finding that the manual tradition of the paper was without intent to pass title when we measure the alleged delivery by such authorities as Black v. Sharkey, 104 Cal. 279–281, 37 Pac. 939; Denis v. Velati, 96 Cal. 223, 31 Pac. 1; Harris v. Harris, 59 Cal. 620–622; Follmer v. Rohrer, 158 Cal. 755–758, 112 Pac. 544; Donahue v. Sweeney, supra. Therefore the granting of the motion in view of the material conflict of evidence may not be disturbed.

The order is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(172 Cal. 326)

LANCEL v. POSTLETHWAITE et al.

(S. F. 7725.)

(Supreme Court of California. March 16, 1916.)

1. APPEAL AND ERROR ⟸353—TIME FOR APPEAL—STATUTES.

Statutes limiting the time of appeal are jurisdictional and mandatory, and, in the absence of an express authorization in the statute itself, a court has no power to extend the time for taking an appeal or to relieve an appellant from accident, surprise, or mistake.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1920–1922; Dec. Dig. ⟸353.]

2. APPEAL AND ERROR ⟸345(1)—MOTION FOR NEW TRIAL—ORDER FOR MOTION—EFFECT—"TERMINATION."

Under Code Civ. Proc. § 939, as amended in 1915 (St. 1915, p. 205), providing that an appeal may be taken from any judgment or order of the superior court from which an appeal lies within 60 days from the entry of such judgment or order, and that if proceedings on a motion for a new trial are pending the time for appeal shall not expire until 30 days after entry of the order determining the motion for a new trial or other termination in the trial court of the proceedings upon such motion, and section 660, providing that the power of the court to pass on a motion for new trial shall expire within three months after the verdict or service on the moving party of notice of the court's decision, and that if such motion is not determined within that time it is denied without further order, the trial court should determine a motion at the earliest possible moment, and its failure to determine it at all within three months is a denial thereof and a "termination in the trial court of the proceedings upon said motion."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1895; Dec. Dig. ⟸345(1).

For other definitions, see Words and Phrases, First and Second Series, Termination.]

3. NEW TRIAL ⟸155 — MOTION FOR NEW TRIAL—TIME—CONSTITUTIONAL ACTS—STATUTORY PROVISIONS.

The matter of motions for a new trial is entirely within the control of the Legislature, there being nothing whatever in the Constitution pertaining thereto, and hence Code Civ. Proc. § 939, as amended in 1915 (St. 1915, p. 205), and section 660, preventing the trial court from granting such motion after the expiration of 90 days from the verdict, etc., and making its failure to act within that time a denial thereof, does not violate any constitutional rights.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. ⟸155.]

4. TIME ⟸10(7)—MOTION FOR NEW TRIAL—STATUTES—"HOLIDAY"—"DAY."

Under Code Civ. Proc. § 12, providing that the time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, when it, too, shall be excluded, and section 10, providing that every Saturday from 12 o'clock noon until 12 o'clock midnight is a holiday as regards the transaction of business in the public offices of the state, and in view of Const. art. 6, § 5, under which the superior court is open for the transaction of business for at least a part of Saturday, and Pol. Code, § 3259, defining a day as the time between any midnight and the midnight following, the fact that the last day of the three months within which an order determining a motion for a new trial could be legally made was a Saturday did not prevent a termination of the proceedings on the motion on that day, as the term "last day is a holiday" means the whole of the day.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 46; Dec. Dig. ⟸10(7).

For other definitions, see Words and Phrases, First and Second Series, Day; Holiday.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Christine B. Lancel against H. W. Postlethwaite and others. Judgment for the defendants, and plaintiff appeals. Appeal dismissed.

Arthur H. Barendt, of San Francisco, for appellant. George F. Hatton, Hartley F. Peart, Pillsbury, Madison & Sutro, and A. D. Plaw, all of San Francisco, for respondents.

ANGELLOTTI, C. J. This is a motion to dismiss an appeal taken by plaintiff from a judgment of the superior court, on the ground

that the same was not taken within the time allowed by law.

[1] As stated in Williams v. Long, 130 Cal. 58, 62 Pac. 264, 80 Am. St. Rep. 68, statutes limiting the time of appeal are jurisdictional and mandatory, and, in the absence of an express authorization in the statute itself, a court has no power to extend the time for taking an appeal, or to relieve an appellant from the effect of misfortune, accident, surprise, or mistake. If the appeal was not taken within the time allowed by law, we have no power to entertain it.

[2] The material facts may be very briefly stated: The judgment was rendered September 1, 1915, and entered September 2, 1915. Written notice of entry of such judgment was served on plaintiff's attorney and filed in the office of the clerk of the superior court on September 4, 1915. Notice of intention to move for a new trial was served and filed on September 13, 1915. No order purporting to dispose of said motion for a new trial was made until December 9, 1915, on which day an order purporting to deny the same was made and entered. The notice of appeal was not filed until January 5, 1916. December 4, 1915, was a Saturday.

Section 939, Code of Civil Procedure, provides:

"An appeal may be taken from any judgment or order of a superior court from which an appeal lies under any provision of this code, or of any other code, or under any other statute, within sixty days from the entry of said judgment or order. * * * If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."

Other sections of the same Code provide for the making of a motion for a new trial on various specified grounds, and section 660 provides, among other things, as follows:

"The power of the court to pass on motion for new trial shall expire within three months after the verdict of the jury or service on the moving party of notice of the decision of the court. If such motion is not determined within said three months, the effect shall be a denial of the motion without further order of the court."

The time within which an appeal may be taken from a judgment was extended, as provided in section 939 as amended in the year 1915 (we have quoted the section as so amended), to enable a party to have reviewed on such appeal the failure or refusal of the trial court to grant his motion for a new trial, amendments of our laws in other respects made at the same time having the effect of abolishing the right of appeal from an order denying a new trial which theretofore existed. The portion of section 660 that we have quoted, added by amendment at the same time, was designed to secure a speedy determination of a motion for a new trial, and thus to obviate one of the many delays preceding the review by an appellate court of the proceedings of the trial court. The effect of this and the other amendments relative to motions for new trial and their disposition by the superior court is, so far as any question here involved is concerned, simply this: The trial court should determine a motion for a new trial regularly made, "at the earliest possible moment," and it is expressly made its duty to do so. It has the power to grant a new trial at any time "within three months after the verdict of the jury or service on the moving party of notice of the decision of the court," and also power to formally deny such motion within said time. Its failure to determine the motion at all within said time is a denial of the motion. In other words, a trial court is empowered to grant a new trial, upon a motion duly made to that end, at any time within three months after the verdict of the jury or service on the moving party of notice of the decision of the court, but not thereafter; and its failure to determine within such time any such motion regularly made is a denial of such motion and a "termination in the trial court" within the meaning of section 939 of the proceedings on such motion.

If the provision of section 660 which we have quoted be effective, Saturday, December 4, 1915, was the last day on which the trial court could make any order determining the motion for a new trial, and the expiration of that day without any order being made was a "termination in the trial court of the proceedings upon said motion" within the meaning of section 939, provided that the fact that said 4th day of December was a Saturday makes no difference, a question we shall refer to later. It would follow that Monday, January 3, 1916, was the last day allowed by law within which to take an appeal from the judgment, and that the attempted appeal taken on January 5, 1916, was ineffectual for any purpose.

[3] It is claimed that the provision is in violation of our Constitution. The theory appears to be that it is an attempted abridgment by the Legislature of power granted to the superior court by the Constitution. We are unable to perceive any good foundation for this claim. The matter of motions for a new trial appears to us to be one entirely within the control of the Legislature, there being nothing whatever in the Constitution pertaining thereto. It has been said that the right to move for a new trial is statutory and must be pursued in the manner pointed out by the statute. California Imp. Co. v. Baroteau, 116 Cal. 136, 47 Pac. 1018; Burton v. Todd, 68 Cal. 489, 9 Pac. 663. Our statutes, while conferring such right, have always limited the grounds upon which such a motion can be made. It cannot be doubted that the Legislature could still further limit such grounds at will, or even altogether abolish the right to make such a motion on any ground. This being so, it is difficult to conceive of any valid objection, based on consti-

tutional grounds, to a provision having the effect simply of prohibiting a trial court from granting any such motion after the expiration of a specified time, and making its failure to act within that time tantamount to a denial of the motion. The limitation of the power of the trial court, if we call it such, is a limitation made by the very body providing that such a motion may be made at all, a body whose power in relation thereto is unlimited, except in so far as it is limited by the Constitution. The contention of counsel appears to be that there is some invasion of the constitutional jurisdiction of the superior court by statutes which, while authorizing a motion for a new trial, prohibit the trial court from determining the same after the expiration of a specified time; that, the power to hear such a motion at all being given, the power to determine the same cannot be so limited or abridged. We can see no force in this contention. If our statutes had simply provided that at any time within three months after verdict or notice of decision, on motion of either party, a trial court could grant a new trial on any of certain specified grounds, we apprehend that no one would contend, in view of the purely statutory nature of such motions, that a new trial could be granted after the expiration of the specified time, or that the limitation as to time was an unwarranted invasion of the constitutional jurisdiction of the court. This is practically all that our statutes do now provide in different language, with the added feature that the court may finally deny such a motion before the expiration of said three months, and that the failure of the court to pass on the motion within that time is in effect a refusal to grant the same and a denial thereof, which may be reviewed as such on the appeal from the judgment.

[4] It is claimed that, in view of the fact that the last day of the three months within which an order determining the motion for a new trial could legally be made was a Saturday, there was no termination in the trial court of the proceedings on motion for a new trial until December 6th; every Sunday being a legal holiday. This claim is based on section 12, Code of Civil Procedure, providing that "the time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded," and section 10, Code of Civil Procedure, which, after specifying certain days as holidays, provides:

"Every Saturday from twelve o'clock noon until twelve o'clock midnight is a holiday as regards the transaction of business in the public offices of this state, and also in political divisions thereof where laws, ordinances or charters provide that public offices shall be closed on holidays," etc.

Assuming for the purpose of this decision the applicability of section 12, Code of Civil Procedure, to the limitation prescribed by section 660, Code of Civil Procedure, we think it very clear that it cannot fairly be held that Saturday, December 4th, was a "holiday" within the meaning of the section. The provision is that the "last day" must be included in the computation, unless such "last day is a holiday." This means, under any fair construction, the whole of the day. Only a portion of the day was even the limited kind of a holiday prescribed for Saturdays by section 10, Code of Civil Procedure, viz., that portion "from twelve o'clock noon until twelve o'clock midnight," and the superior court was certainly open for the transaction of any and all business for at least a portion of the day. Con. § 5, art. 6. A day is defined by our law as being "the period of time between any midnight and the midnight following" (section 3259, Pol. Code), and no rule of construction of which we are aware would warrant us in reading section 12 as excluding the last day, unless it was a holiday during the whole period of its existence.

It follows that the appeal was not taken within the time allowed by law.

If we had any discretionary power in this matter, the case presents such circumstances as might warrant us in relieving the appellant from the effect of her failure to file her notice of appeal in time; but, as we have said, the filing of the notice within the prescribed time is essential to our jurisdiction.

The appeal from the judgment is dismissed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

172 Cal. 366

DOLBEAR et al. v. WILKINSON et al.

(S. F. 6599.)

(Supreme Court of California. March 21, 1916. Rehearing Denied April 20, 1916.)

1. CORPORATIONS ⟸283(1)—ELECTION OF DIRECTORS — STOCKHOLDERS' MEETING—STATUTES.

Civ. Code, § 314, provides that, if an election of corporate directors has not been held at the appointed time, it may be held at some other time ordered by the directors, or a meeting may be called by stockholders, as provided in section 310. Section 310 deals with the removal of directors, and provides that meetings of stockholders for the purpose may be called by stockholders holding at least one-half the votes, and that the calls must be in writing, addressed to the secretary, who must thereupon give notice of the time, place, and object of the meeting, and by whose order it is called. *Held*, that section 314, in authorizing stockholders to call a meeting for the election of directors "as provided in section 310," incorporates, not only the provision prescribing the preliminary step of directing a call to the secretary, but also its required subsequent notice "of the time, place, and object of the meeting," and a special meeting for the election of directors, held upon request, signed by stockholders holding less than half the votes, and not stating the object of the meeting, did not result in a valid election.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1195, 1198–1205; Dec. Dig. ⟸ 283(1).]

2. CORPORATIONS ⟸283(1)—ELECTION OF DIRECTORS — AUTHORITY OF STOCKHOLDERS' MEETING.

A special meeting of corporate stockholders, other than the annual meeting provided by the by-laws, which was held without notice that an election of directors was one of the purposes of the meeting, the notice stating that the purpose was "to transact such business as may come before the said meeting," was not authorized to elect directors, since stockholders are entitled to actual notice of the time, place, and business proposed to be transacted at a special meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1195, 1198–1205; Dec. Dig. ⟸283(1).]

3. CORPORATIONS ⟸283(4)—ELECTION OF DIRECTORS—NOTICE TO STOCKHOLDERS—WAIVER.

Part of stockholders of corporation, attending special meeting pursuant to notice not advising them that the election of directors would be taken up did not waive by attending the meeting, in which they did not participate, want of proper notice to them.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⟸283(4).]

4. CORPORATIONS ⟸283(3)—ELECTION OF DIRECTORS—MAILING OF NOTICE OF STOCKHOLDERS' MEETING — SUFFICIENCY OF EVIDENCE.

In proceedings to determine who were the legal directors of a corporation, evidence *held* sufficient to show mailing of notice of meeting to stockholders by the secretary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1200, 1229; Dec. Dig. ⟸283(3).]

5. CORPORATIONS ⟸283(3) — STOCKHOLDERS' RIGHT TO VOTE—SUFFICIENCY OF EVIDENCE.

In proceedings to determine the legal directors of a corporation, documentary evidence *held* insufficient to overcome the showing of the corporate records that a party was the owner of certain stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1221–1235; Dec. Dig. ⟸283(3).]

Department 1. Appeal from Superior Court, Alameda County; K. S. Mahon and N. D. Arnot, Judges.

Proceeding by C. E. Dolbear and others against Guy Wilkinson and others. From a judgment for defendants and an order denying their motion for new trial, plaintiffs appeal. Judgment and order affirmed.

R. H. Countryman and Thomas B. Dozier, both of San Francisco (Chapman & Trefethen, of Oakland, and William P. Hubbard, of San Francisco, of counsel), for appellants. Chas. W. Slack, Chauncey S. Goodrich, and Perry Evans, all of San Francisco, for respondents.

SLOSS, J. This is a proceeding to determine who are the directors of California Trona Company, a corporation organized under the laws of this state. The plaintiffs, C. E. Dolbear, R. B. Phillips, and E. I. Bartholomew, claim that they, together with E. H. Merrill and J. P. Potter, were elected directors at a meeting of the stockholders held on May 3, 1911. The defendants claim that E. J. Boyes, Guy Wilkinson, Lucien Simon, C. S. Goodrich, and F. J. Hanus were duly elected directors at a meeting held on the 19th day of May, 1911. The court found in favor of the defendants and entered judgment accordingly. The plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The capital stock of the corporation consists of 1,000 shares, all of which was subscribed and issued. The by-laws provided that the annual meeting of the stockholders should be held on the 10th day of January in each year, and should be called by ten days' notice printed in a newspaper, and by notice in writing mailed to each stockholder at least ten days before the meeting. Other stockholders' meetings were to be "called by like notice." It is alleged in the complaint, and admitted by the answers, that no annual or other meeting of the stockholders was held on the 10th day of January, 1911. The meeting of May 3, 1911, at which the plaintiffs claim to have been elected, was attended by stockholders claiming to own or represent 991 shares. The defendant Wilkinson claimed to be the owner of 321 shares. Two hundred and twenty of these had been transferred to his name on the books of the corporation within ten days prior to the date of the meeting. An injunction restraining Wilkinson from voting 100 shares of the remaining stock held by him had been issued and served shortly before the meeting. He made no attempt to vote these 100 shares. The plaintiffs disputed his right to vote the 220 shares which had not been standing in his name for the ten-day period. A motion to adjourn the meeting was made, and Wilkinson was permitted, over the objection of the appellants, to vote his 220 shares in the affirmative. With the aid of his vote, the motion was carried, and the chairman declared the meeting adjourned. The court found that the stockholders who had voted for the adjournment immediately left the room, and that the remainder, holding less than half of the stock of the corporation, thereupon proceeded to elect directors, electing the plaintiffs and their associates. This is the election upon which the appellants found their claim.

[1] The parties argue a number of points with reference to the validity of these proceedings. Thus there is much dispute over the question of Wilkinson's right to vote the 220 shares; over the consequent validity of the vote for adjournment; over the question whether the persons opposing the plaintiffs did, in fact, leave the meeting place before the election of directors, and whether, if they did, a valid election could be held when only a minority of the stock was present or represented. We do not find it necessary, however, to go into any of these questions, as we feel satisfied that the meeting of May 3d was not one at which there could, in the absence, at least, of consent of all the stockholders, be a valid election of directors. The

notice for this meeting stated that a special meeting of the stockholders had been duly called and would be held at a place and time designated, "to transact such business as may come before the said meeting." Under the Civil Code (section 302) "the directors of a corporation must be elected annually by the stockholders or members," and the time for the meeting is fixed unless provision therefor is made in the by-laws. Here the by-laws did provide that such meeting should be held on the 10th day of January in each year, and there is no provision in such by-laws for an election at any other time. Section 314 of the Civil Code provides, however, that if an election has not been held at the appointed time, it may be held at some other time ordered by the directors, or "a meeting may be called by stockholders as provided in section three hundred and ten."

Section 310 thus referred to deals with the removal of directors. It provides that:

"Meetings of stockholders for this purpose may be called * * * by members or stockholders holding at least one half of the votes. Such calls must be in writing, and addressed to the secretary, who must thereupon give notice of the time, place, and object of the meeting, and by whose order it is called."

We think that section 314, in authorizing the stockholders to call a meeting for the election of directors "as provided in section 310," incorporates not only the provisions prescribing the preliminary steps of directing a call to the secretary, but also those requiring the subsequent notice "of the time, place, and object of the meeting." The meeting of May 3d was not an adjournment of the annual meeting. The suggestion that it was, made for the first time in the reply brief of the appellant Phillips, is in direct conflict with the admitted averments of the complaint. Nor was it a meeting "ordered by the directors," within the provision of section 314. The notice stated that it was a special meeting "called at the request of stockholders." The request of the stockholders was in writing, and may fairly be treated as the call mentioned in section 310. It did not, however, meet the requirements of that section, since it was not signed by stockholders "holding one-half of the votes." More important still, the notice was insufficient for the reason that it did not state "the object of the meeting."

[2] But, if we were to concede that the notice described in section 310 applies only to meetings for the removal of directors, the result would not be different. In the absence of statutory provision, the stockholders are, under the general principles governing corporations, entitled to specific notice of the purpose of a meeting which is to elect directors at a time other than that fixed by statute or by-law. In the absence of such notice, a stockholder would have no reason to believe that this important business would be transacted at any meeting other than the one designated by the Civil Code and the by-laws; i. e., the annual meeting, or an adjournment thereof.

"There are three matters concerning every corporate meeting of which the members are entitled to notice, namely, the time, place, and the business proposed to be transacted. Some or all of these may be known to them by virtue of a charter provision or a by-law or a statute. But, if any of them is not known in that way, the stockholders are entitled to an actual notice thereof." 2 Cook on Corporations (6th Ed.) § 595.

This is the unquestioned rule governing special meetings, but says Mr. Cook:

"The better rule is that, where unusual business is to be transacted even at a regular meeting, the notice of that meeting should state the unusual business." 2 Cook on Corporations (6th Ed.) § 595; 3 Clark & Marshall on Corporations, § 649c.

Clearly, therefore, a special meeting will not be authorized to elect directors in the absence of a notice specifying that such election is one of the purposes of the meeeting. Peo. Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; Dunster v. Bernards L. & S. Co., 74 N. J. Law, 132, 65 Atl. 123. See re London, etc., Co., L. R. 31 Ch. Dic. 223. A notice stating that the purpose of the meeting is "to transact such business as may come before the said meeting" is not, of course, a notice that the election of directors, or any other specific matter, is to be taken up. Dunster v. B. L. & S. Co., supra; Peo. Mut. Ins. Co. v. Westcott, supra; Jones v. Concord, etc., Co., 67 N. H. 119, 38 Atl. 120. Such cases as Granger v. Original Emp., etc., Co., 59 Cal. 678, Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17, and Seal of Gold Mining Co. v. Slater, 161 Cal. 621, 120 Pac. 15, cited by the appellants, are not in point. All of these decisions deal with meetings of directors. The holding that the notice for such a meeting need not specify the purpose has no application to stockholders' meetings, which are governed by stricter rules. 2 Cook on Corporations (6th Ed.) § 713a.

[3] There is no ground for the claim that the want of notice was waived by the defendants. The notice received by them did not advise them that the election of directors was to be taken up, and they did not consent to such election by attending the meeting. The evidence is undisputed that they did not participate in such election, and the mere fact that they may have been physically present when an unauthorized minority was seeking to take action cannot deprive them of the right to object to such action.

[4] The attempted election of May 3d being invalid, there remains simply the question whether Wilkinson and his associates were properly elected on May 19th. The court found that this meeting was regularly called, pursuant to the provisions of sections 310 and 314 of the Civil Code, and of the by-laws. The meeting was attended by stockholders owning and holding of record 555 shares of the capital stock. The appellants make the point that there was no sufficient

evidence that notice of this meeting was mailed to the stockholders. But the record contains, in addition to the secretary's affidavit of mailing, his direct testimony that "said affidavit correctly states the facts." The mailing was sufficiently established.

[5] One hundred and forty shares stood in the name of Mabel Boyes on the corporate books and were voted by Wilkinson, who held her proxy. The appellants claim that these shares were the property of the Caradoc Securities Company. This assertion is not supported by the record. The appellants introduced in evidence an agreement to which various persons, describing themselves as shareholders of the California Trona Company, were parties. The words "owning 140 shares" appear on this agreement after the signatures of Mabel Boyes and Caradoc Securities Company. Standing alone and unexplained, as it does, this writing is certainly entirely insufficient to overcome the showing of the corporate records that Mabel Boyes was the owner of the stock.

Some other shares were voted by Wilkinson under proxies given by the holders of record. The validity of the proxies is assailed. We think the points made in this behalf are unsubstantial, but, even if all of the votes thus questioned were eliminated, there would still remain 506 shares, a clear majority of the total capital stock. The vote in favor of the five persons elected at that meeting was unanimous, and the validity of the disputed proxies could not affect the result.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

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WESTERN METAL SUPPLY CO. v. PILLSBURY et al. (L. A. 4030.)

(Supreme Court of California. March 24, 1916. Rehearing Denied April 20, 1916.)

1. CONSTITUTIONAL LAW ⊜80(2) — WORKMEN'S COMPENSATION ACT — CONSTITUTIONALITY—"JUDICIAL POWER."

Const. art. 6, § 1, provides that the judicial power of the state shall be vested in the Senate, certain named courts, and such inferior courts as the Legislature may establish. Const. art. 20, § 21, adopted in 1911, authorizes the Legislature to create and enforce a liability on the part of all employers to compensate their employés for any injury incurred by them in the course of their employment and to provide for the settlement of any disputes arising under the legislation by arbitration or by an industrial accident board, by the courts or by either or any or all of these agencies. Workmen's Compensation, Insurance and Safety Act (St. 1913, p. 279) §§ 22, 23, 24a, 25, 26, 73a, 78, 84, and 84c, give the industrial accident commission power to hear applications by employés or their dependents, after notice is served on the other party, to issue subpœnas, take testimony, punish for contempt, make findings which are conclusive and "full power, authority, and jurisdiction to try and finally determine all proceedings for the recovery of compensation," subject only to a limited right of review by certiorari. *Held*, that the act confers on the commission judicial power, which is the power to decide and make binding orders between persons who bring cases for decision, and therefore violates article 6, § 1, of the Constitution unless within the authority of article 20, § 21.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 144; Dec. Dig. ⊜80(2).

For other definitions, see Words and Phrases, First and Second Series, Judicial Power.]

2. MASTER AND SERVANT ⊜347—WORKMEN'S COMPENSATION ACT—CONSTITUTIONAL PROVISIONS—"COMPENSATION TO EMPLOYÉS."

Const. art. 20, § 21, authorizing the Legislature to create and enforce a liability on the part of all employés to compensate their employés for any injury incurred by the said employés in the course of their employment and to provide for the settlement of disputes arising thereunder by arbitration, by an industrial accident board or by the courts, when construed in the light of its purpose to substitute a system of compensation for all injuries for the common-law liability of the master for negligence, and in the light of the uniform scope of previous Workmen's Compensation Acts, authorized the Legislature to provide for the compensation of those dependent on a workman killed in the course of his employment as well as to an injured employé himself, since "compensation to employés" may be fairly held to mean, not merely money payments to them, but also providing medical and surgical treatment and support for those who ordinarily look to the employé for support.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊜347.

For other definitions, see Words and Phrases, First and Second Series, Compensation.]

3. CONSTITUTIONAL LAW ⊜18 — CONSTRUCTION OF CONSTITUTIONAL PROVISIONS.

A constitutional amendment which aims to enlarge the power of the Legislature or to remove doubts concerning its power should not be given too strict and literal an interpretation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 13, 17; Dec. Dig. ⊜18.]

4. MASTER AND SERVANT ⊜347—WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY—COMPENSATION TO DEPENDENTS.

The fact that the dependents of a workman, killed in the course of his employment, may be nonresidents of the state and nation, does not show that no public purpose is to be served by requiring such compensation to be made so as to deprive that provision of the act of its validity as an exercise of the police power.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊜347.]

5. MASTER AND SERVANT ⊜367—WORKMEN'S COMPENSATION ACT — "EMPLOYER" — "EMPLOYÉ"—"SERVANT."

Under the Workmen's Compensation Act of 1913, section 13 of which defines an "employer" as every person, firm, voluntary association, and private corporation who has any person in service under any appointment or contract of hire, and section 14 of which defines "employé" as every person in the service of an employer under any appointment or contract of hire, even if the relation is the same as that of master and servant under Civ. Code, § 2009, defining a "servant" as one who is employed to render personal service to his employer otherwise than in the pursuing of an independent calling and who in such service remains entirely under the control and direction of the latter, a night watchman, who was employed by six different firms each acting independently of the other, is an

employé of the one on whose premises he was killed while in the discharge of his duties.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸367.

For other definitions, see Words and Phrases, First and Second Series, Employer; Employé; Servant.]

6. MASTER AND SERVANT ⟸372—WORKMEN'S COMPENSATION ACT—"ACCIDENTAL."

That a night watchman was killed while discharging his duties, by the willful act of a third person, does not show that his death was not accidental within the Workmen's Compensation Act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸372.

For other definitions, see Words and Phrases, First and Second Series, Accidental.]

7. MASTER AND SERVANT ⟸361—WORKMEN'S COMPENSATION ACT—"VOLUNTARY ASSOCIATION."

Where a night watchman was employed by six different firms each acting independently of the others in making its agreement with the watchman, they did not compose a voluntary association employing him within Workmen's Compensation Act, § 13.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸361.]

8. MASTER AND SERVANT ⟸386(1) — WORKMEN'S COMPENSATION ACT—DETERMINATION OF COMPENSATION — EMPLOYÉ OF SEVERAL FIRMS.

Under the Workmen's Compensation Act of 1913, which provides as compensation for the death of a workman a percentage of the average annual earnings of the deceased employé, and section 17 of which prescribes the rules for computing earnings of employés, and in several of its subsections contemplates the payment of awards not based on earnings received from the employer in whose service the employé was injured, the earnings of a night watchman independently employed by six different firms is the amount he received from all of the firms, not the amount he received from the employer in whose service he was killed.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸386(1).]

Henshaw, Lorigan, and Melvin, JJ., dissenting.

In Bank. Certiorari by the Western Metal Supply Company against A. J. Pillsbury and others, constituting the Industrial Accident Commission, to review an award of the commission allowing compensation to the widow of James Mason. Award affirmed.

Chickering & Gregory, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco (R. C. Springer, of San Diego, of counsel), for respondents.

SLOSS, J. This is a writ of certiorari to review an award of the industrial accident commission allowing compensation to the widow of James Mason who, the commission found, had been accidentally killed while in the employ of the petitioner, Western Metal Supply Company.

Among other grounds of attack on the award, it is contended that the industrial accident commission is without jurisdiction to allow compensation to dependents where the accident has resulted in the death of an employé. The question thus raised goes to the very foundation of the commission's authority to act at all on applications for death benefits. It is involved in a large number of cases now pending in this court, in addition to the present one. It will not be necessary to repeat our views regarding the constitutionality of the general scheme of compensation embodied in the "Workmen's Compensation, Insurance and Safety Act" of 1913. We have treated this question at some length in our recent decision in Western Indemnity Co. v. Pillsbury, 151 Pac. 398. In that case the court was dealing with the claim of the injured employé himself. We had before us no question touching the right of any other person to receive compensation on account of an injury which had resulted in the death of the employé. While, in some of the later cases decided here, death claims were in fact involved, the questions now to be considered were not presented, or, if presented, were passed as being unnecessary to the disposition of the cases. Now, however, the authority of the commission to make an award in death cases is directly assailed, and we are called upon to decide whether that authority exists.

[1] The argument on behalf of the petitioner is divided into two branches. It is contended, first, that the Legislature has no authority to create a right to compensation in favor of the dependents of an employé who has sustained injuries resulting in his death; and, second, that if this right may be created, the Workmen's Compensation, Insurance and Safety Act transcends constitutional limitations in attempting to vest in the industrial accident commission the power—asserted to be judicial in its nature—to assess compensation and award it to such dependents.

The solution of the question thus raised depends, in its final analysis, on the construction of section 21 of article 20 of the Constitution, adopted October 10, 1911. That section reads:

"The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employés for any injury incurred by the said employés in the course of their employment irrespective of the fault of either party. The Legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either or any or all of these agencies, anything in this Constitution to the contrary notwithstanding."

Clearly the second clause of this section, authorizing the Legislature to provide for the settlement of disputes by a board or commission, has no broader scope than the first clause, which sanctions the creation of a liability. The disputes which may thus be settled are those "arising under the legislation contemplated by this section." It would not avail, therefore, to say that the Legislature has power, independently of this special con-

stitutional authorization, to create a liability on the part of employers in favor of dependents of employés, unless it also has the power, without express constitutional sanction, to vest in the industrial accident commission the power to make awards in such cases. That it has no such power is, we think, entirely beyond question. The power granted to the commission by the act to determine that a right to compensation exists and to fix by an award the amount of such compensation is judicial in its nature. In this behalf it would not seem necessary to do more than refer to Pacific Coast Casualty Co. v. Pillsbury, 153 Pac. 24, where, in speaking of the action of the commission in settling disputes concerning the liability which the Legislature had created, we said:

"This action by such board would be an exercise of judicial power. For that purpose it is, in legal effect, a court."

The correctness of this view is emphasized, indeed demonstrated, by a brief summary of the provisions of the act defining the duties and powers of the board with respect to claims for compensation. The commission is vested with "full power, authority and jurisdiction to try and finally determine" all proceedings for the recovery of compensation (section 73a), subject only to the limited review provided in section 84 of the act. The commission has power to administer oaths, to issue subpœnas (section 78), to take testimony (section 24a), to punish for contempt "in like manner and to the same extent as courts of record" (section 80). Where compensation is sought, the proceedings are in substance those of a court in an action at law. "Application in writing" (i. e., a complaint) is filed with the commission by a party in interest (section 22). The time and place for the hearing are fixed by the commission, and a copy of the application, together with notice of the time and place of hearing, is then served on the adverse party (section 22). This is, in effect, the issuance and service of summons. The adverse party must within five days file his answer (section 23). Here we have the usual framing of issues by the pleadings of the parties. After hearing by the commission, it makes and files its findings of facts and its "award which shall state its determination as to the rights of the parties" (section 25). The findings thus made are "conclusive and final" (section 84c), and the award itself is not reviewable except by a writ of certiorari under which the review is restricted in scope (section 84). Any party in interest may file a certified copy of the findings and award with the clerk of the superior court and judgment must be entered by the clerk in conformity therewith (section 26). The commission itself may stay the execution of any judgment so entered and may order entry of the satisfaction of the judgment (section 26).

The commission, in exercising these powers, is performing precisely the same functions that are performed by any court in passing upon questions brought before it. "Judicial power," says Mr. Justice Miller in his work on the Constitution, "is the power of a court to decide and pronounce a judgment and carry it into effect between persons who bring a case before it for decision." Muskrat v. U. S., 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246. "It is the inherent authority not only to decide but to make binding orders or judgments which constitutes judicial power. * * *" Underwood v. McDuffee, 15 Mich. 361, 93 Am. Dec. 194, quoted in People v. Hayne, 83 Cal. 111, 23 Pac. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211. See, also, Marin W. & P. Co. v. Railroad Commission, decided January 17, 1916, 154 Pac. 866 where "judicial power" is defined. The industrial accident commission is given the power to make binding orders or judgments. In making an award upon which the clerk must enter a judgment, the action of the commission does not differ from that of a judge who directs the entry of judgment by the clerk of the court. The entry of judgment follows automatically upon the filing of the findings and award of the commission. The clerk acts ministerially and with no other authority than that of the commission itself, as evidenced by the certified copy of its proceedings. No judicial action on the part of the superior court or a judge thereof is required to give to the commission's award the full force and effect of a judgment.

We do not overlook the consideration that administrative boards and officers are often called upon to determine the facts and apply the law to those facts. Such bodies and officers do not exercise judicial functions in the strict sense of that term. Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13. We might cite many cases dealing with the acts of bodies like the interstate commerce commission, boards of medical and dental examiners, and other boards or officers authorized to pass on various questions. These cases generally hold that judicial power is not exercised in the performance of the various functions committed to such boards. But none of these cases had to do with a situation like the present, where the law creates a right in one person against another and vests a board with the jurisdiction to hear complaints, to issue process, to compel the attendance of witnesses, to determine conclusively the issues raised by the pleadings of contending parties, and to make a final judgment or award determining the rights of those parties. As was said in State v. Hawkins, 44 Ohio St. 109, 5 N. E. 232, one of the cases cited by the respondents:

"It may be safely conceded that power to hear and determine rights of property and of persons between private parties is judicial, and can only be conferred on the courts."

It is true that, in several cases involving compensation statutes, it has been held that

the boards or officers authorized to determine the facts upon which the right to compensation arose were exercising executive or administrative rather than judicial powers. Borgnis v. Falk, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; Mackin v. Detroit T. A. Co. (Mich.) 153 N. W. 49; Kennerson v. Thames T. Co. (Conn.) 94 Atl. 372. But in none of these cases was the court considering a statute which gave to a commission powers as extensive as those vested by our law in the industrial accident commission. We shall not take the time to review in detail the cases just cited, but content ourselves with saying that we think there is nothing in them which would support the claim that the powers exercised by the industrial accident commission of this state in making awards of compensation are not strictly judicial.

In the absence of a special enabling provision of the Constitution, judicial power could not be vested in the industrial accident commission. Section 1 of article 6 of the Constitution provides that:

"The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, superior courts and such inferior courts as the Legislature may establish in any incorporated city or town, township, county, or city and county."

It is clear that the industrial accident commission is not one of the courts thus designated. It is equally clear that the grant contained in the section of the Constitution just cited, unless modified by other constitutional provisions, is exclusive.

"Except for local purposes, the section disposes of the whole judicial power of the state, and vests all of it in the courts expressly named therein, leaving none at the disposal of the legislature." Pacific Coast Casualty Co. v. Pillsbury, supra.

We are, then, brought back to the inquiry whether section 21 of article 20 of the Constitution contemplates and authorizes legislation creating a liability to pay compensation to dependents of employés whose death has resulted from injury incurred in the course of their employment. If the Legislature is by this constitutional provision authorized to create the liability, it is equally empowered to provide for the adjudication of questions concerning the liability by an industrial accident commission.

[2, 3] The essential language of section 21 is this: The Legislature may "create and enforce a liability on the part of all employers to compensate their employés for any injury incurred by the said employés in the course of their employment." The contention of the petitioner is that this language is not broad enough to cover a compensation to be paid to any one but the injured employé himself. But we are not to give too strict and literal interpretation to a constitutional amendment which aims to enlarge the power of the Legislature, or to remove doubts concerning its power to legislate on a given subject. The constitutional amendment, as is perfectly apparent from its terms, was designed to establish the authority of the Legislature to pass laws making the relation of employer and employé subject to a system of rights and liabilities different from those prevailing at common law. That system was one which had already been adopted in many jurisdictions. The statutes putting it into force were commonly known as workmen's compensation laws. In every one of those laws, provision was made not only for compensation or indemnity to an employé who survived his injury, but for payment to the heirs or dependents of an employé who had received a fatal injury. 2 Boyd, Workmen's Comp. § 213. The two kinds of payment have always been regarded as component parts of a single scheme of rights and liabilities arising out of a given relation. See Huyett v. Pa. R. Co., 86 N. J. Law, 683, 92 Atl. 58. It is true that at common law there was no action for torts causing death. The right of action died with the injured person. Accordingly, it is universally held that statutes like section 377 of the Code of Civil Procedure, giving an action for wrongful act or neglect causing death, create a right entirely distinct from that which was vested in the injured person before his death. But the analogies of the common law cannot be applied too closely to this new scheme, which undertakes to supersede the common law altogether and to create a different standard of rights and obligations, covering the entire field of injury to workmen in the course of their employment. That the constitutional amendment was designed to authorize the establishment of the new system cannot be doubted. In view of the general trend of legislation on this subject, we think the language of the constitutional amendment was not inapt to describe a scheme of liability which should include the entire field embraced within the prior laws. Compensation means more than a mere cash payment to an individual. Compensation to employés for injuries incurred by them may fairly be said to mean, not only a money payment to the employé himself, but provision or indemnification for the various elements of loss which may be the direct result of his injury. It includes, for example, the obligation to provide medical and surgical treatment (section 15, subd. a)—an obligation which does not necessarily involve payment in cash to the employé himself. It may equally be said to cover some provision for those who had been entitled to look to the employé for their support and who by his death are deprived of that support. If the law provided that while an injured workman was disabled payments should be made to his family during the period of the disability, this would be one form of compensation to the workman. It would hardly be claimed that such a provision was beyond the scope of the constitutional au-

thorization. On similar reasoning, it may fairly be said that, where a workman is killed, the requirement that a payment shall, for a given period, be made to his dependents for their support, is also a provision for compensation to the workman within the meaning of section 21 of article 20.

We have not thought it necessary to discuss at any length the objections to this legislation based upon the provisions of the federal Constitution. As we have said, the subject is fully covered, so far as concerns injuries not resulting in death, by the decision in Western Indemnity Co. v. Pillsbury, supra. We see no distinction between such cases and the allowance of death benefits. The provision for such death benefits, like that for the payment of compensation to injured employés themselves, is a regulation of the conditions surrounding the employment of labor and is to be justified upon similar grounds.

[4] It is argued that under the statute the employer may be required to make payments to alien and nonresident dependents, and that no public purpose cognizable by the Legislature of this state is to be served by requiring payments to such aliens and nonresidents. But this argument is based upon altogether too narrow a view of the constitutional limitations upon legislative action. If it may reasonably be thought that the best interests of the state, of the employers of labor, and of those employed, as well as of the public generally, are promoted by imposing upon the industry or the public the burden of industrial accident—and some such theory lies at the bottom of all workmen's compensation statutes (Western Indemnity Co. v. Pillsbury, supra)—the residence and citizenship of the injured workman, or (if he shall have met death) of his dependents, are factors entirely foreign to the discussion. The Legislature has determined that the employment of labor in given pursuits entails upon the employer certain responsibilities towards the persons performing the labor and those dependent upon them. There is no constitutional or rational ground for limiting the benefits of this legislative scheme to citizens or residents of this state. If the employment was such as to fall within the state's lawmaking jurisdiction, the Legislature certainly had the power to pass laws operating uniformly upon all persons affected by such employment.

In addition to the constitutional questions which we have discussed, the petitioner urges various grounds of objection to the action of the commission.

[5] The facts upon which the award was based are somewhat peculiar. James Mason was employed as a night watchman by the applicant, Western Metal Supply Company, and at the same time by five other corporations. He made regular rounds of the premises of the six employers. For his services he received $30 per month from the applicant. The others for whom he acted as watchman paid him different sums, his aggregate monthly earnings from the six employers being $116. The Western Metal Supply Company knew that he was acting as watchman for other employers, but did not know the number of such other employers nor the identity of all of them. Mason's employment was by separate agreement with each of his employers, and not by any joint agreement or joint employment. In addition to the foregoing facts, the commission found:

"That the employment of Mason by the defendant was personal in its nature, and was intended by the parties to be a contract of hire of an agreed portion of his personal service; that on the morning of the 9th day of March, 1914, the dead body of said James Mason was found upon the premises of the defendant Western Metal Supply Company, death having been caused by gunshot wounds inflicted by unknown persons engaged at the time of the murder in committing burglary upon the said premises."

There were findings, in the language of the statute, of the other jurisdictional facts authorizing an award. The commission awarded to the applicant, the widow of James Mason, compensation amounting to three times Mason's average annual earnings; such average annual earnings being based upon the aggregate amount which he received from his six employers.

The petitioner argues that the facts above recited do not justify the conclusion that Mason was an employé of the petitioner. On the contrary, it is insisted, he was an independent contractor. Section 13 of the act defines the term "employer" as "every person, firm, voluntary association, and private corporation * * * who has any person in service under any appointment or contract of hire. * * *" The term "employé" is defined in section 14 as "every person in the service of an employer * * * under any appointment or contract of hire." If it be conceded that the relationship thus described is that of master and servant, as defined in section 2009 of the Civil Code, it must nevertheless be held that the evidence before the commission justified the finding that Mason was a servant of the appellant.

"The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged by him for disobedience of orders or misconduct." Wood on Master and Servant, § 317.

If Mason had been working for the petitioner alone as night watchman, it could hardly be claimed that he was not to be regarded as a servant of such petitioner. He would have been "in the service" of the employer "under a contract of hire," to use the language of the Workmen's Compensation Act, or, if we look to section 2009 of the Civil Code, it might well have been found that he was "employed to render personal service to his employer otherwise than in the pursuit of an independent calling" and in such service remained "entirely under the control and

direction" of the employer. The fact that Mason was working at the same time for different employers is not necessarily inconsistent with the relation of master and servant between any one of such employers and himself. 1 Labatt, Mast. and Ser. (2d Ed.) § 2. The findings and conclusions of the commission on questions of fact are conclusive. Section 84c. If a finding has the support of substantial evidence, it is beyond review here. The most that can here be said is that a finding that Mason was an independent contractor might reasonably have been made. But certainly the conclusion to the contrary was one that could have been entertained by a rational mind. It is therefore binding upon this application.

[6] It is not disputed that the evidence warranted the inference that the killing of Mason occurred while he was "performing services growing out of and incidental to his employment and acting within the course of his employment as such." Workmen's Compensation Act, § 12a. It is argued that, because the shooting was the willful act of a third person, the killing was not accidental. This contention cannot be sustained. In Western Indemnity Co. v. Pillsbury, supra, we upheld an award for injuries received by an employé through the willful assault of a fellow workman. That decision establishes the proposition that an injury may be accidental, even though it be intentionally inflicted by a third person.

[7] As stated above, section 13 of the act includes in the definition of employer every "voluntary association" having any person in service under any appointment or contract of hire. We think there is no force in the claim that the six corporations for which Mason was acting as watchman constituted a "voluntary association." As the commission found, there was no joint agreement between the various employers nor any joint employment by them. Each made a separate agreement with Mason. Clearly these six employers, each acting independently and without concert with the others, cannot be brought within any fair meaning of the term "voluntary association."

[8] Finally, the petitioner claims that the award against it should be based, not upon Mason's total earnings, but upon the amount (i. e., $30 per month) which he received from it. The solution of this question is by no means free from difficulty. At first sight there is much plausibility in the contention that an employer whose liability is based on the earnings of his employé should not be compelled to pay an award measured by the earnings received by the employé from others. The statute contains no provision which can be said to point to a clear solution of this problem. Probably the framers of the act did not have in mind the specinc case of a workman employed in a given capacity by different employers, to each of whom he rendered services for a portion of his time. It must be remembered, however, that the main purpose of the act is to indemnify the workman for the loss suffered by him. The indemnity takes two forms: The furnishing of medical attention, and payment of a proportion of the earnings lost in consequence of the injury. In case of death, the amount payable is a percentage "of the average annual earnings of the deceased employé." A fair compensation is to be paid to the employé, or to the dependents who have lost in him their source of support. It should be based upon the amount which the employé was in the habit of earning in the particular kind of employment, rather than the amount which he had been receiving from a particular employer. This was the view taken by the Supreme Judicial Court of Massachusetts in dealing with a statute which, in this regard, is not unlike our own. A longshoreman was injured while working for a steamship company. He had been employed part of the time by this company, and had earned, on an average, $8 per week from it. His total earnings from all employers averaged $13 per week. It was held, in Gillen's Case, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371, that the award of compensation was properly based upon the employé's average weekly earnings as longshoreman from all sources. The court said that:

"The loss of his capacity to earn, as demonstrated by his conduct in such regular employment, is the basis upon which his compensation should be based."

This conclusion which, we think, is the correct one, does not conflict with the rules laid down in section 17 of the act for computing the average annual or weekly earnings of an employé. That section in several of its subdivisions clearly contemplates the payment of awards which are not based upon the amount actually received by the employé from the particular employer in whose service he was at the time of the injury. There is undoubtedly an element of hardship in throwing the entire burden upon the applicant. The burden is, however, thrown upon it under the act by reason of the fact that the employé was killed while in its service.

The award is affirmed.

ANGELLOTTI, C. J. (concurring). I concur in the judgment and also in the opinion of Mr. Justice SLOSS. I desire to add a few words as to my views on the question of the proper construction of section 21 of article 20 of the Constitution. I am entirely satisfied, as held by the court, that there is to be found in such provision, in view of the circumstances which we have a right to consider in construing the language of such a constitutional provision, an intent to include the whole subject-matter of compensation for injuries to employés in the course of their employment, including death, regardless of the fact that the compensation in the event of death goes to dependents of the employé. Of course, it must be conceded that, where a

constitutional provision is so clear and unambiguous as to leave no doubt as to its meaning, the courts are not at liberty to alter the meaning so expressed by resort to other considerations, and the intent of the people in adopting the provision, which is necessarily the governing factor, must be determined solely by the language they have used. In such a case, while the object of construction of such a provision is simply to give effect to the intent of the people in adopting it, that intent is to be found in the provision itself. But in considering the language used extremes of both a liberal and a strict construction are to be avoided, and mere technical rules of construction are often to be disregarded. As an illustration, Mr. Cooley says that the maxim that statutes in derogation of the common law should be strictly construed can seldom with propriety or safety be applied to constitutional provisions. In this connection he also says:

"When these amendments assume to make any change in the common law the change designed is generally a radical one; but as they do not go minutely into particulars, as to statutes, it will sometimes be easy to defeat a provision if courts are at liberty to say that they will presume against any intention to alter the common law further than is expressly declared. A reasonable construction is what such an instrument demands and should receive; and the real question is what the people meant, and not how meaningless their words can be made by the application of arbitrary rules." Cooley, Constitutional Limitations (7th Ed.) p. 89.

Section 21 of article 20 of the Constitution was proposed to the electors as an amendment by the Legislature at the regular session of 1911, the same session at which was adopted the so-called Roseberry Workmen's Compensation Act (St. 1911, p. 796), the compensation provisions of which were elective as to both employer and employé. The latter act was the first step in this state toward substituting for the old system of an action in the courts for the recovery of damages from an employer for injuries to a workman in cases where the employer was found guilty of some negligence or misconduct, the general system of compensation for injuries incurred by employés in the course of their employment embodied in workman's compensation laws in various other states and countries, a system imposing liability for compensation irrespective of the fault of either party, and generally administered by a commission. The nature of the very radical change proposed and the reasons for such legislation were discussed in the opinion of Mr. Justice Sloss in Western Indemnity Co. v. Pillsbury, 151 Pac. 398. As we have said, the system provided by the Roseberry Act was elective, and there was grave question as to the power of the Legislature, in view of certain provisions of our Constitution as it then stood, to provide such a system as would be compulsory on all employers and employés coming within its terms, as is the system provided by the later act here under consideration, popularly known as the Boynton Act (St. 1913, p. 279); enacted after the adoption of the constitutional amendment. As was said in Western Indemnity Co. v. Pillsbury, supra, the most striking difference between the two laws, the Roseberry Act and the Boynton Act, is that the compensation provisions of the latter statute are compulsory. No one will question that the sole purpose of the amendment was to obviate such objection as might be made, based on provisions of our Constitution, to legislation creating and providing for the enforcement of the liability incident to such a compulsory system. The paramount idea was to free the legislative department from the effect of certain constitutional provisions which might reasonably be contended to preclude the desired action, and to leave that department with full power to deal with the particular subject-matter, regardless of such constitutional provisions. As substantially said by counsel for the industrial accident commission, the central thought of the amendment is not at all by way of limitation, but to fully grant authority to the Legislature, if such authorization was necessary, to create and provide for the enforcement of this new scheme of liability to take the place of the old scheme based on fault.

The Roseberry Act, which, as I have said, was enacted at the same session at which the constitutional amendment was proposed, provided compensation for dependents of an employé who was fatally injured in the due course of his employment. So far as legislation has gone on this subject, such compensation is an inseparable part of every such system. As is said in 2 Boyd on Workmen's Compensation, § 213:

"Provision is universally made in all of the compensation acts to provide compensation for persons who wholly or in part depend upon an employé who is killed in the due course of employment."

An examination of the laws of other states and countries on this subject shows that this statement is absolutely correct. The contention of petitioner in this regard would bring us to the conclusion that the Legislature in proposing and the people in adopting the amendment under consideration, one designed to confer on the Legislature full power to provide for the creation and enforcement of the liability attendant on such a system, intended to so limit the authority of the Legislature in that regard as to preclude it from either creating or providing for the enforcement of any liability in connection therewith to pay compensation for the death of the employé to his dependents, a matter considered an essential part of the system in every workmen's compensation law ever enacted, and one embraced in the very law enacted by the Legislature at the same session. It is difficult to understand how, in the nature of things, any such effect could have been intended. Does the language used com-

pel such a conclusion as to the intent of the amendment?

So far as this question is concerned, the material portion of the amendment is the first sentence. The language is:

"The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employés for any injury incurred by the said employés in the course of their employment irrespective of the fault of either party."

The remainder of the section has simply to do with the conferring of full power on the Legislature to provide for the settlement of disputes arising under such legislation. The claim that no intent can here be found to include compensation for death to dependents must rest upon the fact that the words "their employés" were inserted after the words "to compensate," the language being "to compensate their employés," for it is very clear that, in the absence of these two words, the succeeding words "for any injury incurred by the said employés," could be fairly construed in no other way than as including any and all injuries, including death, thus making the section provide for the creation and enforcement of a liability on the part of all employers to compensate for any injury incurred or suffered by an employé in the course of his employment, including the compensation to dependents in the event of death. It does seem to me that such a claim attributes too much force and too technical a meaning to these two words in the connection in which they are used, one not in accord with their ordinary and popular significance in such a connection. We know that such acts as the Roseberry and Boynton Acts are generally and popularly known as "Workmen's Compensation Laws," and, as we have seen, they invariably include a scheme for the compensation of dependents in the event of death. This term necessarily brings to the mind of any one a law including such a scheme as an essential part. And I believe that the same signification should be given to such phrases as "compensation of employés," or "to compensate their employés," or "any injury incurred by the said employés," when used in a general way in connection with such laws; for I believe that such is the meaning ordinarily given to such language in this connection by the people generally. It is the popular signification in this connection. An examination of the titles adopted by those framing such laws is interesting as indicating the views of legislators on this subject. In Bradbury's Workmen's Compensation (2d Ed.), we find the legislation of this and other countries pertaining thereto. In Great Britain the act of 1906 is entitled, 'An act to consolidate and amend the law with respect to compensation to workmen for injuries suffered in the course of their employment." Volume 2, p. 1735. Our own federal Compensation Law of May 30, 1908, for employés of the government, is entitled, "An act granting to certain employés of the United States the right to receive from it compensation for injuries sustained in the course of their employment." Volume 1, p. 1049. The Connecticut act is entitled, "An act concerning compensation to workmen injured in the course of their employment." Volume 2, p. 1144. The title of the Kansas act is, "An act to provide compensation for workmen injured in certain hazardous industries." Volume 2, p. 1218. The title of an act of Massachusetts is, "An act to provide for compensating certain public employés for injuries sustained in the course of their employment." Volume 2, p. 1262. The title of the act of Alberta is, "An act with respect to compensation to workmen for injuries suffered in the course of their employment" (volume 2, p. 1641); that of an act of British Columbia, "An act respecting compensation to workmen for accidental injuries suffered in the course of their employment" (volume 2, p. 1641); and those of Manitoba and Nova Scotia the same (volume 2, pp. 1655, 1698). The act of Saskatchewan is entitled, "An act respecting compensation to workmen for injuries suffered in the course of their employment," and it is declared that it is to be known as "The Workmen's Compensation Law." Volume 2, p. 1725. As I have noted, all of these acts, as well as all other acts on the subject, include the scheme of compensation to dependents in the event of death. In other states the title substantially defines the act as an act for the compensation for an injury suffered or sustained by an employé in the course of his employment, specifying in terms nothing about death or compensation to dependents. Iowa, vol. 2, p. 1190; New Jersey, vol. 2, p. 1375. This indicates the existence of a very different meaning for such words as are used in our constitutional amendment, when used in describing workmen's compensation legislation, from that given to our constitutional provision by the learned counsel for petitioner. I am satisfied that, in the light of the history of such legislation, the only fair conclusion is that the words of the constitutional provision, considered all together, could have been understood by the people in no other way than as meaning that compensation "irrespective of the fault of either party" could be provided for any injury (including death) suffered or sustained by an employé in the course of his employment, including compensation of dependents of the employé in the event of death. Such is the meaning fairly indicated by the language used, in view of the subject-matter of the provision.

I concur: LAWLOR, J.

SHAW, J. (concurring). I concur in the opinion of Mr. Justice SLOSS.

In view of the reference therein to the constitutionality of the general scheme of the act of 1913, as determined in Western Indemnity

Co. v. Pillsbury, 151 Pac. 398, I deem it necessary to add this: I do not agree that the Legislature has power under the authority of section 21, art. 20, of the Constitution, or otherwise, to create a compulsory liability on the part of employers to compensate their employés for injuries to such employés in the course of the employment, without regard to negligence, except where the injury is caused by the negligence of the employer, or of a fellow servant, or where the negligence of the employé merely contributes thereto, or where it occurs because of the dangers incident to the work, the place where, or the appliances with which, the employé is engaged. If the injury occurs in the course of the employment solely from the negligence of the employé, and not from any of the above-mentioned causes, I do not think the state may rightfully impose on the faultless employer any liability growing out of such injury. To do so would be a mere tyrannical exercise of physical power. I have stated my reasons more fully in my opinion in the case cited, rendered on the petition for rehearing.

HENSHAW, J. (dissenting). I dissent from more than one of the legal conclusions declared in the prevailing opinion. In so doing I have no disposition to repeat the views which I expressed at length in my dissenting opinion in Western Indemnity Co. v. Pillsbury, 151 Pac. 398. In this case I dissent specifically from:

1. The construction of the constitutional provision which creates "a liability on the part of all employers to compensate their employés for any injury incurred by the said employés in the course of their employment." By that construction it is announced that this language of the Constitution, expressly limited to compensation to employés, means compensation to heirs, to actual dependents, or to a named class of so-called dependents, without regard to their needs. Of course, the Constitution neither says nor authorizes this. Of course, the Constitution by its very words limits the liability for compensation to the employés, and therefore, by every canon of construction, particularly in a "revolutionary act" such as this has been described to be, should be construed only in accordance with its language. The reasoning by which the conclusion of the prevailing opinion is reached is, as well as I can follow it, along two lines. In the concurring opinion of the Chief Justice the argument seems to be that as laws of this nature are generally known as "workmen's compensation acts," and as in all of these laws express provision is made for the compensation of dependents for the death of the injured employé, therefore we should say that the Constitution meant to include a like provision, and, furthermore, as it is a desirable thing that the whole subject-matter should be left to the accident commission, we are justified in helping out this deficiency of the Constitution by making it say, not what it does say, but what in the opinion of this court it should have said. If this reasoning is sound, it not only opens wide the door to and justifies any form of usurpation of the legislative power by the judiciary, but goes a step further and justifies the judicial enactment of Constitutions. For such a construction of the Constitution makes the people of this state declare what distinctly they declined to declare, and confers upon the Legislature a power which distinctly the Constitution failed, if it did not refuse, to confer upon the Legislature. The unvarnished truth is that, under the guise of construction, this court is filling a manifest gap and hiatus in the law. It is inserting in the Constitution important provisions of the law affecting personal rights which provisions are not expressed therein. So that hereafter this court can be justly charged not only with making laws under the guise of construction, but with framing Constitutions as well.

The second line of reasoning recognizes the radical and essential differences which exist at common law (which is the basis of jurisprudence in this state, Pol. Code. 4468) between an action in tort by a person for injuries and an action for his wrongful death by his heirs, and declares, as indeed must be declared, that, while the right of action to an employé for injuries existed at common law and was enforceable against the master, damages or compensation for the wrongful death of an employé, or of anybody else, were unknown at common law. It is recognized that such was the law of this state until the right of action for the wrongful death was placed upon our books as a statutory right. But we are advised under this line of reasoning that "the analogies of the common law cannot be applied too closely to this new scheme which undertakes to supersede the common law altogether." To this I make answer that here there is no question whatsoever of analogies. It is a question of principles. Specifically, it is the question of applying the proper principles and canons of construction to this constitutional amendment. Those principles are still the principles of construction embraced and declared in the common law, repeated in our Code rules of construction (Civ. Code and Code Civ. Proc. § 5), and reinforced by the added provision of the Code to the effect that the common law of England is the rule of decision in all courts of this state (Pol. Code, 4468).

The imperative duty is thus cast upon this court to construe the scope of this constitutional grant of power to the Legislature, under common-law rules governing the construction and interpretation of enactments, precisely as we would construe the same language if found in one of our legislative acts. What jurist with the slightest knowledge of the common law would dream of saying, or would dare to say, that a legislative act in

the language of this Constitution awarding compensation "to the injured employé" could or would be stretched to mean the creation of a right of action in the heirs or dependents of a dead employé? An act of Parliament is England's supreme law, precisely as is our Constitution. Could any common-law lawyer be found who would risk his reputation for sanity by declaring that an act of Parliament, in the language of our Constitution, included indemnification to dependents for the death of the employé? And is it not amazing, if this construction be in any wise tenable, that the same construction has not long since been put upon the common law itself? Would it not have been said (as is here said in reference to our constitutional provision) that as the common law gave a right to compensation to an injured employé, and as compensation is but another word for damages, the common law itself, without statutory enactment, gave a right of action to the heirs or dependents of the employé in the event of his death? How much wasted time and superfluous labor have Legislatures bestowed upon these and like questions if this novel rule of construction is a sound one. The framers of every workmen's compensation act thought it necessary to make express provision for compensation in the case of death. They need not have done so. Our Legislature thought it necessary to make express provision for a right of action following a wrongful death. It need not have done so. In all the history of the common law to no analyst of and no commentator on it did it ever occur that the recognized right of action to a person for injuries contained within itself the right of action to his heirs or dependents in the event of his death. We must regret this age-long deficiency in their perceptive and analytical faculties.

2. The employer in this case was concededly absolutely blameless and without fault. I deny the power of the state Constitution to take the property of one man under such circumstances and to bestow it upon another. My views upon this I set forth in extenso in Western Indemnity Co. v. Pillsbury, supra. I have no desire to repeat them, but once more and for the last time I must dissent from a judicial declaration which amounts simply to this: Whenever the Legislature despoils a blameless person or class of persons of their property to bestow it on the supposedly needy, this court will say that the act of spoliation is "referable to the police power" and consequently valid. To a new liability or a new form of liability created to meet negligence or tort, actual or imputable there can be no valid objection; actual as where the employer fails himself to observe due care for his employés, imputable as where injury results to one employé from the misconduct of another, which latter may reasonably be regarded as in a sort an agent of the employer himself. But beyond this no legitimate exercise of the police power can go and to approve legislative acts which transcend these just and well-defined limitations is to throw wide the door to whatever form of expropriation the Legislature may see fit to indulge in.

In Calder v. Bull, 3 U. S. (3 Dall.) 399, 1 L. Ed. 648, Justice Iredell, after discussing the legislative omnipotence of the English Parliament, declares:

"In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have, individually, framed their state Constitutions, since the Revolution, and of the people of the United States, when they framed the federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void."

In Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162, Chief Justice Marshall speaks as follows:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"

I am not unmindful of the fact that these are utterances of ancient law, having both been written more than a hundred years ago. Nor am I unmindful of the modern tendency to belittle and reject all such utterances as having been made by men steeped to the lips in the wine of privilege and incapable of understanding the present day theories of the rights of man. Nevertheless they sat in the nation's highest judicial chairs, and, until their successors in those chairs shall say that their words have lost their meaning and their constitutional expositions are obsolete, I shall continue to found my legal views on those utterances rather than on the new science of legal hermeneutics of which the prevailing opinions in this and the earlier case afford such luminous examples.

3. I dissent from the view which justifies the giving of the property of a citizen of this country to nonresident aliens who are not even within the jurisdiction of the state. By no conceivable stretch of the imagination of which I am capable can I perceive that the support of such nonresident aliens is any part of the duty of the state, or that provision for such support comes within any possible legitimate purview of the police power. I must confess to a lack of nimbleness of mind which makes it impossible for me to follow the rapidly shifting grounds upon which one or another of the terms of this law are upheld. I have heretofore expressed some of my difficulties in this regard. Thus when under the provisions of the Constitution, which the Constitution itself declares are mandatory, it is declared that the Legislature shall impose a liability upon all employers, I have been unable to see how justification could be found for the act of the

Legislature in exempting favored classes of employers. The answer is made by this court that these exempted employers of labor are not favored but unfavored classes, because this law is really a benefit to the employer. But why then the Legislature should be allowed to discriminate against certain employers remains an unanswered query. When it is asked, if the law be for the benefit of the employé, by what right are the employés of these exempted classes denied their right, we are brought back to our starting point by the declaration that the Legislature exempted them because it believed that there was less danger or risk in their employments. When the farmers' men working harvesters and thrashing machines are deprived of the benefit of this law, this court gravely states that the reason doubtless was that the Legislature did not think that their employment was as dangerous as those of dry goods clerks and telephone girls. Whenever a feature of the act does not appear to be for the benefit of the employer, it is upheld as being a benefit to the employé. When it is not a benefit to the employé, it is justified as being a benefit to the employer. And whenever it cuts too deeply into the rights of both employer and employé, then it is said to be justified by the state's interest in the general subject. And this last is the argument here advanced in support of the donation by the state of the property of its citizens to alien nonresidents.

4. I dissent from the declaration that the state may arbitrarily create and define a class of persons and by calling them "dependents" confer upon them any man's property, and I say that this cannot be done even as an exercise of the police power. For the purposes of this argument, I will concede that the property of the employer may be given to the actual dependents of the employé who is killed, but the actual dependency as a determined fact is the only basis in law or equity upon which this may be done.

5. I dissent from the views which uphold this award in full and force full compensation to be made by only one of the deceased's six employers. This dissent has nothing to do with the construction of the law put upon it by the Industrial Accident Commission to the effect that the compensation to the deceased's dependents should be based upon his total earning capacity in his vocation. This is manifestly the sound view of the law, and this is what the Gillen Case, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371, decided, and all that it decided. There was not before the Massachusetts court the question here presented, and I fail to understand how it can be thought and said that the Gillen Case is authority even of the slightest weight for the harsh and unnecessary construction here put upon this law. The deceased was a night watchman whose services were engaged by six employers. Those six employers were continuously and contemporaneously his employers during every moment of the time that he was on duty. He was protecting the properties of all of them. He was found murdered upon the premises of one, and because of that fact, and that fact alone, the employer upon whose premises his body was found is mulct for the whole compensation due his dependents. The residents of two blocks in the city of San Francisco employ a man to carry away their garbage. These two hundred residents pay him each one dollar a month for so doing. He earns from his employment $200 a month. Upon the stairway of one of these employers he negligently falls and breaks his neck. That householder must pay the full amount of the compensation. The gardner whom fifty householders employ at a dollar a month each to take care of their garden plats is injured upon the premises of one of them. That man alone must bear all the burden of compensation. And this result is declared notwithstanding the fact that at the time and during all of the time he is as much the employé of the others as of the one. It is a perfectly permissible construction of this statute to say, as is the fact, that all of these men are coemployers, and that each one shall bear his proportionate share of the award. How much more equitable this construction would be requires no word of comment. The evils arising from the other construction are most apparent. Furthermore, if this rule of construction of the statute be the true one, which of these employers will be responsible in the event that the employé is killed or injured going to or returning from his work? If his dependents are to be compensated only by the man for whom he happens to be actually laboring at the time of the injury, then we have an omission in the law, and in such a case neither the employé for his injuries nor his dependents for his death could receive any compensation. Or, if this necessary construction be pushed aside, as has been done with the Constitution, and it be said that some one of them will have to compensate the injured man, then we have a liability cast at the whim, caprice, or favoritism of the injured man, of his dependents, or of the accident commission itself. So unnecessary and so injurious is this construction of the law as compared with the one which would make all the contemporaneous employers proportionately responsible, that I fail absolutely to understand why this forced, unnecessary, and unjust construction should find favor with this court.

LORIGAN, J. (dissenting). I concur in the views expressed by Justice HENSHAW on the construction to be given the constitutional provision respecting power of the commission to award compensation.

MELVIN, J. (dissenting). I concur in all that Mr. Justice HENSHAW says with reference to the construction of the language

of the Constitution whereby a liability of employers to compensate "their employés" is extended to include a compulsion upon them to recompense dependents of such employés. I also concur in all that he says with reference to the award of full compensation against one of numerous coemployers. It seems to me that the result reached by the majority of the court permits an injustice which calls for just such vigorous protest as my learned Brother makes.

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SOUTHERN PAC. CO. v. LEVEE DIST. NO. 1 OF SUTTER COUNTY et al.

(Sac. 2154.)

(Supreme Court of California. March 18, 1916.)

1. LEVEES ⟸22 — ASSESSMENTS — NATURE AS "TAXES."

Under Const. art. 13, § 14, declaring that taxes levied, assessed, and collected upon the operative properties of railroads shall be entirely and exclusively for state purposes, and subdivisions "a," "e," and "f," declaring that such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, but that all property of railroads except shares of stock shall be subject to taxation to pay the principal and interest of any bonded indebtedness created and outstanding by any city, county, town, or district before the adoption of the section, which taxes shall be deducted from the total amount paid in taxes for state purposes, and that all provisions of the section shall be self-executing, and the Legislature shall pass necessary laws to carry the section into effect, taxes levied by a levee district, although partaking of the nature of assessments for benefits, fall within the provision.

[Ed. Note.—For other cases, see Levees, Cent. Dig. §§ 21, 22; Dec. Dig. ⟸22.

For other definitions, see Words and Phrases, First and Second Series, Tax.]

2. LEVEES ⟸22 — ASSESSMENTS — LEVEE DISTRICTS.

A levee district, while not a municipality, is included within the constitutional provision; this being shown by the reports of the commission which promulgated the law and in view of the legislation carrying it into effect.

[Ed. Note.—For other cases, see Levees, Cent. Dig. §§ 21, 22; Dec. Dig. ⟸22.]

3. LEVEES ⟸26 — ASSESSMENT OF TAX — RECOVERY OF TAXES.

A levee district which had already incurred bonded indebtedness did not levy its taxes until after the taxes which a railroad company was required by Const. art. 13, § 14, to pay to the state in lieu of all other taxes had accrued and been paid. Thereafter the district levied taxes to defray its bonded indebtedness. *Held*, that the railroad company, having paid such district taxes, was entitled to recover the amount from the state comptroller; the Constitution providing that such taxes should be deducted from the state taxes.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 25; Dec. Dig. ⟸26.]

4. LEVEES ⟸29 — ASSESSMENT OF TAX — INJUNCTION.

In such case the fact that the railroad company had already paid the taxes levied under the Constitution does not warrant an injunction against the levy of taxes by the district.

[Ed. Note.—For other cases, see Levees, Dec. Dig. ⟸29.]

In Bank. Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Submission of controversy between the Southern Pacific Company and Levee District No. 1 of Sutter County and others. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

Henley C. Booth, of San Francisco (Wm. F. Herrin, of San Francisco, of counsel), for appellant. U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., for respondent state controller. M. E. Sanborn and Lawrence Schillig, Dist. Atty., both of Yuba City, for respondent Sutter County. Garret W. McEnerney, of San Francisco, amicus curiæ.

HENSHAW, J. The differences between the plaintiff and the parties defendant were submitted to the superior court for decision under an agreed statement of facts, as contemplated by section 1138 of the Code of Civil Procedure. The judgment of the superior court was against plaintiff, and this appeal followed.

The stipulated facts essential to this consideration are the following: By the constitutional amendment and the legislative enactments passed in subordination thereto public service corporations, of which plaintiff is one, pay to the state a percentage of their gross revenues, fixed by law, as a "commutated or substituted tax for other taxes which were or might have been levied." Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 143 Pac. 700. This tax for the year beginning July 1, 1911, was 4 per cent. of the gross receipts arising from the operations of plaintiff within the state of California during the calendar year of 1910. It was due and payable on the first Monday of July (Const. art. 13, § 14, subd. "f"), and was by appellant paid in full.

Defendant levee district No. 1 of Sutter county is organized under special acts of the Legislature. Stats. 1867–68, p. 316; Stats. 1873–74, p. 511; Stats. 1907, p. 47; Stats. 1911, p. 347. The district has an assessor whose duty it is between the first Monday in March and the first Monday in July of each year to assess at its actual cash value "all the real and personal property in said district" for the purpose of raising revenue for the maintenance and support of the district. The personal property tax must be promptly collected, and is made a lien upon the real property of the owner of both. Seizure and sale may be made of the personal property to enforce this tax. On the first Monday of July and thereafter the board of directors of the district must meet to examine and equalize the assessment. The board of directors also estimate the percentage of the tax necessary to be levied, and to do this thing must meet on the third Monday in September and fix the rate. The clerk of the

board of supervisors certifies this rate to the county auditor, and the corrected and equalized assessment roll is delivered to that official. He makes the necessary computations, fixing the individual taxes at the rate prescribed, and on or before the second Monday in October delivers the assessment book to the tax collector of the district. The tax collector of the district then publishes a notice for two weeks, specifying that all taxes are due and payable, and that they will become delinquent at noon on the first Monday of January next succeeding, unless paid prior thereto. From the date of the delivery of the assessment roll to the tax collector of the district the taxes levied become a lien on the lands within the district. All moneys received by the tax collector of the district are to be paid into the county treasury of Sutter county, and the treasurer shall pay out of these moneys the interest and principal of the bonds of the district as required by law, and shall disburse the funds remaining after so doing on warrants drawn by the county auditor upon this fund.

Prior to the change in the method of taxing public utilities (Const. art. 13, § 14), and continuously thereafter up to and including the time of the submission of this controversy to the superior court, the defendant levee district had an outstanding bonded indebtedness of $400,000, saving that $60,000 of this bonded indebtedness had been paid. The levee district proceeded to assess, levy, and enforce the collection of its annual tax upon and against the operative properties of the plaintiff. This tax, it will be noted, was not fixed as to amount nor did it become a lien until long after the date when the annual state tax of plaintiff had become due and payable and had been paid. Before seeking to enforce the collection of this tax against plaintiff the levee district made formal demand upon the controller to pay over to it out of the tax so collected from plaintiff the amount of the district tax against plaintiff's property. Upon the controller's refusal so to do demand was made upon the plaintiff for the payment of this district tax, with threats of the enforcement of the penalty provided by law for its failure to pay. Under this compulsion plaintiff paid this district tax, accompanying the payment by written objection and protest.

Appellant's contention is that it is entitled to a recovery of the amount of the tax thus paid to the district, and it stands indifferent as to whether that recovery should be had from the district directly or from the controller. The district insists that appellant is entitled to no recovery, but, if it should be held that it is entitled to a recovery, that recovery should be had against the controller. The controller joins with the district in disputing appellant's right to any recovery, but further urges that no recovery can be had against the state, because the tax which appellant paid to the state was paid voluntarily and without protest. The other defendants are sued merely in their representative capacities—some as directors of the district, and of the others O'Banion is the treasurer of Sutter county, and thus the custodian of the district's funds, and Ohleyer is the assessor of the levee district. These defendants are impleaded, not alone as proper parties defendant for the recovery of the moneys, but because appellant also seeks injunctive relief against the district and its officers, which injunctive relief is that the district and its officers be prohibited from further levying a similar tax against appellant's operative properties within the district. With this statement of facts clearly in mind, we may proceed to a consideration of the legal questions presented by the controversy. Upon this consideration the following quotations from the Constitution have a controlling bearing:

"Taxes levied, assessed and collected as hereinafter provided upon (the operative properties of) railroads * * * shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided." Const. art. 13, § 14.

"Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided." Const. art. 13, § 14, subd. "a."

For a better understanding of the questions presented, and for convenience, the words embraced in parentheses have been interpolated into the constitutional provisions.

"All property enumerated in subdivisions a, b, and d of this section (being all of the properties of these corporations excepting their shares of stock) shall be subject to taxation, in the manner provided by law, to pay the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district, before the adoption of this section. The taxes so paid for principal and interest on such bonded indebtedness shall be deducted from the total amount paid in taxes for state purposes." Const. art. 13, § 14, subd. "e."

"All the provisions of this section shall be self-executing, and the Legislature shall pass all laws necessary to carry this section into effect. * * * The Legislature shall provide for reimbursement from the general funds of any county to districts therein where loss is occasioned in such districts by the withdrawal from local taxation of property taxed for state purposes only." Const. art. 13, § 14, subd. "f."

[1] The first proposition advanced by all of the respondents is that the tax levied by the levee district is not a tax at all. Of course, respondents do not by this mean to be understood as saying that it is not a tax as distinguished from an assessment for benefits. For the contrary has been decided in the case of this defendant levee district as to the precise form of raising revenues which the Legislature has authorized it to employ. People v. Whyler, 41 Cal. 351; Williams v. Corcoran, 46 Cal. 553; Wilson v. Board of Supervisors of Sutter County, 47 Cal. 91. While to the same effect are the cases of Smith v. Farrelly, 52 Cal. 77, and City Street

Imp. Co. v. Regents, etc., 153 Cal. 776, 96 Pac. 801, 18 L. R. A. (N. S.) 451. What respondents really mean is that, because this tax partakes in its nature of an assessment for benefits, and as benefit assessments are not expressly forbidden by the Constitution, this tax should be construed as a benefit assessment and thus upheld. But this very argument was advanced in the Whyler Case, and was disposed of after discussion by a declaration to the effect that, while the Legislature might have authorized the district to levy benefit assessments upon the land, it saw fit to authorize the district to levy a general tax upon all property, real and personal, without regard to benefits, and that the two methods of raising revenue were so entirely distinct, were permissible upon such wholly different grounds, that there could be no legal identity established between them. And such is the view of all the authorities, though reference need be made only to Neenan v. Smith, 50 Mo. 525, and Cooley, Taxation (3d Ed.) p. 1290. There can be no possible escape from the conclusion, therefore, that when the Constitution declares that the taxes paid by corporations such as appellant "shall be in lieu of all other taxes," there is no power in this court to split the phrase "all other taxes" and exempt from the operation of this universal language some taxes of a specific kind levied for some specific purpose. We are then throughout this case considering the law only as it applies to taxes, and not to assessments for benefits.

[2] The next proposition, for which all of respondents contend, is that, conceding this to be a tax, while the Constitution has declared that the method which it has adopted for raising this revenue from these corporations for state purposes shall be in lieu of all other taxes and licenses, state, county, and municipal, and has thus, in effect, forbidden the levy of such taxes by the enumerated corporate subdivisions of the state, namely, counties and municipalities, it has not forbidden the imposition of such taxes upon the properties of these corporations by districts which are in no true sense municipal corporations. It may at once be said, as has been frequently decided, that these district agencies and mandatories of the state are not municipal corporations. People v. Reclamation Dist. 551, 117 Cal. 114, 48 Pac. 1016; Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 53 Pac. 401; People v. Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 676; Reclamation Dist. 551 v. County of Sacramento, 134 Cal. 477, 66 Pac. 668; People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207; Reclamation Dist. v. Birks, 159 Cal. 237, 113 Pac. 170. The question thus calling for determination may be thus stated: Because the Constitution does in terms and by name relieve the operative properties of these public service corporations from taxation by counties and municipalities, and does not in the sentence so doing in terms relieve them from taxes which might be imposed by districts, may such districts tax those operative properties? A satisfactory answer to this question cannot be found from a mere dissection of this single sentence of the Constitution. There is involved in its proper determination a consideration of the scope and meaning of the whole constitutional provision.

Of the purpose of the framers of this new taxation measure and of the intent of the people in adopting it there is fortunately not the slightest doubt. The state had appointed a learned commission on revenue and taxation, whose labors extended over many years. In 1906 they promulgated their first report. In 1910 they put forth their second report. These reports were most widely distributed, at the state's expense, with the avowed purpose of educating its people to a knowledge of the reasons why the change in the method of taxation of public service corporations, banks, insurance companies, etc., was deemed most desirable, and to an understanding of the benefits which would follow the adoption of the new method. Those reports themselves are official publications of the state. Appendix to Journals of Senate and Assembly, 39th Sess., 1911, vol. 1. Some of the reasons for the change have been expressed by this court in P. G. & E. Co. v. Roberts, 168 Cal. 420, 143 Pac. 700. Another and potent reason as set forth in the reports was the injustice of permitting local assessments for local ends upon properties such as railway companies and banks acting under corporate franchises and to whose prosperity the whole state contributed. Illustrations were given showing the injustice of permitting a poor county, contributing little or nothing to the support of a railway, but through whose territory a railway chanced to run, to tax locally the properties of the railway, while an adjoining county, rich and prosperous and contributing enormously to the maintenance and support of the road, could, because the railroad did not reach into the county, receive no dollar of revenue. The same argument was applied to banks, and the demand was for a "separation of sources of taxation" and a constitutional provision authorizing the state, and the state alone, to tax such corporations, while "the counties and local governments shall tax only the private or individual real estate and tangible property within their boundaries, property, that is, which is clearly and distinctly localized." Herein it was pointed out that corporate properties were broadly differentiated from such local properties, in that the former "does not have in the same sense a local situs. It extends over many communities, serves all, and all contribute to its income." "Obviously there is a perfectly clear line of demarcation between property local in character, which would be subject to local taxation, and property or industries gen-

eral in character, which should be subject to general or state taxation. To accomplish separation it is necessary to define clearly and sharply the boundary line between state and local powers of taxation." "If we have separation of sources, the state alone would deal with these corporations. This would save a great amount of friction and more or less expense." These quotations are from the reports of the commission on revenue and taxation, and could be indefinitely multiplied. Sufficient, we think, has been said to show that the commission at least contemplated and proposed for purposes of taxation a complete separation of the taxing power, conferring upon the state the exclusive power to tax all of the properties of all these corporations by a tax substituted and commutated for the different ad valorem taxes, this tax taking the form of a recovery into the state treasury of a percentage fixed by law and changeable at the will of the Legislature of the gross revenues of these corporations, while the corporate agencies and mandatories of the state were forbidden to levy local taxes upon the operative properties of these corporations. In view of this and of what will hereafter be said, we think the argument to be of little weight that this constitutional amendment, while deliberately framed to forbid local taxation upon the part of counties and municipalities, with equal deliberation designed that such local taxation could be imposed by districts, this argument resting for its sole weight upon the omission of the word "district" in the inhibiting clause; for we not only find the learned commissioners speaking in their reports indifferently of taxation by cities or taxation by counties or "local taxation," but we find in every word of their reports that their fundamental idea was that the state, and the state alone, should fully tax for its own purposes by this new method all of the properties of the corporations, which properties, as a matter of justice to avoid double taxation, as a matter of expediency to avoid waste, and as a matter of public policy to take away from these corporations all temptation to enter politics, should be absolutely relieved from "local taxation." This is not only the manifest design of the commission; it represents not alone the educational doctrines declared to the people, but, when the constitutional amendment is read as a whole, it is found clearly expressed therein.

It would appear to be beyond peradventure, therefore, that when the Constitution declared that the state taxes "shall be in lieu of all other taxes, state, county, and municipal," it used the words "state, county and municipal" as inclusive and descriptive, and not as designed to exempt districts from its operation and to authorize the levying of local taxes by such districts. 2 Lewis' Sutherland, Stat. Const. § 495; Church of the Holy Trinity v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. And this conclusion is strongly confirmed when consideration is paid to this constitutional amendment as a whole, rather than to this single detached sentence from it. Subdivision "e" of section 14, as above quoted, in terms declares that the operative properties of such corporations as appellant shall be subject to taxation "to pay the principal and interest of any bonded indebtedness created and outstanding by any * * * district before the adoption of this section." Here is an express authorization to levy a specific tax for a single specific purpose, and under the rules of construction too familiar to require the support of authorities, in view of the whole scope of the act, it is too plain for argument that the express grant of power to levy a specific tax for a specific purpose embraces within it the implied denial of the right to levy any such tax for any other purpose. Therefore it is concluded that both on the report of the commissioners and on the language of the constitutional amendment the only form of local tax which may be levied and collected "by any city, city and county, county, town, township or district" is that tax levied to pay the principal and interest of a bonded indebtedness created and outstanding at the time the constitutional amendment went into effect.

Of persuasive, though not of controlling, value to the consideration is the contemporaneous act of the Legislature, upon which is enjoined by the provisions of the Constitution itself the duty "to pass all laws necessary to carry this section into effect." We will not unnecessarily prolong this discussion by quoting from the legislative acts. It is enough to refer to them. By a reading of them it is made plainly to appear that the Legislature itself dealt expressly with districts and construed the Constitution to forbid local taxation by such districts saving in the one instance authorized by the Constitution itself. Stats. 1911, c. 335; Stats. of Special Sess. of Legislature of 1911, c. 23; Stats. Regular Sess. of Legislature of 1911, c. 602; Stats. of 1913, cc. 6, 320, 533.

[3] The conclusion thus reached and expressed is that the defendant district has not the general power to tax appellant's properties for its local purposes. The particular tax here under consideration, however, was admittedly levied under the constitutional sanction. In other words, it was a tax to pay the outstanding bonded indebtedness of the district. We next come, therefore, to the correlated rights and duties of these disputants under the admitted facts, which admitted facts for convenience may again be epitomized: The railroad company did pay, as it was called upon to pay, into the state treasury on the first Monday of July, the full 4 per cent. of its gross revenues. The district tax at that time had not been assessed and levied. It was quite proper for the district to assess and levy this tax, because it was clearly within the contemplation of

the constitutional provision that it should receive the amount of that tax either from the state by deduction from the total amount paid in by the railroad company, or from the railroad, which in turn would be entitled to reduce its total 4 per cent. by the amount of the local tax which it had thus paid. Owing to the varying dates when these assessments became fixed and the taxes payable, it was the duty of the appellant to pay in the full 4 per cent. to the state as it did. At the time it did this it could not know, and so could not withhold, the amount of the district tax. Nor yet could it protest against its payment of the full 4 per cent., since that payment was clearly contemplated by law, and there was no legal ground of protest against it. The language of the Constitution touching this matter is as follows:

"The taxes so paid for principal and interest on such bonded indebtedness shall be deducted from the total amount paid in taxes for state purposes."

In view of the erudition of the framers of this amendment and of the study which they devoted to it, it is apparent that this language is most apt to meet just such cases as that here presented. It does not, as the controller argues, require that the corporations shall first deduct the amounts of these local taxes and pay only the balance after such deduction into the state treasury at the risk of forfeiture of the amount of the local tax, under the plea that the total state tax was voluntarily paid. Nor yet does it countenance for a moment the double taxation which would result if the state was paid the tax in full, and the district in turn was paid its tax in full. Thus the language does not say that:

"The taxes so paid for principal and interest shall be deducted from the total amount to be paid in taxes for state purposes."

It says that the deduction shall be made from the total amount paid in taxes for state purposes. If we are to give to this language the rigid construction for which the controller seems to contend, then, if the Constitution had meant that it should be compulsory upon the corporations themselves to deduct the amount of the local tax and pay only the balance into the state treasury, it would certainly so have said, by employing the phrase "to be paid" instead of the word "paid." It is the reasonable construction of this sentence that "the taxes so paid for principal and interest" means both that, if paid to the district, they may be deducted from the total amount to be paid to the state, or, if paid to the state, the state shall deduct "from the total amount paid in taxes for state purposes" the amount due to the district and make that amount over to the district. Such should have been the course adopted by the controller after the amount of the district tax was legally fixed and payable and demand had been made upon him for the payment of the same, out of the "total amount paid in taxes for state purposes" by appellant. The controller's refusal so to do was the initial error. Upon his refusal the district turned to appellant and exacted from it a double payment under protest. Appellant then is clearly entitled to its recovery. It has been agreed by the parties that, if this court shall reach the conclusion that appellant is entitled to its recovery, it may order a direct recovery from the controller. We need not therefore pause to consider with more particularity the form of the judgment.

[4] The application of appellant for injunctive relief, after what already has been said, calls for but brief consideration. It is clearly within the power of the district to levy this tax for the purpose of ascertaining the proportion of the bonded indebtedness and interest which the property of appellant should bear and pay, and no injunction therefore should be granted to prevent the district from so doing. Upon the other hand, it is not to be anticipated that any difficulty will be experienced in the future in the matter of the payments to such districts where the conditions here present exist, namely, where the time for the payment of the state tax antedates the assessment and levy of the district tax. No force inheres in the controller's objection that the Legislature has not provided adequate machinery justifying him in paying to such districts the amounts of their taxes. The constitutional amendment itself declares that "all the provisions of this section shall be self-executing." And if there be a lack of machinery in other respects, the controller will be amply protected in the payment of these moneys by proper vouchers showing the payment thereof and by proper entries in his books disclosing the nature and amount of the disbursements.

It is ordered, therefore, that the judgment appealed from be, and hereby is, reversed, and in conformity with the agreement of the parties it is further ordered that the superior court enter its judgment of award in favor of the appellant and against the respondent controller for the amount sued for.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; SHAW, J.

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SACRAMENTO & SAN JOAQUIN DRAINAGE DIST. v. RECTOR, Judge of the Superior Court. (Sac. 2427.)

(Supreme Court of California. March 23, 1916.)

1. VENUE ⟸3 — CHANGE OF VENUE — STATUTES—CONSTITUTIONALITY.

Code Civ. Proc. § 170, as amended by St. 1915, p. 531, provides that in proceedings involving reclamation, levee, swamp land, or drainage districts, relating to real property, or any work approved by the reclamation board, the

judge of the superior court of the county in which the district is located shall be disqualified, unless the parties waive such disqualification, and that nothing contained in the section shall affect a party's right to a change of place of trial in the cases provided for in title 4, pt. 2, of the Code. Section 397, a part of such title, permits place of trial to be changed when from any cause there is no judge of a court qualified to act. *Held*, that section 170, as amended, does not violate Const. art. 4, § 25, subd. 4, prohibiting legislation as to change of venue, since by the last clause change of venue is expressly excepted from operation of the statute.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 2; Dec. Dig. ⟸3.]

2. STATUTES ⟸93(9) — CLASSIFICATION OF MUNICIPALITIES—REASONABLENESS.

Classification of public quasi corporations for the purpose of providing disqualifications against certain judges to sit in cases involving such organizations must be founded upon good reason, and not on the arbitrary will of the Legislature; but, if good ground therefor exists, such classification is not void because it fails to embrace every class which might have been included.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. ⟸93(9).]

3. STATUTES ⟸93(9) — CLASSIFICATION OF MUNICIPALITIES — VALIDITY OF DISTINCTIONS.

Code Civ. Proc. § 170, as amended by St. 1915, p. 531, disqualifying a judge of the county to sit in an action involving any reclamation, levee, swamp land, or drainage district in the county, is not unconstitutional as creating an arbitrary classification; the purposes of the districts enumerated being distinct and their administration essentially different from that of any other public quasi corporation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. ⟸93(9).]

4. STATUTES ⟸93(9)—CLASSIFICATION OF MUNICIPALITIES—VALIDITY OF DISTINCTIONS.

Code Civ. Proc. § 170, as amended by St. 1915, p. 531, disqualifying a judge of the county to sit in an action involving any reclamation, levee, swamp land, or drainage district in the county, is not unconstitutional as imposing peculiar restrictions and disabilities upon a class arbitrarily selected; the districts enumerated being of extensive nature including more than one county and presenting a conflict of interests in the citizens of the district.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. ⟸93(9).]

5. CONSTITUTIONAL LAW ⟸70(3)—VALIDITY OF STATUTE—POWER OF COURT.

The court cannot nullify a law obviously designed to remove judges from all possible local influences, in the absence of palpable abuse of the Legislature's discretion.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. ⟸70(3).]

6. STATUTES ⟸100(4)—VALIDITY—REASONABLENESS OF CLASSIFICATION.

Code Civ. Proc. § 170, as amended by St. 1915, p. 531, disqualifying a judge of the county to sit in an action involving any reclamation, levee, swamp land, or drainage district in the county, is not invalid as unreasonable in failing to apply to personal property and personal obligations as well as to real property; the character of the actions in such districts being altogether real.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 112; Dec. Dig. ⟸100(4).]

7. JUDGES ⟸40 — DISQUALIFICATION — WAIVER.

Code Civ. Proc. § 170, as amended by St. 1915, p. 531, disqualifying a judge of the county to sit in an action involving any reclamation, levee, swamp land, or drainage district in the county, is not invalid because it permits waiver of the disqualification by the parties, since any statutory disqualification may be waived.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 185; Dec. Dig. ⟸40.]

8. STATUTES ⟸93(9)—GENERAL AND SPECIAL LAWS—VALIDITY.

That but one district might measure up to the conditions invoking the operation of Code Civ. Proc. § 170, as amended by St. 1915, p. 531, disqualifying a judge of the county to sit in an action involving any reclamation, levee, swamp land, or drainage district in the county, would not invalidate the law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. ⟸93(9).]

In Bank. Application for writ of prohibition by the Sacramento & San Joaquin Drainage District against E. N. Rector, Judge of the Superior Court. Ordered that the writ be made peremptory.

Sullivan, Sullivan and Theo. J. Roche and C. H. Oatman, all of San Francisco, for petitioner. Edward F. Treadwell, of San Francisco, and Ostrander Tuttle, Griffin & Shaffer, Brickley & Schino, Edward Bickmore, and F. W. Henderson, all of Merced, for respondent.

MELVIN, J. The Sacramento and San Joaquin drainage district petitioned this court for a writ of prohibition to prevent the judge of the superior court of the state of California in and for the county of Merced from proceeding to hear and act upon a demurrer in a case pending in said county in which the petitioner is defendant and Miller & Lux, a corporation, is plaintiff. It appears from the affidavit of one of the attorneys for petitioner that the action in question involves the validity of a certain assessment made by petitioner and affecting real property of said Miller & Lux in Merced county. It is also shown that the said judge of the said superior court has refused to ask the Governor of the state of California to designate and request some other judge of the superior court of the state of California to try said cause. The refusal was based upon the ground that the statute, under which petitioner asserts the judge's disqualification to preside in the proceedings connected with the case, is unconstitutional. Upon the filing of the petition, an alternative writ of prohibition issued from this court, and the matter was duly heard. We are now to determine whether the temporary writ shall be dismissed or made permanent.

The statute involved in this application is subdivision 5 of section 170, Code of Civil Procedure, as amended in 1915 (Stats. 1915, p. 531). It is as follows:

"In an action or proceeding brought in the superior court or justices' court by or against the reclamation board of the State of California, or any reclamation, levee, swamp land or drainage district, or any public agency, or trustee, officer or employé thereof, affecting or relating to any real property or any easement or right of way, levee, embankment, canal, or any work provided for or approved by the reclamation board of the State of California, the judge of the superior court of the county, or justice of the peace of the township in which such real property, or any part thereof, or such easement or right of way, levee, embankment, canal or work, or any part thereof, is situated, shall be disqualified to sit or act, and such action, if brought in the superior court, shall be heard and tried by some other judge of the superior court requested to sit therein by the Governor, or if brought in the justices' court, by some other justice of the peace requested to sit therein by the Governor; unless the parties to the action shall sign and file in the action or proceeding a stipulation in writing, waiving the disqualification in this subdivision of this section provided, in which case such judge or justice of the peace may proceed with the trial or hearing with the same legal effect as if no such legal disqualification existed. If, however, the parties to the action shall sign and file a stipulation agreeing upon some other judge of the superior court or justice of the peace to sit or act in place of the judge or justice disqualified under the provisions of this subdivision, the judge or justice agreed upon shall be designated by the Governor to sit in the action; provided, that nothing herein contained shall be construed as preventing the judge of the superior court of such county from issuing a temporary injunction or restraining order, which shall, if granted, remain in force until vacated or modified by the judge designated by the Governor as herein provided. Nothing in this section contained shall affect a party's right to a change of the place of trial in the cases provided for in title 4, part 2 of this Code."

Respondent attacks the statute upon a number of grounds, the first and most important of which is that it is a special law as to venue and relating to practice in courts of justice and in violation (say counsel for respondent) of subdivisions 3 and 4 of section 25 of article 4 of the Constitution of California.

[1] The assertion that it relates to venue is based upon the provision of section 397 of the Code of Civil Procedure permitting the place of trial to be changed "when from any cause there is no judge of the court qualified to act." But the section here under review by its very terms provides that nothing therein contained "shall affect a party's right to a change of the place of trial in the cases provided for in title 4, part 2" of the Code of Civil Procedure. Section 397, Code of Civil Procedure, is one of the very sections contained in said title 4, part 2. Section 397, Code of Civil Procedure, is not made a part of, but is in terms excluded from the operation of, the statute here under attack, and therefore there is no force in the contention that the new section has imported into it something relating to the venue of actions.

[2, 3] Considering the section as one "regulating the practice in courts of justice" and hence as one coming under the constitutional mandate that the Legislature "shall not pass local or special laws" on that subject, we are met by respondent's objection that the classification of causes which may not be heard by judges of counties in which the subject-matter of the litigation exists is not founded upon any natural, intrinsic, or constitutional distinction. And in the development of this objection it is specified by respondent that the act applies only to part of a class, in that judges are not disqualified from hearing causes involving properties in their respective counties belonging to irrigation districts, sanitary districts, protection districts, water districts, lighting districts, storm water districts, and other public agencies. The rule undoubtedly is that any classification of the sort attempted in this statute must be founded upon some good reason and may not rest in the arbitrary will of the Legislature; but it is also true that, if good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included. Ex parte Martin, 157 Cal. 57, 106 Pac. 235, 26 L. R. A. (N. S.) 242; Matter of Application of Miller, 162 Cal. 698, 124 Pac. 427, and cases there cited; Cohen v. City of Alameda, 168 Cal. 266, 142 Pac. 885. But it will be observed that the kinds of districts mentioned in the subdivision with which we are now concerned are those in which, generally, indeed almost invariably, the improvements must be of an extensive physical nature, involving the condemnation of land, the erection of embankments, the cutting of canals, and the like, while omitted districts of the sort specified in respondent's objection do not, as a rule, involve operations so vast in an engineering sense. Therefore we do not consider the omission of other districts from the enumeration in the statute fatal to its constitutionality.

[4] Let us then examine it with a view to determining whether or not it imposes peculiar restrictions and disabilities upon a class arbitrarily selected. Reclamation, levee, swamp land, and drainage districts have a similarity of purpose which is most obvious—each has for one of its principal objects the keeping of surplus water from some definite area. Actions involving real property subject to assessment in such districts may be treated by the Legislature as a distinctive sort of actions and regulated accordingly. The district which is here by its proper officers the petitioner has been declared by the Legislature to be of peculiar importance because the state and the people "have a primary and supreme interest in having erected, maintained and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries * * * good and sufficient levees * * * adequately protecting the lands overflowed or subject to overflow by said streams." Stats. 1915, p. 1340, § 7. Recognizing the distinctive characteristics of reclamation districts, this court, before the

repeal of section 3493½ of the Political Code, upheld as constitutional the provisions of that statute designed to test the legal perfection of an assessment before action was brought to enforce it. This peculiar proceeding was admittedly invented to obviate certain difficulties and delays. Reclamation Dist. No. 531 v. McCullah, 124 Cal. 176, 56 Pac. 887; Reclamation Dist. No. 551 v. Van Loben Sels, 117 Cal. 165, 49 Pac. 131. Indeed, it has been frequently held that distinct classes of business, occupation, etc., may be regulated by legislation peculiarly appropriate to them without violation of article 4 of the Constitution. This rule is supported by such authorities as People v. Superior Court, 100 Cal. 120, 34 Pac. 492; Ex parte Lichtenstein, 67 Cal. 359, 7 Pac. 728, 56 Am. Rep. 713; Matter of Miller, supra; Ruperich v. Baehr, 142 Cal. 195, 75 Pac. 782; Ex parte King, 157 Cal. 161, 106 Pac. 578; Matter of Burke, 160 Cal. 303, 116 Pac. 755; Deyoe v. Superior Court, 140 Cal. 478, 74 Pac. 28, 98 Am. St. Rep. 73; and Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 321, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199.

[5] The Legislature in enacting this amendment to section 170 of the Code of Civil Procedure was justified in making a class of the corporations mentioned therein and in providing for the disqualification of the judges in counties where litigation might arise regarding the real property of such districts. As we have had occasion to state, earlier in this opinion, usually the improvements in these districts are of an extensive nature. Frequently they are located in more than one county. The interests of some of the people of one county may perhaps be opposed to those of other persons in another county within the district, as for example when the residents of a district within one county are opposing what may seem to them an extravagant plan to be executed in another county, but for which the contestants are liable to assessment. In such an event, it may happen that those who are to be paid for the land and for the labor involved in making the contemplated improvements may be deeply interested in upholding the action of the governing body of the district while their neighbors in another county may be bitterly opposed to the assessment of their lands for the contemplated purposes. The act now before us was obviously designed to remove judges from all possible influences of a local character and to give to the Governor of the state the power of calling a judge free from all bias. We cannot nullify such a law unless we can say that there has been a palpable abuse of discretion by the Legislature. That such abuse characterized the Legislature in passing this law does not appear.

[6] As actions relating to real property, easements, rights of way, and the like, will always be by far the most important in the litigation of reclamation and other similar districts, there is no valid objection to the reasonableness of this statute based upon the fact that it does not apply to the trial of actions involving personal property and personal obligations.

[7] Nor is there any force to the objection that this statute is invalid because it permits the parties to an action to waive the disqualification of the judge of the court of the county wherein the subject-matter of the suit lies. Any statutory disqualification of this sort may be waived by the parties in whose favor it would ordinarily be invoked, and indeed subdivision 2 of section 170, Code of Civil Procedure, has for years provided for a waiver of the disqualification of a judge related within the third degree to one of the litigants.

[8] We find no ambiguity in the section. The expression "provided for or approved by the reclamation board of the state of California" does not qualify all of the words including and following the words "real property." It limits only the word "work." It is argued that, since the reclamation board only has authority to approve work of other districts which are overflowed from the Sacramento or San Joaquin rivers (Stats. 1913, p. 252; Stats. 1915, p. 1338), it must follow that the act, in large part at least, applies only to the district which is here the petitioner. If that were so, and conceding it to be so for the purpose of this proceeding, the act would not be invalid because but one district measures up to its terms. Matter of Burke, supra.

No other matters discussed in the briefs require analysis.

Let the writ be made peremptory.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.; SLOSS, J.; LAWLOR, J.; LORIGAN, J.

172 Cal. 371

COX v. SCHNERR. (Sac. 2230.)

(Supreme Court of California. March 23, 1916. Rehearing Denied April 20, 1916.)

1. PLEADING ⊂=291(2) — DEFENSE FOUNDED ON WRITTEN INSTRUMENT—DENIAL UNDER OATH—STATUTE.

In an action to quiet title by plaintiff claiming under a deed which defendant contended was procured by undue influence, where, in his answer to the cross-complaint, plaintiff set forth the deed in hæc verba, defendant's answer and cross-complaint, discrediting the deed, being verified, and, although not setting out the deed, amply identifying it as the instrument, which, according to the allegations of the pleadings, was void for defendant's fraudulent conduct in procuring it, defendant's failure to file an affidavit denying execution and delivery of the deed, as required by Code Civ. Proc. § 448, did not admit execution and delivery.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 864, 865, 866½–868, 871, 874, 875, 877, 879; Dec. Dig. ⊂=291(2).]

2. DEEDS ⟸208(3)—DELIVERY—PRIMA FACIE EVIDENCE—PRODUCTION.

In suit to quiet title, production of the deed, under which plaintiff claims, by himself, the grantee named therein, is prima facie evidence of delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 627; Dec. Dig. ⟸208(3).]

3. DEEDS ⟸60—CONDITIONAL DELIVERY TO GRANTEE—STATUTE.

By direct provision of Civ. Code, § 1056, a deed cannot be delivered to the grantee himself conditionally.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 124; Dec. Dig. ⟸60.]

4. DEEDS ⟸56(1) — DEED PROCURED BY FRAUD—"DELIVERY."

Where a deed is procured by the fraud of the grantee, the manual transfer of the instrument to him is not a "delivery," in legal sense, for lack of free consent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117, 121, 122; Dec. Dig. ⟸56(1).

For other definitions, see Words and Phrases, First and Second Series, Delivery.]

5. DEEDS ⟸211(4) — CONFIDENTIAL RELATIONS OF PARTIES—SUFFICIENCY OF EVIDENCE.

In suit to quiet title, evidence *held* sufficient to support finding that plaintiff was the trusted friend and confidential adviser of his grantor when the deed from her to him was drafted and signed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 641, 642; Dec. Dig. ⟸211(4).]

6. DEEDS ⟸72(3)—CONFIDENTIAL RELATIONS OF PARTIES—DUTY OF GRANTEE.

Though mere friendship is not a confidential relation which forces the donee of valuable property to treat with the donor in such a way as to preclude all possibility of undue influence, where a voluntary grantee was the trusted friend and confidential adviser of his grantor, a woman who had intrusted all of her father's papers to him and had instructed him to employ counsel to assist in taking charge of the administration of her father's estate, etc., it was incumbent upon the grantee to use the utmost good faith in accepting a conveyance of her lands from her as a gift.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 195, 196; Dec. Dig. ⟸72(3).]

7. DEEDS ⟸211(4)—FRAUD OF GRANTEE—SUFFICIENCY OF EVIDENCE.

In suit to quiet title, evidence *held* sufficient to justify finding that plaintiff's course, in accepting a voluntary conveyance of lands from a woman who regarded him as her trusted friend and confidential adviser, was fraudulent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 641, 642; Dec. Dig. ⟸211(4).]

8. DEEDS ⟸196(3) — CONFIDENTIAL RELATIONS BETWEEN PARTIES—BURDEN TO SHOW GOOD FAITH.

Though the burden of proof usually lies upon the party asserting fraud, where one claims under a contract or conveyance of property from a person to whom he stood in a relation of trust and confidence, he must prove that he exercised the utmost good faith and that the other had independent advice and acted of his own volition; a rule applying not only to attorneys, trustees, clergymen and others bearing a formal relation of trust to those with whom they deal, but in every case where there has been a confidence reposed investing the person with an advantage in treating with the person confiding in him.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 649; Dec. Dig. ⟸196(3).]

9. TRIAL ⟸140(1)—CREDIBILITY—QUESTION FOR TRIAL COURT.

It is the province of the trial court to determine the weight and credit to be given the testimony of witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 334; Dec. Dig. ⟸140(1).]

10. APPEAL AND ERROR ⟸994(3)—REVIEW—FINDING.

The Supreme Court may not control the conclusion or finding of the superior court denying credence to testimony, unless it appears that there is nothing at all impairing its accuracy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3904–3905½; Dec. Dig. ⟸994(3).]

11. WILLS ⟸93—ATTEMPTED TESTAMENTARY DISPOSITION—SUFFICIENCY OF EVIDENCE.

In suit to quiet title, evidence *held* sufficient to justify the conclusion that plaintiff and his grantor regarded a so-called deed to plaintiff not as a transfer of present title but an attempted testamentary disposition of the land.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 222–224; Dec. Dig. ⟸93.]

12. DEEDS ⟸9—TIME OF TAKING EFFECT—DEATH OF GRANTOR.

A deed not testamentary in form, intended by the parties to pass title only upon the death of the grantor, could not take effect.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 5; Dec. Dig. ⟸9.]

13. APPEAL AND ERROR ⟸987(1)—REVIEW—WEIGHT OF EVIDENCE.

The Supreme Court cannot pass upon the weight of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893, 3894; Dec. Dig. ⟸987(1).]

14. LIMITATION OF ACTIONS ⟸19(1)—CROSS-ACTION FOR FRAUD—STATUTE.

Code Civ. Proc. § 338, subd. 4, providing that an action for relief on the ground of fraud or mistake must be brought within three years, did not, in trespass to try title by plaintiff claiming under his grantor's voluntary deed, bar the cause of action, pleaded in a cross-complaint by defendant in possession, that plaintiff's deed was procured by undue influence upon the grantor, though defendant's original answer was filed more than three years after the date of the deed, since the rule of limitation does not apply to mere defenses; the cross-action being in effect for the recovery of real property and governed by section 318, prescribing a limitation of five years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73, 80, 84, 85; Dec. Dig. ⟸19(1).]

Department 2. Appeal from Superior Court, Sacramento County; John F. Ellison, Judge.

Suit by J. P. Cox against Edward Schnerr. From a judgment for defendant and an order denying his motion for a new trial, plaintiff appeals. Judgment and order affirmed.

Devlin & Devlin, of Sacramento, for appellant. C. E. McLaughlin, of Sacramento, for respondent.

MELVIN, J. Plaintiff sued to quiet title to certain property in Nevada county. Defendant filed an answer and a cross-complaint, and the latter was answered by plain-

tiff as cross-defendant. A trial was had upon the issues joined, the cause having been transferred for convenience of witnesses to Sacramento county. Judgment was given in favor of the defendant and cross-complainant. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The plaintiff's alleged title was based upon an instrument which was in form a deed. This writing was dated March 5, 1906, and purported to be a conveyance by Annie E. Carpenter of the real property here in controversy. Both by his answer and his cross-complaint defendant attacked this deed, upon the ground of plaintiff's fraud. Undue influence exercised by the grantee, Cox, over the grantor, Annie E. Carpenter, her inability because of her confidence and trust in the plaintiff and by reason also of her inordinate use of intoxicants to understand the nature of the instrument, and the forgery of the alleged deed, were averred in the answer and in the cross-complaint. The court found against the alleged forgery and also against the averment that the grantor was a woman of intemperate habits. It was found that William Carpenter died testate in Sacramento county on February 20, 1906; that his sole heir was Annie E. Carpenter; that upon the death of her father she became the owner of the real property described in the complaint; that J. P. Cox then was and for many years had been the trusted personal friend and confidential adviser of Miss Carpenter and exercised influence and control over her and her acts; that he petitioned for and upon her nomination obtained letters as the administrator of William Carpenter's estate, although Annie E. Carpenter was named as executrix in the will; that he prepared, presented to her, and caused her to sign and acknowledge the deed upon which he rests his claim to the property here in litigation; that she handed the deed to plaintiff; that at that time he exercised undue influence over her and her acts; that "when Annie E. Carpenter placed said deed drawn by plaintiff on March 5, 1906, in the hands of plaintiff, she did so with the understanding and belief that the title to the property described in the complaint would not pass until said deed was recorded and that said deed would not be recorded until after her death; and at said time, and in placing said deed in the hands of the plaintiff, Annie E. Carpenter understood and believed that she could recall said deed, and that she at all times retained control of said deed; that plaintiff assented to and acquiesced in the said understanding and belief so entertained by Annie E. Carpenter; that at said time when Annie E. Carpenter signed said deed and placed the same in the hands of the plaintiff she did so in contemplation of death with the understanding, intention, and belief that said deed was not to take effect and would not take effect until after her death and that she could recall said deed at any time." It was found, also, that at no time was Miss Carpenter advised concerning the nature and effect of the deed and that she received no independent advice in relation to it. The court also found that there had been no execution of the instrument with intent to convey nor delivery with such intent. The court also found that the causes of action set forth in the cross-complaint were not barred by the statute of limitations. There was also a finding to the effect that, during the life of Annie E. Carpenter, J. P. Cox always acknowledged her title to the property. On the 1st day of April, 1906, Annie E. Carpenter and the defendant, Edward Schnerr, intermarried. She died in October, 1908, and he as her sole heir at law succeeded to her interest in the land.

[1] In his answer to the cross-complaint the plaintiff and cross-defendant set forth the deed from Miss Carpenter to himself as grantee in hæc verba, and it is now the contention of his counsel that by failure to file an affidavit as required by section 448 of the Code of Civil Procedure the execution and delivery of the deed were admitted by the cross-complainant. In support of this position, Sloan v. Diggins, 49 Cal. 40, Rosenthal v. Merced Bank, 110 Cal. 200, 42 Pac. 640, Knight v. Whitmore, 125 Cal. 200, 57 Pac. 891, and Carpenter v. Shinners, 108 Cal. 362, 41 Pac. 473—are cited. There is no merit in appellant's point, and the cited authorities do not support his claim. The main purpose of the answer and the cross-complaint was to discredit the deed upon which rested plaintiff's claim of title. These pleadings were verified, and, although the deed was not fully set out in either of them, it was amply identified as the instrument which, according to the allegations of these pleadings, was void because of the fraudulent conduct of the plaintiff in procuring it. In both the defendant's answer and the cross-complaint the deed was identified by the recitals of the names of the parties thereto, its date, and the volume and page of its recordation. In the verified pleadings the due execution and delivery of this document were stoutly denied. It would have been a vain and useless exaction, therefore, to have required further denial of the effect of this writing by defendant and cross-complainant merely because a copy of the instrument had been set out in the answer to the cross-complaint.

[2] Appellant's statement that the production of the deed by the grantee named therein is prima facie evidence of delivery is a correct one; but in this case the prima facie presumption is overcome by abundant evidence.

[3, 4] Appellant's counsel call attention to the fact that the deed of March 5, 1906, was, as found by the court, signed by Miss Carpenter and placed in the hands of plaintiff. These facts, they say, establish execution and delivery as there can be no conditional

delivery of such an instrument to the grantee himself. Section 1056, Civ. Code; Devlin on Deeds (3d Ed.) § 314. But the question of conditional delivery is not in this case. The very basis of defendant's case is the fraud of the plaintiff in procuring the deed. If it were fraudulently obtained, the mere manual tradition of it could not be in legal sense a delivery. Execution and delivery of such an instrument depend upon more than the mechanical acts of signing it and passing it to another person. Apparent consent is not real or free when obtained through fraud, undue influence or mistake. Free consent is an indispensable element in the making of a valid contract.

The testimony of the plaintiff himself was to the effect that, shortly after Mr. Carpenter's death, he went to the ranch where Miss Carpenter was living. He fixed the date as March 5, 1906, because of the death of one of his friends and a mission which he undertook on account thereof. Miss Carpenter rode into Folsom with him and during the journey a conversation between them took place. After referring to the sudden deaths of her father, mother, and brother, Miss Carpenter, according to plaintiff said she wanted to arrange her business affairs. He testified with reference to this conversation in part as follows:

"I asked her how she wanted to fix it. She said, 'by deed.' I says, 'I don't mean that, Annie, I mean how do you wish to dispose of it?' 'Well,' she said, 'I don't care anything about most of my relations.' She says, 'The Long family, ma's brother's family, we haven't been friends for a great many years.' She says, 'We haven't spoken to probably for 20 years.' She says: 'Pa has got a couple of brothers in the East. I never met but one of them. He was out on the ranch a while, but we did not like him. Ma made him get off it.' She says: 'You have been as kind to me as a brother. I am going to give you some land.' I says: 'You are? What are you going to give me, the McNamee Ranch?' She says, 'No, there is a mortgage on that.' I says, 'You know that had been in our family once for about 20 years.' She says, 'I won't do anything about that, because I am going to give you Twin Valleys.' She says, 'Pa often said he would like to see you have some land in the mountains, and the rest of the property I am going to give Hughey and his brother, on my side of the family, ma's sister's children.' By Hughey and his brother she referred to the McGuire boys."

After their arrival at Folsom, according to Cox, they discovered Mr. Carpenter's will in an old wallet which had been previously taken to Cox's office. At Miss Carpenter's request (as Cox testified), he prepared the deeds of certain property to the McGuires and also the one in which his name appeared as grantee. He then called in Leonard, a justice of the peace, who took her acknowledgments. Cox's account of the occurrences when Leonard came into the room was as follows:

"I said, 'Annie wants you to take her signature or acknowledgment,' when he came in the office. Annie said 'Yes, Johnnie, I am deeding the Twin Valleys to Jay, and the rest of the property to Hughey and his brother.'"

The deeds were then put into two envelopes, the McGuire deeds in one and the deed to Cox in the other. These were held for a few moments by Miss Carpenter, according to Cox's account, and then she said:

"'Well, I will give you these deeds now, Jay. You understand you are not to record them until after my death. I want the use of this property while I live.'"

To which he replied, "Certainly, that is understood." Upon cross-examination Cox repeated the narrative of the transaction with a fidelity to detail which argued either an excellent memory or a committed story. The justice of the peace corroborated the plaintiff with reference to Miss Carpenter's remark to him when he was about to take her acknowledgment to the deed. His version of the passing of the deeds and the conversation at that time corresponded exactly with the plaintiff's.

Alene Hamlin called by plaintiff testified that Mrs. Schnerr in the presence of the latter's husband and Mrs. Burns told witness about deeds which she had made in favor of Cox and the McGuire boys.

Emma P. Wells testified to a similar conversation with Miss Carpenter a week or two after her father's death, as did Albert D. Scott, who went to work on the Carpenter ranch shortly after Mr. Carpenter's death. Appellant's counsel insist that the oral evidence of the plaintiff and the other witnesses called in his behalf conclusively establishes the execution and delivery of the deed.

[5-8] The finding that plaintiff was the trusted friend and confidential adviser of Miss Carpenter at the time the deed was drafted and signed is supported by the evidence. It is true that proof of mere friendship is not sufficient to establish the sort of confidential relation which forces the donee of a valuable property to treat with his donor in such a way as to preclude all possibility of undue influence. But in this case plaintiff himself furnished proof of the utmost trust and confidence reposed in him by Miss Carpenter. He was the first adviser summoned and consulted after her father's death. To him had been intrusted all of Mr. Carpenter's papers, and she had instructed him to employ learned counsel to assist him in taking charge of the administration of her father's estate. She called him her "best friend." Long prior to the death of her father and her brother William, she had consulted Cox, and he had drawn for her deeds of her property in favor of her brother to be delivered in case she should die before William Carpenter, Jr. These and many other circumstances which we need not detail showed the existence of unbounded trust which made it incumbent upon plaintiff to use the utmost good faith in dealing with her. The court was fully justified, in view of the evidence, in holding that his course, under the circumstances, was eloquent of fraud. The burden of proof usu-

ally rests upon the person asserting fraud; but, when one bases a claim upon a contract obtained from a person to whom he stands in a relation of trust and confidence, it becomes his task to prove that he exhibited that uberrima fides which removes all doubt respecting the fairness of the contract. And this rule does not apply merely to those who bear a formal relation of trust to those with whom they deal—not only to attorneys, physicians, trustees, clergymen, kinsmen, and others who by the very force of their occupations or relationship are presumed to be in the class of persons bound to act with the utmost good faith. It applies in every case "where there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding." 2 Jones on Evidence (Ed. of 1913) § 190.

[9, 10] In every transaction of this kind, one who holds such confidential relation will be presumed to have taken undue advantage of the trusting friend, unless it shall appear that such person had independent advice and acted not only of his own volition but with full comprehension of the results of his action. Ross v. Conway, 92 Cal. 632–635, 28 Pac. 785; Darlington's Estate, 147 Pa. 624–631, 23 Atl. 1046, 30 Am. St. Rep. 776; Firebaugh v. Burbank, 121 Cal. 186–191, 53 Pac. 560; Piercy v. Piercy, 18 Cal. App. 751–756, 124 Pac. 561; Odell v. Moss, 130 Cal. 352–357, 62 Pac. 555. In view of this rule, it cannot be held merely because defendant could not contradict plaintiff's account of the transaction between himself and Miss Carpenter, which, he says, terminated in the execution and delivery of the deeds, and could not refute the statements of the other witnesses regarding the declarations of the alleged grantor with reference to the disposition of her property to plaintiff and to her cousins, that therefore no proof of fraud was made. The presumption arising from the confidential relations of the parties to the purported conveyance might of itself, and in spite of the evidence offered by plaintiff, be sufficient to justify the court's findings of fraud. There may have been in the manner of the witnesses or the circumstances attending the giving of their testimony that which justified the court in disregarding it. It is within the province of the trial court to determine what weight and credit shall be given to the testimony of any witness and this court may not control the conclusion or finding of the superior court denying credence to the testimony unless it appears that there is nothing which at all impairs its accuracy. Blanc v. Connor, 167 Cal. 719–722, 141 Pac. 217; Davis v. Judson, 159 Cal. 121–128, 113 Pac. 147. The testimony of all witnesses except the plaintiff and the justice of the peace who took the acknowledgment was entirely of alleged declarations of plaintiff's grantor who had died before the witnesses testified. Such evidence has been characterized by this court as the weakest kind that may be produced. Mattingly v. Pennie, 105 Cal. 514–523, 39 Pac. 200, 45 Am. St. Rep. 87; Austin v. Wilcoxson, 149 Cal. 24–29, 84 Pac. 417. Perhaps the court gave it slight weight or none at all and probably the testimony of the plaintiff was disregarded because of his solemn declaration under oath, given at a hearing in the probate court, that no such writing as the deed upon which he now relies was ever executed by Miss Carpenter. It appears without contradiction that the heir contested the final account of Cox as administrator of the estate of William Carpenter, deceased. He had asked for distribution of the entire estate to Mrs. Schnerr (née Carpenter). In the course of the hearing upon the contest Cox was given a very searching examination regarding the papers which he had submitted to the lady from time to time for her signature. Cox was asked the following questions and gave the answers indicated:

"Q. You have asked for distribution here of this entire estate to Mrs. Schnerr. Do you know of any transfer or conveyance she has made of her property? A. I do not know it is transferred, only it is of record. I know some papers I prepared for her, not associated in the estate at all. Q. It relates to her interest in the estate? A. It pertains to her land interest. Q. What is that paper? A. A paper from Mrs. Schnerr to Mr. Schnerr. Q. Anything else? A. No."

All through the hearing, Cox protested that the only papers Mrs. Schnerr had signed were those relating to the conduct of the affairs of the estate. This is so utterly at variance with his testimony in the case at bar that the chancellor was justified in casting out any part or all of the later version of the transaction which gave rise to the deeds.

[11, 12] But laying aside the question of fraud there was abundant evidence to justify the court's conclusion that both the plaintiff and Miss Carpenter regarded the so-called deed not as a transfer of present title but an attempted testamentary disposition of the land. The plaintiff testified that on April 17, 1906, he had a conversation with Mrs. Schnerr at her house. She said:

"Jay, I have got a husband now, and I want to change those McGuire deeds in favor of Ed" —Mr. Schnerr, defendant in this action.

He gave her the deeds and never saw them again. These deeds naming her cousins as grantees were given to him, according to his testimony, under exactly the same circumstances as those attending the tradition of the deed here in dispute; yet he seems to have surrendered them without question of her right thus summarily to recall them. All of the deeds were made, as he said, at a time immediately following her statement about the sudden deaths of the members of her family and with the distinct understanding that they were not to be recorded until after her death. There was no trust clause in the

deed upon which he bases his claim and therefore such cases as Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 Pac. 242, cited by appellant, cannot apply. The deed involved in the Tennant Case reserved the power to revoke the grant or to sell the property. In this case the instrument was in form a quitclaim deed reciting as consideration "ten dollars (and other valued consideration)." It either conveyed her interest immediately and fully, or not at all. The conduct of both parties to this deed when dealing with the McGuire deeds indicates very strongly that there was no intent to pass title to any of the property until the death of the grantor, and as the writings were not testamentary in form they could not and did not take effect. Cox's intent to take an interest only after death was further shown by his denial under oath that any such deed existed, by his dealing with the land as administrator, treating it as the property of the estate, and leasing it for a long term to one Mills. In Kenney v. Parks, 137 Cal. 527, 70 Pac. 556, the court was considering a state of facts somewhat similar to those existing here. Plaintiff in that case had signed two deeds purporting to convey certain land to her husband. Both husband and wife believed the deeds would be of no validity until recorded, and, upon the promise of the former that he would not record them unless he should survive her, the wife placed them in his possession. It was held that there was no delivery; the court saying, in part (137 Cal. at page 531, 70 Pac. at page 557):

"To constitute delivery of a deed, it is not sufficient that there be a mere delivery of its possession, but this act must be accompanied with the intent that the deed shall become operative as such. 2 Boone on Real Property, § 295a; Black v. Sharkey, 104 Cal. 281 [37 Pac. 939]; Denis v. Velati, 96 Cal. 227 [31 Pac. 1]; Harris v. Harris, 59 Cal. 622. Here both parties understood that the deed could have no effect until recorded; and there was therefore no intent that it should become immediately operative, or that it should ever become operative during the life of the grantor, or afterwards, unless the grantee should survive her."

See, also, Follmer v. Rohrer, 158 Cal. 758, 112 Pac. 544; Bias v. Reed, 169 Cal. 45, 145 Pac. 516. It follows that the findings based upon failure of delivery in view of the belief that the deeds were testamentary must be upheld.

[13] Plaintiff testified that at the time Mrs. Schnerr took back the McGuire deeds he said to her: "You ought to tell your husband about my deed, Annie." To which, after declaring that her husband had nothing to do with the property which she inherited from her father and commenting upon Mr. Schnerr's wish to take the administration of the Carpenter estate from Cox, she responded: "I want you to keep the deed and go right along with my business as though I was not married." This conversation and the alleged statements of Mrs. Schnerr regarding the deed which other witnesses related are deemed by appellant to be ample proof of the laches of Mrs. Schnerr, who, as his counsel say, knew all about the deed and its provisions, yet took no steps to have it declared void. But we may not pass upon the weight of this evidence, nor question the power of the court to find that the alleged grantor never acquiesced in nor affirmed the deed nor admitted directly or indirectly that plaintiff had any interest in the property. Under the circumstances which we have discussed heretofore, the court trying the issues may have disregarded this testimony entirely, depending upon the presumption of fraud and plaintiff's statements under oath in the probate proceeding when Mrs. Schnerr was present, rather than his later version of his transactions with her touching this property.

[14] Appellant apparently places great faith in subdivision 4 of section 338 of the Code of Civil Procedure as a bar to the cause of action pleaded in the cross-complaint and also to the defense to his main cause of action. While it is true that a cause of action for relief on the ground of fraud or mistake must be commenced within three years from the time of the discovery of such fraud or mistake, the rule does not apply to mere defenses. It is to be remembered that this is an action to quiet title commenced by Cox, who depends upon his purported deed. By way of defense, Mr. Schnerr pleads plaintiff's fraud in obtaining said deed. While it is true that the original answer was not filed until more than three years after the date of the deed, the allegations of fraud in said answer are not restricted by the statute of limitations invoked by plaintiff. In Hart v. Church, 126 Cal. 471, at page 479, 58 Pac. 910, at page 913 (77 Am. St. Rep. 195) this same statute was under consideration, and Mr. Justice Henshaw, delivering the opinion of this department, said:

"It is true, as appellant contends, that, where a party seeks a rescission of a contract, he must act with promptness, and that the question as to what is or is not a prompt effort to rescind must depend in each case upon its own peculiar facts. It is also true that, where a party seeks relief upon the ground of fraud or mistake, the action must be commenced within three years after the discovery of the facts constituting the fraud or mistake; but a different case is presented where the party who has procured the fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid or to enforce its executory terms, and is thus himself asking affirmative relief. The three years' statute of limitations does not bar the defendant in such a case from objecting to the validity or to the enforcement of the contract upon the ground of fraud. It is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud."

In Murphy v. Crowley, 140 Cal. 141–143, 73 Pac. 820, the action was one in equity seeking manifold relief, including the setting

aside of a deed. The court held that it was an action for the recovery of real property or possession thereof within the meaning of section 318 of the Code of Civil Procedure, and that subdivision 4 of section 338 of the Code of Civil Procedure did not apply. Appellant concedes the existence of the rule announced by these cases and by such authorities as Goodnow v. Parker, 112 Cal. 437, 44 Pac. 738, South Tule Independent Ditch Co. v. King, 144 Cal. 450–455, 77 Pac. 1032, Page v. Garver, 146 Cal. 577–579, 80 Pac. 860, and numerous others cited by respondent, but insists that, inasmuch as defendant is and has been in possession of the property, the only question involved is not recovery or possession thereof, but is plaintiff's alleged fraud in the procurement of the deed, and that therefore section 318 of the Code of Civil Procedure has no application. But the plaintiff himself had put the matter of possession or right to possession in issue by bringing this action, and, even if it be conceded that defendant might not have brought an original action to cancel the deed, nevertheless he may defend upon the theory that fraud vitiates plaintiff's alleged cause of action. McColgan v. Muirland, 2 Cal. App. 6–11, 82 Pac. 1113.

Since the defense based upon plaintiff's fraud was effective, it makes no difference to plaintiff what affirmative relief was granted defendant on his cross-complaint and plaintiff may not properly complain even if he were correct in his theory that the relief prayed for in the cross-complaint is barred by the statute of limitations. But it was not so cut off by the statute. The interest of Schnerr, the cross-complainant, arose upon the death of his wife. His pleading by way of cross-complaint has for its very essence the fact that the fraudulent deed is a cloud upon his title and the relief prayed for is the removal of the cloud. Of course, the question of fraud is incidental, but the gravamen of the cross-complaint is that Schnerr as owner of the land may be injured by the deed if it be not canceled. Fraud is merely a feature of the case, and the running of the statute of limitations does not antedate plaintiff's title. In other words, the case is within the doctrine of those discussed by Mr. Justice Lorigan in Scholle v. Finnell, 166 Cal. 546–550 et seq., 137 Pac. 241.

Appellant denies defendant's right to disaffirm the deed. He says that, there being no proof of probate proceedings or of the appointment of an administrator or executrix, there is no showing of the heir's right to disaffirm. A similar contention was made in Page v. Garver, supra, but was overruled by the court on the authority of Murphy v. Crowley, supra, and other cases cited on page 579 of 146 Cal., on page 861 of 80 Pac. See, also, Ross v. Conway, supra.

No other features of the case are sufficiently important to require discussion.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

172 Cal. 357

H. G. BITTLESTON LAW & COLLECTION AGENCY v. HOWARD. (L. A. 4209.)

(Supreme Court of California. March 18, 1916. Rehearing Denied April 13, 1916.)

1. PLEADING ⇐301(3) — VERIFICATION—SURPLUSAGE.

Where the verification of a pleading by the assignor of a corporation, which sued on contract, contained the qualification "except as to matters stated on information and belief," and no such matters were stated, the exception could be treated as surplusage, and the verification is a positive affirmance of all the matters stated therein.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 314, 893–895; Dec. Dig. ⇐301(3).]

2. PLEADING ⇐301(3)—VERIFICATION—SUFFICIENCY.

A verification in terms that the affiant "is the assignor of the plaintiff, and for that reason better informed as to the facts than the plaintiff, that he has read the complaint and knows the contents thereof, and that the same is true of his own knowledge," sufficiently alleges that the facts are within the knowledge of the verifier, as required by Code Civ. Proc. § 446.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 314, 893–895; Dec. Dig. ⇐301(3).]

3. PLEADING ⇐302 — VERIFICATION—SUFFICIENCY.

Under Code Civ. Proc. § 446, requiring verification of the pleading to state, if made by any other person than the party, the reason why it was not made by the party, the verification is sufficient where it in terms states that the affiant "is the assignor of the plaintiff, and for that reason better informed as to the facts than the plaintiff," since by such verification, although it does not specifically state the reason, the reason is easily to be ascertained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 898–903; Dec. Dig. ⇐302.]

4. CORPORATIONS ⇐517—PLEADING—VERIFICATION BY OFFICERS—NECESSITY.

The plaintiff corporation's pleading might be verified by another than an officer thereof; the requirement of Code Civ. Proc. § 446, that an officer of the corporation verify the pleading, being permissible, and not exclusive.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2047–2051; Dec. Dig. ⇐517.]

5. PLEADING ⇐350(1) — JUDGMENT ON THE PLEADINGS—PREREQUISITES.

A motion for judgment on the pleadings, where the answer on file is altogether insufficient, is proper, without preliminary motion to strike the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1053, 1054, 1070, 1072–1074; Dec. Dig. ⇐350(1).]

In Bank. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the H. G. Bittleston Law & Collection Agency, a corporation, against Gertrude C. Howard. From a judgment on the pleadings for plaintiff, defendant appeals. Affirmed.

Charles J. Kelly, of Los Angeles, for appellant. Gray & Bittleston, of Los Angeles, for respondent.

LAWLOR, J. This is an action brought by the plaintiff corporation against the defendant for an alleged breach of two agreements in writing whereby the defendant employed R. W. Kinsey, the plaintiff's assignor, as her agent for the purpose of securing certain loans on real property in the county of Los Angeles, and for the securing of which loans she agreed to pay the said R. W. Kinsey commissions amounting to $342. The said agreements are set forth in two counts in the amended complaint, which purports to be verified by the said R. W. Kinsey. A demurrer was interposed by the defendant to the amended complaint and overruled, whereupon the defendant served and filed an unverified answer in the form of a general denial. The plaintiff moved the court for judgment on the pleadings, on the ground that the unverified answer to the verified complaint constituted no defense to the cause of action or any portion thereof. The motion was granted, and judgment was entered on the pleadings as prayed for. Defendant appeals.

[1, 2] The sole question presented is whether the amended complaint was properly verified. It is contended:

"That the affidavit of verification to the complaint herein, and relied upon by the plaintiff upon such motion, is not such an affidavit as to make the complaint a verified pleading within the provisions of section 446, of the Code of Civil Procedure, and was therefore an unverified complaint to which an unverified answer and a general denial is permitted (Code Civ. Proc. § 437)." "In this case," says the appellant, "although the affidavit is made by a person who is not a party to the action, it does not state that the facts are 'within the knowledge' of the person verifying, nor does the affidavit set forth the reasons why it is not made by the party."

The affidavit is not open to either of these objections. Section 446 of the Code of Civil Procedure provides:

"Every pleading must be subscribed by the party or his attorney. * * * In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are herein stated on his information or belief, and as to those matters that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney has his office, or from some cause unable to verify it, or the facts are within the knowledge of the attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties. When a corporation is a party, the verification may be made by any officer thereof. * * *"

The affidavit of verification is as follows:

"R. W. Kinsey, being duly sworn, deposes and says: That he is the assignor of plaintiff in the above-entitled action, and, for that reason, is better informed as to the facts thereof than the said plaintiff, that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated on information and belief, and as to those matters that he believes it to be true."

The affidavit, it will be noted, contains the usual qualification of the statute—"except as to the matters which are therein stated on his information or belief." But the complaint contains no allegation based on information and belief, and therefore the averment must be treated as mere surplusage. Lassen v. Board of Dental Examiners, 24 Cal. App. 767, 142 Pac. 505. As no fact is stated in the body of the complaint upon the information and belief of affiant, the verification is to be regarded as a positive affirmance of the truth of the allegations of the complaint, notwithstanding the use of the form of the verification containing the usual words "except as to the matters which are therein stated on his information and belief." Christopher v. Condogeorge, 128 Cal. 581, 61 Pac. 174; Patterson v. Ely, 19 Cal. 28.

Omitting the averment based on information and belief from the affidavit it still states that the affiant has read the complaint and knows the contents thereof, and that the same is true. This is clearly the equivalent of an averment in the exact language of the section—that "the facts are within the knowledge" of the affiant. But, in addition to the above the affidavit avers that the affiant is the assignor of the plaintiff, and the agreements, which are set out in the complaint, show that they were entered into between the affiant and the defendant. The requirements of this branch of the section were fully complied with.

[3] Nor does the affidavit fail to state the reasons why the verification was not made by the plaintiff corporation. As already stated, the complaint alleges that the agreements were entered into between the affiant and the defendant. The former therefore had primary knowledge of the facts. He subsequently assigned the claim to the corporation. While it does not affirmatively appear whether the corporation or its officers had knowledge of the facts relating to the transactions between the affiant and the defendant, it cannot be doubted that the affiant was qualified to verify the facts from first hand knowledge. "The object of the verification is to insure good faith in the averments of the party." Patterson v. Ely, supra. Upon all the facts the reason sufficiently appears why the affidavit was made by the assignor instead of one of the officers of the plaintiff corporation. It is not vital to such a verification that the affidavit specify in formal characterization the facts constituting the reasons why it is not made by the party, where such reasons can be gathered from all the facts stated in the affidavit, when read in the light of the pleading.

In Newman v. Bird, 60 Cal. 372, the affidavit of verification is made by the agent of the party, who states that he is such agent,

that he has heard read the complaint, that he knows the contents thereof, that the same is true of his own knowledge, and that he therefore swears that the facts, stated in the complaint, are within his own knowledge, and that they are true. The court said:

"The reason given in this case for the verification of the complaint by the agent is that the facts are within his knowledge, and that brings the case within the language of the section of the Code above cited. We are therefore of the opinion that the complaint was properly verified."

In that case the verification was held sufficient because it was made by an agent who averred that the facts set out in the complaint were within his own knowledge. In this case the affiant states that he is the assignor of the corporation, that the facts are true of his own knowledge, and for the reason that he is the assignor of the plaintiff he is better informed as to the facts. This is a sufficient statement of the reason why the verification is not made by the plaintiff.

Silcox v. Lang, 78 Cal. 118, 20 Pac. 297, is relied upon by the appellant to establish the insufficiency of the verification here. But we think the case is clearly distinguishable on the facts. The affiant in that case, the attorney for the defendants, averred "that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge." This is the same as the corresponding averment in this case, and by itself would constitute an averment that the facts are within his knowledge. But the two cases are not otherwise identical. Under section 446 of the Code of Civil Procedure the verification may be made by the attorney or another person when the party is absent from the county or from some cause unable to verify the pleading, and in the presence of either of these conditions the verification may be made by the attorney or other person on information or belief; or, if the facts are within the knowledge of the attorney or other person, either may verify the pleading without regard to the existence of such conditions. In Silcox v. Lang, supra, the affidavit of the attorney purported to aver his knowledge and information or belief. It does not appear whether the answer contained any allegations based on information or belief. But, inasmuch as the affidavit did not state as a reason for the attorney making the affidavit either the absence or inability of the party, the averments on information or belief added nothing to the verification. The attorney, evidently in an attempt to comply with the clause of the section calling for the reasons why the affidavit was not made by the party, averred that "as such attorney the facts are more fully known to him than said defendants, and therefore he makes this affidavit." The court held that the affidavit was insufficient, because it did not aver that the facts were within the knowledge of the attorney, and "shows no reason why the pleading might not have been verified by the parties." It is apparent from the decision that the averment as to the information or belief of the attorney, and that which purports to state the reason why the parties did not make the verification, were held to qualify the preceding averment as to the knowledge of the affiant, and hence that the affiant did not in direct terms aver that the facts were "within his knowledge" as was necessary since the affidavit did not state that the parties were absent or unable to act. Newman v. Bird, supra, was not referred to in the decision.

In this case the averments covering the reasons why the corporation did not verify the complaint does not qualify the averment that the facts were within the knowledge of the affiant. On the contrary, the averment that he is the assignor, and for that reason is better informed than the corporation, adds force to the averment that the facts are true of the assignor's own knowledge. All the averments of the affidavit, when read in connection with the complaint, affirm a primary knowledge of the facts on the part of the assignor, and this must be deemed a sufficient statement of the reasons why the party did not verify the complaint.

[4] The plaintiff in this case is a corporation, and the affiant is not an officer thereof. But the clause in section 446, providing for verification of a pleading by an officer when the corporation is a party, is not exclusive. It is permissive only, and does not exclude an attorney or other person from making the verification in a proper case. See High Rock Knitting Co. v. Bronner, 18 Misc. Rep. 627, 43 N. Y. Supp. 725. The clause is qualified by the preceding part of the section, and is not to be construed as a limitation that only the officers of a corporation can verify the pleadings thereof.

[5] The motion for judgment on the pleadings, without a preliminary motion to strike the answer from the files was proper. Hearst v. Hart, 128 Cal. 327, 60 Pac. 846.

No other points require consideration. The judgment is affirmed.

SLOSS, J. I concur in the judgment. The affidavit shows that the facts were within the knowledge of the affiant Kinsey. He declares "that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge. * * *" The statement that facts are true of one's own knowledge necessarily imports that the facts are within his knowledge. The added words, "except as to matters which are therein stated as to information and belief," do not qualify the positive character of the verification, since the pleading contains no averments on information and belief. The verification, therefore, fully meets the provision of section 446, Code of Civil Procedure, allowing a person not a party to verify where the facts are within his knowledge.

I am, however, unable to see any distinc-

tion in this respect between the case at bar and Silcox v. Lang, 78 Cal. 118, 20 Pac. 297. The verification which was there held to be insufficient was in the same form as the one before us. There is nothing in the report of the Silcox Case to show that the pleading there in question contained any allegation on information and belief. I think, therefore, that Silcox v. Lang, should, so far as it touches the point under discussion, be distinctly and unequivocally overruled.

I agree to the view that the affidavit contains a sufficient statement of the reasons why it is not made by one of the parties.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

29 Cal. App. 725

CAIN v. FRENCH. (Civ. 1766.)

(District Court of Appeal, First District, California. Feb. 21, 1916. Rehearing Denied by Supreme Court April 14, 1916.)

1. COSTS ⇐4—ALLOWANCE—STATUTES GOVERNING—CHANGE OF RULE.
Since costs are but an incident of judgment, the rule pertaining to their allowance may be changed or modified by statute during pendency of the action.
[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 2, 3, 109; Dec. Dig. ⇐4.]

2. ACTION ⇐71—TERMINATION.
An action once instituted is thenceforth pending at every instant until final judgment is pronounced and entered up.
[Ed. Note.—For other cases, see Action, Cent. Dig. § 756; Dec. Dig. ⇐71.
For other definitions, see Words and Phrases, First and Second Series, Pending.]

3. COSTS ⇐222—ALLOWANCE—PRINTING OF BRIEFS—STATUTES GOVERNING.
Since the successful party is not entitled to the fruits of her judgment until it is finally determined in her favor by the affirmance, the statute in force at the time when the judgment is thus made final controls the allowance of the costs to her, so that though original judgment was entered before enactment of the amendment (St. 1913, p. 1033) to Code Civ. Proc. § 1027, providing for allowance of costs of printing certain briefs, the successful party could have costs of printing a brief on appeal allowed, final judgment having been entered after such enactment.
[Ed. Note.—For other cases, see Costs, Cent. Dig. § 833; Dec. Dig. ⇐222.]

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Annie Cain against Henry French. From an order denying defendant's motion to retax plaintiff's costs, defendant appeals. Affirmed.

See, also, 25 Cal. App. 499, 144 Pac. 302.

Henry French, of San Jose, in pro. per. E. A. Wilcox, C. F. Crothers, and Fry & Jenkins, all of San Jose, for respondent.

LENNON, P. J. This is an appeal from an order denying the defendant's motion to retax the plaintiff's costs in the above-entitled action.

Upon the hearing of the motion the only objection urged to the cost bill related to the charge of $30.65 for the printing of the plaintiff's brief in reply to the brief of the defendant upon the latter's appeal from the judgment originally entered in the action in favor of the plaintiff. The sole point made in this court in support of the appeal is that when the plaintiff's reply brief was filed upon the original appeal the expense incurred for the printing of such brief was not allowable as an item of costs; and that therefore such item could not be properly taxed against the defendant by the lower court upon the going down of the remittitur.

The plaintiff's reply brief upon the original appeal was filed in this court of May 27, 1913, and at that time "there was, * * * no provision of rule or statute authorizing the taxing as costs of the expense of printing briefs. * * * " Estate of Prager, 167 Cal. 737, 141 Pac. 369. But upon August 10, 1913 (St. 1913, p. 1033), an amendment to section 1027 of the Code of Civil Procedure went into effect, whereby the prevailing party upon an appeal was given the right to charge as an item of the costs in the action the expense of printing briefs when the same did not exceed the sum of $50. The plaintiff's memorandum of costs and disbursements in the present case was filed in the lower court after the going down of the remittitur from this court on December 14, 1914, and the defendant's motion to retax was heard and denied on December 21, 1914. It will thus be seen that the amendment to the statute permitting the expense of printing briefs upon appeal to be charged as a part of the costs of the prevailing party was in force and effect prior to and at the time when, by the affirmance of this court, the judgment in favor of the plaintiff became final.

[1] Costs are but an incident of a judgment; and the rule pertaining to the allowance of costs in an action may be changed or modified by statute during its pendency. Ellis v. Whittier, 37 Me. 548; Billings v. Segar, 11 Mass. 340.

[2] Admittedly an action once instituted is thenceforth pending at every instant of time until final judgment has been pronounced and entered up.

[3] The plaintiff in the present case was not entitled to the fruits of her judgment until it was finally determined in her favor by the affirmance of it by this court, and therefore the statute in force at the time when the judgment was thus made final covers and controls the allowance of costs to her. Hepworth v. Gardner, 4 Utah, 439, 11 Pac. 566.

The order appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

29 Cal. App. 659

CAVITT v. RAJE. (Civ. 1654.)

(District Court of Appeal, First District, California. Feb. 14, 1916. Rehearing Denied by Supreme Court April 12, 1916.)

1. VENUE ⟸66—MOTION FOR CHANGE—SUFFICIENCY OF AFFIDAVIT.

An affidavit of merits filed with the motion for a change of venue, without objection to its consideration, and embracing all the essential averments of a sufficient affidavit of merits, was entitled to be read and considered on the hearing of the motion, though it contained interlineations and alterations.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 110–113; Dec. Dig. ⟸66.]

2. VENUE ⟸66 — AFFIDAVITS — "MATERIAL CHANGE OR ALTERATION."

Under Code Civ. Proc. § 1982, requiring the party producing a writing as genuine, which has been or appears to have been altered after its execution in a part material to the question in dispute, to account for the appearance of the alteration by showing that it was made by another without his consent, or was made innocently, or that it did not change the meaning or language of the instrument, a "material change or alteration" is one causing an instrument to speak a language different in legal effect from that which it originally spoke, or which remedies a defective instrument; and in an affidavit for a change of venue reading, "I further say that I have fully and fairly
the said case in this cause to my counsel," etc., the insertion of the word "stated" after its execution to supply no more than the court would have supplied for him was immaterial.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 110–113; Dec. Dig. ⟸66.

For other definitions, see Words and Phrases, First and Second Series, Material Alteration.]

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by W. C. Cavitt against Thor Raje. From an order denying defendant's motion for a change of venue, he appeals. Reversed.

McKenna & McKenna, of Los Angeles, for appellant. W. C. Cavitt, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from an order denying a motion by defendant for a change of the place of trial. There is absolutely no merit in the motion to dismiss the appeal, and, contrary to the plaintiff's contention, the affidavits in the record show that the defendant at the time of the commencement of the action resided in the county of Los Angeles.

In the defendant's demand for a change of the place of trial, in the notice of motion, and in several of the affidavits which were filed in the proceeding there were many interlineations and erasures. This is so with reference to the affidavit of merits verified and filed by the defendant; and it is the plaintiff's principal claim in support of the order of the trial court that the defendant, although requested, refused to say that the alterations therein were made prior to the execution of the instrument, and that upon objection by plaintiff upon that ground the court excluded the same from consideration, and accordingly denied said motion. The record, however, does not show that the defendant was asked to account for the appearance of the alterations, or that he refused to do so, or that plaintiff made any objection to the consideration of the affidavit of merits, or that the court failed to consider it. The court, however, in its order denying the motion, significantly says that, having "seen and read the affidavits, etc., the motion is denied"; and, since the parties have discussed the matter in their briefs as though the motion were denied on the ground stated, it may not be amiss to briefly review the matter.

[1, 2] Upon examining the affidavit in its original form, and ignoring the alterations, it is found to embrace all the essential averments of a sufficient affidavit of merits (Watkins v. Degener, 63 Cal. 500; Nolan v. McDuffie, 125 Cal. 334, 58 Pac. 4), and therefore the interlineations and erasures in the affidavit complained of are wholly immaterial, and defendant was entitled to have it read and considered on the hearing of the motion. If the alteration changed "the meaning or language of the instrument" (Code Civ. Proc. § 1982), or if it remedied a defective affidavit, the change would be regarded as material, and the affidavit could not then have been considered without a satisfactory explanation (Code Civ. Proc. § 1982).

"A material change or alteration of an instrument is one which causes it to speak a language different in legal effect from that which it originally spoke." 2 Corpus Juris, p. 1173, § 2, and page 1178, § 7.

In one place in the affidavit as it read originally the word "stated" is omitted, the affidavit reading, "I further say that I have fully and fairly the said case in this cause to my counsel," etc.; but from what appears later in the affidavit, and reading it as a whole, it is clear that the defendant in effect avers that he made a full and fair "statement" of the case in said cause to his attorneys. In other words, in supplying or inserting in the affidavit the word "stated," assuming it was done after its execution, the defendant did no more than the court would have done for him, and that change in or addition to the affidavit may therefore be regarded as immaterial. Humphreys v. Crane, 5 Cal. 173; First Nat. Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748; Rogers v. Shaw, 59 Cal. 260; McGowan v. Supreme Court, etc., 107 Wis. 462, 469, 83 N. W. 775; 2 Corpus Juris, p. 1198, § 44. Any change made in a document after its execution, which merely expresses what would otherwise be supplied by intendment is immaterial, and the document is in effect unaltered by it. 2 Corpus Juris, p. 1193, § 34.

From what has been said it appears that

the defendant was entitled to an order changing the place of trial to the county of Los Angeles, and that the court erred in its order denying defendant's motion.

The order is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

29 Cal. App. 713

HAGENKAMP v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES. (WEGMAN, Intervener). (Civ. 1683.)

(District Court of Appeal, First District, California. Feb. 19, 1916. Rehearing Denied by Supreme Court April 14, 1916.)

1. TRIAL ⟸6(1)—RESETTING FOR TRIAL—NOTICE.

In an action against an insurance company, with a complaint in intervention, and a partial trial at which counsel for intervener was present, an order transferring the cause to another department of the court for trial before the same judge and an order in that department placing it upon the calendar for trial on a certain day, was, in effect, a resetting of the case for trial, which, where it was not shown that it was made without knowledge and consent of the intervener, could not be tried in his absence without giving him the five days' notice required by Code Civ. Proc. § 594, providing for bringing an issue to trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 13–16; Dec. Dig. ⟸6(1).]

2. APPEAL AND ERROR ⟸856(1)—REVIEW—GROUNDS OF DECISION—MOTION TO VACATE JUDGMENT.

On a motion to vacate a judgment for failure to give the statutory notice required for the setting of a cause for trial, and for inadvertence and mistake of counsel in making a wrong entry in his office diary of the date set for the trial, an order granting the motion, general in its terms, covered both grounds, and if the evidence in support of either was sufficient, the order must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3406, 3408–3410, 3416, 3420–3422, 3429–3431, 3434; Dec. Dig. ⟸856(1).]

3. JUDGMENT ⟸162(4)—DEFAULT—MOTION TO SET ASIDE—SUFFICIENCY OF EVIDENCE—MISTAKE.

Finding of inadvertent and excusable negligence, implied from the making of an order setting aside a judgment on that ground, *held* sufficiently supported by the evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 322; Dec. Dig. ⟸162(4).]

4. JUDGMENT ⟸162(4) — VACATION — SUFFICIENCY OF EVIDENCE.

Where a party in default, whose pleading shows a substantial cause of action, makes seasonable application to be relieved from a default, very slight evidence will be required to justify the court in setting aside the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 322; Dec. Dig. ⟸162(4).]

5. JUDGMENT ⟸160 — DEFAULT — MOTION TO SET ASIDE — AFFIDAVIT OF MERITS — SUFFICIENCY.

Although an affidavit of merits filed in support of an intervener's motion to vacate a default judgment averring facts intended to embody the essentials of an affidavit of merits was defective in particulars, the allegations of the verified complaint in intervention showing a substantial cause of action were sufficient to constitute an affidavit of merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 314–316; Dec. Dig. ⟸160.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by Louis K. Hagenkamp against the Equitable Life Assurance Society of the United States, in which Catherine Wegman filed a complaint in intervention. From an order vacating and setting aside a judgment for plaintiff on motion of the intervener, plaintiff appeals. Affirmed.

Howard Harron, of San Francisco, for appellant. Willard P. Smith, of San Francisco, Judson W. Reeves, of Healdsburg (Berkeley B. Blake, of San Francisco, of counsel), for respondent.

LENNON, P. J. The plaintiff in this action sought to recover from the defendant corporation, Equitable Life Assurance Society, the sum of $750, alleged to be the proceeds due upon a matured 20-year endowment life insurance policy issued by the corporation defendant to Philip W. Wegman, deceased, and which, during the latter's lifetime, had been assigned by him to the plaintiff. Catherine W. Wegman, the widow of the deceased, by leave of the court first had and obtained, filed in the action her complaint in intervention, wherein she claimed the sum in suit by virtue of an assignment of the policy to her alleged to have been made prior to the claimed assignment thereof to the plaintiff. Issue was joined by the plaintiff upon the allegations of the complaint in intervention; and by stipulation of the parties the corporation defendant deposited with the court the sum in suit upon the condition that it be applied in satisfaction of any judgment which might be rendered in the action for either the plaintiff or the intervener. The record shows the rendition of a judgment on August 7, 1913, in favor of the plaintiff and against the intervener, based upon findings of fact which, among other things, declare that the cause "came on regularly for trial on the 16th day of May, 1913, at which time witnesses were sworn and testified, and thereafter the cause was regularly continued" to the 7th day of August, 1913, for "further hearing"; and the cause coming on regularly then to be heard, evidence was introduced and the cause submitted for decision.

The judgment thus rendered was entered of record on August 8, 1913; and the statement upon appeal from the order shows that on that date counsel for the intervener prepared and gave notice to plaintiff and his counsel of a motion to vacate and set aside the judgment upon the ground that no valid notice of the setting of the cause for trial was given to the intervener or her counsel, and upon the further ground that said judg-

ment was rendered and entered through the intervener's inadvertence, mistake, and excusable neglect. The court below ordered the judgment vacated, and it is from that order that the appeal is taken.

The motion to vacate was accompanied and supported by the affidavit of the counsel for the respondent which, among other things, tended to show that on August 6, 1913, he received a postcard notice from the clerk of the court in which the action was pending, notifying him that the same had been set for trial, but did not specify the date upon which the trial would be had; and that at about 5:15 p. m. of August 5, 1913, the attorney for the plaintiff served the attorney for the intervener with a notice that the cause had been set for trial on the 7th day of August, 1913, at the hour of 10 o'clock a. m.; that immediately upon receiving said notice the attorney for the intervener proceeded to enter in his office diary a note of the setting of the case for trial so that his attention in due course would be called thereto, but inadvertently he made such entry in his diary upon the page thereof dated August 8, 1913, instead of August 7, 1913. This affidavit of counsel for the intervener further averred facts which evidently were intended to embody the essentials of an affidavit of merits.

Upon the hearing of the motion to vacate counsel for the plaintiff presented in evidence in reply to the showing made upon behalf of the intervener, an affidavit which, in its recital of the history of the case, tended to show that the trial thereof was partially had in one department of the superior court upon two different days in the presence of and with the consent of counsel for the intervener, and that upon the conclusion of the second day's trial the case was transferred to another department of the court for "a continuation of the trial" before the same judge who had partially heard the case, and that there it was subsequently ordered to be placed upon the calendar for August 7, 1913, for trial. It was not shown, however, nor is it contended upon behalf of the plaintiff, that counsel for the intervener was present in court when the case was so placed upon the calendar. In reply to the foregoing affidavit counsel for the intervener filed an affidavit alleging facts which tended to show that the cause was never set for trial prior to August 7th, and was not tried wholly or in part prior to that date, and that the prior taking of the testimony of certain witnesses—claimed by the plaintiff to have constituted a trial—was merely had in lieu of the taking of their depositions, and was done by virtue of a stipulation between the respective parties.

In support of the appeal it is one of the contentions of counsel for plaintiff that if it be true that the case was partially heard in the presence of and with the consent of counsel for the intervener in one department of the superior court, then, notwithstanding the transfer of the case from one department to another, he must be deemed to have had actual knowledge of what was done in the case after as well as before the transfer, and consequently the notice served upon him was wholly unnecessary, and cannot be made the basis for the claim of inadvertence and excusable neglect. It is also insisted that the findings and judgment originally made and entered were, in the absence of proceedings to correct the record, conclusive upon the parties to the action, and that therefore the finding of the lower court necessarily implied from the order vacating the judgment, contradicting the recitals in the findings and judgment originally made and entered, cannot be rightfully resorted to in aid of the order vacating the judgment; and that the only remedy available to the intervener in the circumstances was a motion for a new trial grounded upon the provisions of subdivision 3, section 657, of the Code of Civil Procedure.

[1] Conceding without deciding that the proceedings had in the case prior to August 7, 1913, constituted a partial trial of the case, at which counsel for the intervener was present, nevertheless no showing was made that he was present in the department to which the case was subsequently transferred at the time it was ordered on the calendar of that department, or that he had actual knowledge of such order and consented thereto. The order thus made was in effect a resetting of the cause for trial; and it not having been shown that it was made with the knowledge and consent of the counsel for the intervener, a further trial of the case could not be had in his absence without giving him the five days' notice required by section 594 of the Code of Civil Procedure. Estate of Dean, 149 Cal. 487, 87 Pac. 13. There is much force in the contention that, in the absence of proceedings to make the record conform to the fact, the recitals of the findings and judgment to the effect that a trial of the case was actually had, should, in the absence of a motion for a new trial, prevail over the finding to the contrary.

[2] We do not deem it necessary, however, to decide the question of practice involved therein in the presence of a record which shows that the motion to vacate was grounded and granted upon the failure to give the statutory notice required for the setting of the cause for trial, and also upon the alleged mistake, inadvertence, and excusable neglect of counsel for the intervener in making a wrong entry in his office diary of the date set for the trial of the cause. The order granting the motion to vacate being general in its terms covered both grounds; and if the evidence adduced in support of either be sufficient, the order vacating the judgment must be affirmed.

[3] The evidence is undisputed that the

statutory notice of the setting of the cause for trial was not given to the counsel for the intervener, and therefore the order appealed from is fully supported upon that ground alone; but even if it be assumed that the statutory notice was waived by accepting and acknowledging without protest service of a shorter notice, still we think the finding of inadvertence and excusable neglect implied from the making of the order appealed from, is also sufficiently supported by the evidence.

There is no merit in the contention that the evidence is insufficient in the particular that it does not show that counsel for the intervener was accustomed to rely upon the entries made in his office diary for information concerning the status of causes in which he was interested. If this contention be worthy of an answer, the answer is to be found in the averment of the affidavit of counsel for the intervener that he made the entry in question "upon his office diary in order that the same might be drawn to his attention in due course."

The error of counsel for the intervener in entering in his diary the date of the trial was not an unlikely inadvertence, and was entirely free from any suggestion that it was deliberately done as the foundation for a dilatory move in the case.

[4] Moreover the complaint in intervention not only discloses a substantial cause of action—which the record shows had been previously prosecuted with vigor and in good faith—but further, that on the day following the rendition of the judgment proceedings were immediately instituted by counsel for the intervener to have it vacated. As was said in the very recent case of Berri v. Rogero, 168 Cal. 736, 145 Pac. 95:

> "Where a party in default makes seasonable application to be relieved therefrom * * * very slight evidence will be required to justify the court in setting aside the default."

[5] We are of the opinion that the affidavit of merits filed in support of the motion was sufficient, notwithstanding that it was not couched in the phraseology generally employed in such an affidavit; but even if the affidavit be conceded to be deficient in the particulars pointed out by counsel for the plaintiff, the allegations of the verified complaint in intervention were sufficient to constitute an affidavit of merits.

The one remaining point made in support of the appeal relative to the insufficiency of the verification to the complaint in intervention is trivial and not deserving of serious consideration.

The order appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

30 Cal. App. 231

W. R. GRACE & CO. v. LEVY. (Civ. 1637.)

(District Court of Appeal, First District, California. March 30, 1916, April 27, 1916. Rehearing Denied by Supreme Court May 29, 1916.)

1. APPEAL AND ERROR ⊂⊃1011(1)—REVIEW—FINDINGS.

A finding of fact by the trial court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⊂⊃1011(1).]

2. SALES ⊂⊃442(4) — REMEDIES OF BUYER — DAMAGES.

Where goods were bought for use in a foreign country, and the buyer had no opportunity of inspection before they reached the foreign port, his damages for breach of warranty should be fixed with reference to the market value of the goods at the port of destination; Civ. Code, § 3313, declaring that the detriment caused by breach of warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred if it had been complied with, over its actual value.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1287; Dec. Dig. ⊂⊃442(4).]

3. SALES ⊂⊃440(4) — REMEDIES OF BUYER — EVIDENCE.

In an action for a seller's breach of warranty concerning coffee bags packed and shipped to a foreign port, evidence showing the seller's knowledge of the purpose to which the bags were to be devoted is admissible on the question of the buyer's damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1271; Dec. Dig. ⊂⊃440(4).]

4. SALES ⊂⊃288(2)—WARRANTIES—BREACHES—DEFENSES.

That a buyer inspected goods which were warranted before receiving them is no defense to an action for breach of warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 818, 819; Dec. Dig. ⊂⊃288(2).]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by W. R. Grace & Co. against Harry Levy. Judgment was rendered granting plaintiff only part of the relief sought, both parties moved for new trial, and both appealed from the orders denying their motions. Affirmed on defendant's appeal, and reversed and remanded on that of plaintiff.

Wise & O'Connor, of San Francisco, for appellant Harry Levy. Goodfellow, Eells & Orrick, and O'Connor & Schwartz, all of San Francisco, for appellant W. R. Grace & Co.

PER CURIAM. This is an action for damages for the breach of an express warranty which accompanied the sale of a certain quantity of coffee bags to the plaintiff by the defendant. The complaint pleaded four causes of action in separate counts, each of which was identical in language, save and except as to the dates and the amounts involved. The defendant, answering, denied all of the material allegations of the complaint, save and except the allegation concerning the execution of the contract and the giving of the warranty.

On the issues thus framed the cause was tried by the court without a jury, and judgment rendered and entered in favor of the plaintiff in the sum of $1,200 upon the issues involved in the first three counts. Upon the issues involved in the fourth count the court found that the plaintiff had an opportunity to inspect and did inspect the bags contracted for prior to delivery, and approved the same, and that therefore the plaintiff was not entitled as a matter of law to recover on that particular count, and rendered judgment thereon in favor of the defendant.

Upon the issues involved in the first count the trial court found, in substantial accord with the allegations of the complaint, that on October 3, 1911, the defendant at the city and county of San Francisco sold to the plaintiff 10,000 secondhand gunny bags, and that at the time of such sale, and as a part of the transaction, the defendant warranted said bags to be in good, sound condition and of the size of about 28 by 40 inches; that the defendant agreed to pack said bags in bales; that he knew they were to be shipped to and used in the vicinity of San Jose de Guatemala; that the bags were delivered to the plaintiff at San Francisco, the place agreed upon for delivery; that at the request of the plaintiff the bags as baled were marked "J. G. V. No. ——— San Jose de Guat.," and were delivered so marked to a drayman for the plaintiff; that the bags when thus delivered were not in good, sound condition or of the size of about 28 by 40 inches; that it had not been practicable for the plaintiff to inspect the bags after delivery at San Francisco or prior to their shipment to the port of destination or until their arrival at said port; that the plaintiff could not, with the exercise of the diligence usual and ordinary in such a transaction, have inspected said bags until their arrival at the port of destination; that the bags, while being baled in San Francisco were not inspected or approved by the plaintiff or declared by it to meet the requirements of the warranty; that after shipment of the bags, and before their receipt at the port of destination, the plaintiff, relying on the contract and warranty in suit, paid to defendant the

agreed price; that the bags reached the port of destination on November 30, 1911, and were received by the plaintiff; that, if the quality and condition of the bags had measured up to the requirements of the warranty, they would have had a value of $1,000; that by reason of the defendant's breach of the warranty the actual value of the bags at the time of their receipt by the plaintiff at the port of destination was only $500; and, finally, that the detriment suffered by the plaintiff from the breach of the warranty was the sum of $500.

The second and third counts of the complaint involved, respectively, the sale of 12,000 bags on November 20, 1911, and 2,000 bags on December 18, 1911. Upon practically the same state of facts as was involved in the first count the trial court found that the plaintiff was damaged because of the breach of the warranty in the sum of $600 on the second count, and in the sum of $100 on the third count.

From the judgment entered in favor of the plaintiff the defendant has appealed, and from the judgment entered in favor of the defendant upon the fourth count of the complaint the plaintiff has appealed. Both parties appeal from orders denying their respective motions for a new trial.

The findings above referred to are assailed by the defendant upon the ground, as claimed, that they are not supported by the evidence, in that it was not shown that the bags were not good secondhand bags when delivered to plaintiff, or that the plaintiff suffered any damage by reason of the defendant's alleged breach of the warranty.

[1] The evidence produced upon the whole case was in substantial conflict. We have neither the time nor the inclination to follow respective counsel in their discussion of the weight of the evidence and the credibility of the witnesses; and it must suffice for us to say that we are of the opinion that the evidence is sufficient to support the finding concerning the condition of the bags when they were delivered to the plaintiff. Much of the evidence upon this phase of the case was directed to showing the condition of the bags upon their arrival at the port of destination. There was, however, some evidence as to their condition when they were baled at and shipped by the defendant in San Francisco. This evidence was conflicting, and that offered and received upon behalf of the plaintiff tended to support the finding in question. This being so, the finding must stand, even though it be conceded, as counsel for the defendant contends, that it was incumbent upon the plaintiff to show that the bags were not as warranted when baled and shipped from the defendant's warehouse at San Francisco.

[2] The contention that there was no evidence as to the damage suffered by the plaintiff is based upon the fact that all of the evidence in this behalf was confined to the market value of the bags at the port of destination. In this connection we are satisfied that the evidence sufficiently sustains the findings that it was not practicable for the plaintiff to inspect the bags at San Francisco, and that the defendant knew at the time of the sale and warranty that the bags were to be shipped to and used at San Jose de Guatemala. This being so, the damages found for plaintiff were properly fixed with reference to the market value of the bags at the port of destination rather than at San Francisco where they were baled and received. Civ. Code, § 3313; Shearer v. Park Nursery Co., 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125; Krasilnikoff v. Dundon, 8 Cal. App. 406, 97 Pac. 172; Germain Fruit Co. v. Armsby, 153 Cal. 585, 96 Pac. 319.

[3] The trial court did not err in its ruling permitting the defendant Levy as a witness for the plaintiff to be interrogated as to his knowledge "at the time of the concluding of the transaction" concerning the place where the bags were to be used. If he knew at the time stated in the question that the bags were to be used elsewhere than in San Francisco, he must have acquired that knowledge during the negotiations between the parties and before the transaction was concluded. Evidence of such knowledge was therefore material to the issues.

[4] Upon the issues involved in the fourth count of the complaint the trial court found substantially that on July 13, 1912, at San Francisco, Cal., the defendant sold the plaintiff 8,000 "secondhand coffee gunnies," agreeing to pack them in bales; that the defendant knew at the time of the sale that such bags were to be shipped to and used in the vicinity of San Jose de Guatemala; that on July 23, 1912, defendant packed 8,000 bags in bales, and delivered them to the plaintiff at San Francisco, which was the place agreed upon for delivery; that at the request of the plaintiff these bags were marked "J. G. V. No. ——— San Jose de Guat.," and were delivered so marked to a drayman for plaintiff. The trial court found that these bags were not secondhand coffee gunnies; but it further found that the plaintiff had an opportunity to inspect the gunnies prior to their shipment to and arrival at San Jose de Guatemala; that they were inspected and approved by the plaintiff, and by it declared to be secondhand gunnies; that the plaintiff accepted the bags as conforming in all respects with the bags sold to it by the defendant. Finally, the court found that after the shipment of the 8,000 bags involved in the fourth count in the complaint, and before their receipt at San Jose de Guatemala, the plaintiff, relying upon its contract with the defendant, paid him the purchase price of said bags. The trial court made no finding upon the issue raised by the pleadings as to the damage claimed to have been suffered by the plaintiff as the result of the defend-

ant's breach of the express warranty alleged to have accompanied the sale.

Assuming that the evidence adduced upon the issues in the fourth count of the complaint sufficiently supports the finding that the bags in question were accepted by the plaintiff, still such finding does not in turn support the judgment. It is not disputed that the bags were expressly warranted to be "secondhand gunnies," and the finding that the bags delivered to the plaintiff did not meet the requirements of the warranty is sufficiently supported by the evidence. The inspection of the bags relied upon to support the judgment in favor of the defendant upon the fourth count of the complaint occurred, if at all, prior to the delivery to the plaintiff. Such inspection did not as a matter of law operate as a waiver of the warranty, nor excuse the defendant from liability for a breach of the same. Gould v. Stein, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; Barnum Wire, etc., Works v. Seley, 34 Tex. Civ. App. 47, 77 S. W. 827; Williams v. State, 45 Ind. 157; Williston on Sales, § 208, p. 275; North, etc., v. Hobbs, Wall, 159 Cal. 380, 389, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501.

It follows from what we have said that the judgment rendered and entered in favor of the plaintiff on the first three counts of the complaint and the order denying the defendant's motion for a new trial must be affirmed, and that the judgment entered in favor of the defendant upon the fourth count must be reversed, and a new trial ordered as to said fourth count only, and the cause remanded, with directions to the trial court to find upon the one issue as to damages only as to said fourth count, letting stand all other findings as to said fourth count, and thereupon to enter judgment.

172 Cal. 436

PARKER v. BOWER. (S. F. 6917.)
(Supreme Court of California. March 31, 1916.)

EXECUTORS AND ADMINISTRATORS ⟸315(5)—DISTRIBUTION OF ESTATE — DECREE — CONSTRUCTION—ESTATES CREATED.

A decree of distribution of property, giving to the widow an undivided half interest in fee simple in lands and "a life estate in the remaining undivided one-half, to have and to hold during her natural life, and full power to sell and dispose of the same as in her discretion may seem advisable, remainder interest on the termination of the life estate" to go to other heirs, creates a fee simple in the widow in all the land granted upon exercise of the power to dispose, the clause requiring such construction to avoid redundancy, and such construction being the natural grammatical effect of the words used.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1306, 1307, 1310; Dec. Dig. ⟸315(5).]

Department 2. Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by Thomas Parker against Allen V. Bower. Judgment for plaintiff, and defendant appeals on the judgment roll. Affirmed.

F. E. Johnston, H. L. Johnston, and L. E. Johnston, all of Napa, for appellant. Theodore A. Bell, of San Francisco (Charles F. Hanlon, of San Francisco, of counsel), for respondent.

SHAW, J. The defendant appeals from the judgment upon the judgment roll alone. The case involves the title to a parcel of real estate. The complaint is, in form, an action to quiet the title of the plaintiff therein against the asserted unfounded claims of the defendant.

The plaintiff derives title under a deed executed by Clara B. Anderson. She was also known as Clarinda, and was formerly the wife of Jacob Bower. The property was distributed to her upon the final settlement of the estate of Jacob Bower, and the case depends upon her power to convey the property in fee, under the terms of the decree of distribution. The portion of the decree material to the question is as follows:

"It is hereby ordered, adjudged, and decreed that the residue of said estate hereinafter particularly described be, and the same is hereby, distributed as follows: An undivided one-half interest therein in fee simple is distributed to Clarinda Bower, the surviving wife of deceased, and a life estate in the remaining undivided one-half interest therein is distributed to said Clarinda Bower, to have and to hold during her natural life, and full power to sell and dispose of the same as in her discretion may seem advisable, and the residue and remainder in said undivided one-half interest after the termination of said life estate of said Clarinda Bower is distributed to Henry T. Bower and Allen V. Bower, share and share alike."

The interest involved in this case is the undivided one-half interest given to Clarinda Bower for her life by said decree. She afterwards sold and conveyed the same to one Rannells, who, in turn, conveyed the same to the plaintiff. It is claimed by the defendant that the decree did not give her power to sell the land in fee, but only to sell her life estate therein.

We do not think this contention can be sustained. It will be noted with respect to this one-half interest that the decree gives to Clarinda Bower two things: First, a life estate therein during her natural life; second, "full power to sell and dispose of the same as in her discretion may seem advisable." The contention of the appellant is that the words "the same," in the clause last quoted, refer to the life estate in the property, and not to the property itself, and that consequently it gave her only a power of disposition and sale of such life estate. The decree vested in her the absolute title to the life estate. She therefore had full power to sell and dispose of it, and no declaration in the decree was necessary to authorize her to make such disposition or sale. If that meaning be given to it, the clause giving her power to sell would be entirely useless and redundant. It is a "familiar rule of construction not to treat any word as redundant, if we can avoid doing so without marring the obvious sense of the entire clause." Hyatt v. Allen, 54 Cal. 357. If we construe it as applying to the property, rather than to the life estate alone the clause is made effective, and the reason for its insertion becomes plain. The purpose must have been to confer a power not previously given. This would not be done unless the words "the same" refer to and include the fee-simple estate in the one-half interest which is the subject of that passage. This is also the grammatical effect of the statement as a whole.

The appellant relies on a line of decisions similar to Brant v. Virginia, etc., Co., 93 U. S. 326, 23 L. Ed. 927. In that case the will gave to Nancy Sinclair the property in question "to have and to hold during her life and to do with as she sees proper before her death." It will be readily seen that this language is wholly different in effect from that in the above-mentioned decree. It clearly implies that her power of disposition of the property is only of her interest before her death. Furthermore, it does not give the power to sell in terms. The court held that it gave her no power to sell the remainder, but only the power to deal with the property as one might who was the owner only of the estate expressly given. In this connection the court made this general declaration upon which the appellant relies:

"Where a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended."

The other cases cited in support of this proposition are Giles v. Little, 104 U. S. 291, 26 L. Ed. 745; Bradley v. Westcott, 13 Ves. 445; Smith v. Bell, 6 Pet. 68, 8 L. Ed. 322; Boyd v. Strahan, 36 Ill. 355; Wardner v. Board, 232 Ill. 606, 83 N. E. 1077, 122 Am. St. Rep. 138; Kennedy v. Kennedy, 105 Ill. 350. In each of these cases the main question was whether the words used gave power to dispose of the property absolutely, or whether they merely gave power to deal with the limited estate given to the devisee. In none of them was there any express power given to sell, as in the case at bar. The difference between these cases and the case at bar will be seen at once by a statement of the language under consideration in each of these cases. Thus in Giles v. Little the widow was given property "with full power, right, and authority to dispose of the same as to her shall seem meet and proper so long as she shall remain my widow." In Boyd v. Strahan the qualification was that the property was "to be at her own disposal, and for her own proper use and benefit, during her natural life." In Kennedy v. Kennedy the property was given "during her life, to occupy and use the same, or dispose of it, at her will and pleasure and use and control the proceeds thereof." In Smith v. Bell personal property was given to the wife "for her own use and benefit and disposal, absolutely." In Wardner v. Board the widow was given a life estate with power to "use, dispose of and control according to her own judgment during her natural life." In Bradley v. Westcott the widow was given personal property "for and during the term of her natural life, to be at her full, free, and absolute disposal and disposition during her natural life." It will thus be seen that the language in none of these cases approaches the proposition stated in the language under consideration. We do not think the cases are applicable to the present case. The natural and ordinary meaning of the language of the decree is that the widow was given the power to sell the property in fee simple. The sale thereof therefore carried the title to the remainder, divested the two residuary devisees of their title thereto, and vested it in her grantee.

The judgment is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

172 Cal. 432

BIER v. LEISLE et al. (S. F. 7579.)

(Supreme Court of California. March 24, 1916.)

1. MORTGAGES ⇐32(1)—ABSOLUTE DEED AS MORTGAGE.

A deed of community property, made by a husband on the parol trust that the grantee should pay debts of the husband, including a debt due the grantee, and sell the property to do so, dividing whatever surplus there might be between the husband and wife, could not be regarded as a mortgage given as security for the payment of the debt due the grantee or the other debts.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60, 62–66; Dec. Dig. ⇐32(1).]

2. TRUSTS ⇐17, 18(7)—PAROL TRUSTS—VALIDITY—STATUTE.

Notwithstanding Civ. Code, § 852, providing that no trust in relation to realty is valid unless created or declared by a written instrument subscribed by the trustee or his agent, by the instrument under which the trustee claims the estate affected, or by operation of law, where a husband conveyed community property to a third person on parol trust that the latter should sell the same and pay debts of the husband, dividing any surplus between the husband and wife, such parol trust was not void, a trust arising by operation of law, enforceable by the parties for whose benefit the conveyance was made.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 23; Dec. Dig. ⇐17, 18(7).]

3. HOMESTEAD ⇐196 — SELECTION SUBSEQUENT TO CONVEYANCE.

The attempted selection by a wife of community premises as a homestead, after their conveyance by her husband with her consent to a third person as trustee to pay the husband's debts, created no interest in the land, nor could it avail against the prior conveyance.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 367; Dec. Dig. ⇐196.]

4. HOMESTEAD ⇐81—TITLE SUPPORTING.

A homestead does not depend upon the character of the title which the claimant has, as a mere naked title may be impressed with the homestead characteristic.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 114–118; Dec. Dig. ⇐81.]

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action to quiet title by Henry B. Bier against John Jacob Leisle and another. From a judgment for defendants, and an order denying his motion for new trial, plaintiff appeals. Judgment and order denying new trial reversed.

W. P. Thompson, of Fresno, for appellant. Drew & Drew, of Fresno, for respondents.

ANGELLOTTI, C. J. The complaint in this case is in the ordinary form of a complaint in an action to quiet title to land, plaintiff alleging himself to be the owner in fee simple and entitled to the possession of certain land in Fresno county. Defendant John Jacob Leisle, who was the husband of his codefendant, defaulted. Defendant Maggie Leisle answered, denying plaintiff's allegation of ownership. She admitted that she and John Jacob Leisle are husband and wife, "subject to an interlocutory decree" of divorce, and alleged that she has an estate in said land, consisting of a homestead right. She further alleged, in substance, that in exchange for certain community property of herself and husband, the latter obtained the land in suit, causing the deed therefor to be made by the grantor to plaintiff, as security for a debt of $200, then

due plaintiff from him, and that plaintiff holds the legal title thereto solely as security for said debt and interest. She further alleged that subsequent to said deed she took possession of the land, and has ever since occupied the residence thereon as a home for herself and family, and that while so living on the land she selected the same in accordance with law as a homestead. She offered to pay the said amount alleged to be due to plaintiff, and asked for a decree that he be adjudged to hold the title only as security for such amount, and that he be required to convey the same to her upon payment thereof. The trial court found in accord with the allegations of the answer, and judgment was given to the effect that plaintiff held the title in trust for the community interest of defendants, subject to his claim for $200 and interest, and that the property is the homestead of defendant Maggie Leisle, subject to said claim and the community interest of John Jacob Leisle. This is an appeal by plaintiff from such judgment, and from an order denying his motion for a new trial.

The deed conveying the land to plaintiff was absolute in form, an ordinary grant, bargain, and sale deed, the consideration expressed being $10. At the time of the transfer to plaintiff all interest of defendants in the property was community property, subject to the control and power of disposition of the husband, with such limitations only as are prescribed in section 172, Civil Code. The evidence of plaintiff, to the effect that in so far as the husband was concerned the conveyance was made to him (plaintiff) upon the parol understanding and agreement that he would assume and pay certain debts of the husband, amounting to $820.50 and interest (including the debt of $200 due him), that he was to sell the property as soon as he could do so and pay these debts, and divide whatever surplus there might be, if any, between the defendants, was uncontradicted. Defendant Maggie Leisle testified simply that *she* did not agree to pay any debt out of the property other than the $200 debt due plaintiff. A list of the debts referred to was introduced in evidence.

[1] There is nothing in the evidence to warrant a conclusion that the deed can be regarded as a mortgage given as security for the payment of either the debt due plaintiff or the other debts referred to. According to the evidence it was intended as an absolute conveyance, for the purpose of securing a sale of the property and a distribution of the proceeds among the various creditors named, the husband reserving no interest whatever in the *property*, but only an interest in a possible surplus. The agreement was substantially the same, so far as this question is concerned, as that discussed in Sabichi v. Chase, 108 Cal. 81, 41 Pac. 29, where the distinction between such an instrument and one in the nature of a mortgage was discussed, and it was said that "the material and essential characteristic" of such an agreement as this is "the presence of a trust." It was also said therein:

"The provision that a surplus of proceeds remaining after satisfaction of the claims of the creditors named should be returned to the grantors does not, as supposed by appellants, distinguish the contract as one of security only. * * * The reservation of an interest in the possible surplus—not in the property itself—marks the transaction more clearly as an assignment for the benefit of creditors."

[2] As we have said, this agreement rested entirely in parol, and it is therefore claimed that the trust is void, because not created by an instrument in writing as required by section 852 of the Civil Code. That section provides:

"No trust in relation to real property is valid unless created or declared: 1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing; 2. By the instrument under which the trustee claims the estate affected; or, 3. By operation of law."

If the trust is void and unenforceable in view of these provisions, we do not see how that fact could avail defendant Maggie Leisle. Plaintiff would then hold the property as his own, free of any trust. The conveyance to him was absolute, save for this trust. Also it was based upon a valuable consideration, for the indebtedness due him from Leisle was a valuable consideration for the conveyance. But we do not think that the trust is void. Of course, not being in writing, it is not good as an express trust, but under the well-settled rule discussed in Lauricella v. Lauricella, 161 Cal. 61,[1] there is a trust arising by operation of law enforceable by the parties for whose benefit the conveyance was made.

[3, 4] In view of the facts we have a case where from the time of the conveyance to plaintiff no interest whatsoever *in the land* remained in either defendant, their only right being one in the possible surplus that might remain after the sale of the land and the payment of the creditors. Of course the *subsequent* attempted selection by the wife of the premises as a homestead could not *create* any such interest, nor could it avail against the *prior* deed to plaintiff. Such cases as King v. Gotz, 70 Cal. 236, 11 Pac. 656, and MacLeod v. Moran, 153 Cal. 97, 94 Pac. 604, are not in point. We are not concerned here with any question whether the husband or wife had any such interest in the property as would serve as a basis for impressing it with the homestead characteristic. As said by Mr. Justice Henshaw in Bell v. Wilson, 155 Pac. 625, 626:

"Again, as was long ago decided in this state, the homestead in no wise depends upon the character of the title which the homestead claimant has. A mere naked possession, without other title, may be impressed with the homestead characteristic. * * * Whatever the character of the claim or title which the declarant has at the time of making the declaration, the homestead right will attach *to such claim or title.* * * * Imperfections in or even the absence

[1] 118 Pac. 430.

of a title is a false quantity which must be excluded from consideration." The italics are ours.

But the attempted selection of property as a homestead adds nothing to the title of the claimant, and of course cannot avail against one who, at the time of such selection, has already acquired all of the interest of both husband and wife in the land, leaving them without any interest therein. Snodgrass v. Parks, 79 Cal. 55, 21 Pac. 429.

It thus appears that the conclusion of the trial court cannot be approved.

The judgment and order denying a new trial are reversed.

We concur: MELVIN, J.; SLOSS, J.; SHAW, J.; HENSHAW, J.; LAWLOR, J.

(172 Cal. 363)

In re SCOTT et ux. (L. A. 3518.)

(Supreme Court of California. March 20, 1916. On Rehearing, April 14, 1916.)

PUBLIC LANDS ⟸28 — RESURVEY—RIGHT TO QUESTION RESULTS.

Where title to section 36 of the original United States survey, which on approval of such survey vested in the state, had passed to plaintiff before Congress ordered a resurvey, he alone, and not defendants, who after such order of resurvey made entry of section 33 of the original survey, and were therefore controlled by the results of the resurvey, could question the identity of said section 36 with plot 57 of the resurvey as determined and declared by the resurvey.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 40; Dec. Dig. ⟸28.]

Department 2. Appeal from Superior Court, Imperial County; Geo. H. Hutton, Judge.

Application by C. A. Scott and wife to bring certain lands under the operation of the Torrens Land Act of March 17, 1897 (St. 1897, p. 138). From an adverse judgment, plaintiffs appeal. Reversed.

Haines & Haines, of San Diego, for appellants. Conkling & Brown, Eshleman & Swing, and Phil D. Swing, all of El Centro, for respondents.

HENSHAW, J. This action was brought by C. A. Scott and his wife under the provisions of the Torrens Land Act. They sought a decree establishing title in themselves to school section 36, township 13 south, range 13 east, S. B. M., in Imperial county, which section was located as tract 57 of the resurvey of the township under the act of Congress of July 1, 1902. Notice was duly served upon all the persons named as occupants of tract 57 and occupants of the lands adjoining this tract. The petition states that tract 57 of the resurvey is section 36 of the original survey; that John J. Miller occupied the south half thereof; Josiah W. Edwards occupied the north one-half of the northwest quarter and the northwest quarter of the northeast quarter thereof; that W. A. Patterson and his wife occupied a portion of the northeast quarter, defined to be the northeast quarter of the northeast quarter and the south one-half of the northeast quarter; that Paulina McElfresh occupied the south half of the northwest quarter. She filed a disclaimer in these proceedings. Miller, Edwards, and the Pattersons filed a joint answer, and subsequently the Pattersons filed a separate answer. These answers in substance admit that Scott is the grantee of the state of California of section 36, township 13, but aver that that section is not identical with tract 57 of the new survey, but that tract 57 is identical with section 33 of township 13, and the defendants assert ownership in themselves of tract 57 as being section 33, township 13, under their respective desert land entries. The answers attack the original United States survey made in 1856 and approved March 2, 1857, as being fraudulent and fictitious, and allege that township 13 was not surveyed until "the so-called resurvey thereof was made in the year 1908." As to this resurvey, it is asserted that:

"No attempt has been made to locate the school section, or any other section, or any other lands, in accordance with the old United States survey alleged to have been made in 1856."

Upon approval in 1857 of the survey of 1856, title to section 36 vested in the state of California. This title passed to petitioner C. A. Scott under his certificate of purchase of January 3, 1901, before the resurvey was ordered. Upon the other hand, all the rights of the defendants were initiated by entries made after the act of Congress ordering the resurvey, and were therefore controlled by the results of that survey. Whitaker v. McBride, 197 U. S. 510, 25 Sup. Ct. 530, 49 L. Ed. 857; Stoneroad v. Stoneroad, 158 U. S. 240, 15 Sup. Ct. 822, 39 L. Ed. 966; Russell v. Maxwell Land Grant Co., 158 U. S. 253, 15 Sup. Ct. 827, 39 L. Ed. 971; Horne v. Smith, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68; Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566.

One of the results of the resurvey was a determination by the land department that this section 36 of the original survey was plot 57 of the resurvey. To this determination, which thus fixed the location of the original section 36, who can object? Not these respondents, whose entries one and all were made in subordination to this resurvey. The only person entitled to object was Scott, who had succeeded to the state's title. If Scott believed that section 36, to which admittedly he had title, was not identical with plot 57 as determined and declared by the resurvey, unquestionably he would have been entitled to urge this contention in the proper forum. Whatever may be the fact as to the identity of locations of section 36 and plot 57, the situation presented is simply this: By errors and irregularities in the original survey and

by the obliteration of landmarks it was difficult, if not impossible, to locate section 36. In this condition of affairs, the United States caused a resurvey to be made, and in effect said to the state and to Scott, the successor of the state, "We tender to you plot 57 as representing section 36." If Scott accepted this, no one of these respondents could be heard to object for the reason indicated, that, their rights having been initiated subject to the resurvey, they were bound by this act of the United States. Scott accepted this declaration of the United States, and the matter was finally adjusted.

We have thus outlined the controversy. All of the asserted errors of the trial court revolve around its refusal to accept as final the declaration of the land department that old section 36 is identical with plot 57 of the new survey. In so doing the trial court fell into grievous error. It is unnecessary here to do more than refer to the case of Nichols v. McCullom, 169 Cal. 611, 147 Pac. 271, where precisely the same situation was presented and where it is held that the resurvey absolutely controls.

The judgment appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

On Rehearing.

ANGELLOTTI, C. J. Application for modification of judgment denied.

29 Cal. App. 740

FRY v. ASTORG et al. (BROWN, Intervener).
(Civ. 1660.)

(District Court of Appeal, First District, California. Feb. 23, 1916. Rehearing Denied by Supreme Court April 14, 1916.)

1. APPEAL AND ERROR ⇐377—UNDERTAKING—SUFFICIENCY.

Where an appeal is taken by one person and the undertaking thereon purports on its face to be given on an appeal by several persons, the undertaking is insufficient to support the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2017–2021; Dec. Dig. ⇐ 377.]

2. APPEAL AND ERROR ⇐1225 — APPEAL BOND—VARIANCE—LIABILITY OF SURETY.

Although the maker of a bond is generally bound by the recitals in it, the surety on an undertaking to support the appeal of several defendants is not liable on an appeal prosecuted by one of the defendants, since, as a matter of fact, the recitals of the undertaking are not to support an appeal by one defendant alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4729–4733; Dec. Dig. ⇐ 1225.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Fred W. Fry against A. Astorg and another, in which Azubah S. Brown intervenes. From a judgment for the plaintiff and from an order denying it a new trial, defendant the United States Fidelity & Guaranty Company appeals. Reversed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant. Welles Whitmore, of San Francisco, for respondent. T. J. Sheridan, of San Francisco, for defendant A. Astorg. William C. Crittenden, of San Francisco, for intervener.

KERRIGAN, J. This is an appeal from the judgment and from an order denying the motion of the defendant the United States Fidelity & Guaranty Company for a new trial.

Several years ago the plaintiff's assignor, V. A. Hager, commenced an action against A. Astorg, M. Astorg, and F. Ginard to recover possession of certain lands and premises situate in Lake county, in which action the plaintiff ultimately recovered a judgment against the defendants. Thereafter the defendant A. Astorg gave notice of appeal from the judgment, and filed the undertaking on which this action was brought, which by its language purports to be given in an appeal taken, not by Astorg alone, but by all of the defendants in that action. It recites as follows:

"Whereas the defendants in the above-entitled action have appealed to the Supreme Court * * * from a judgment made and entered against said defendants: * * * Now therefore, in consideration of the premises and of such appeal, the United States Fidelity & Guaranty Company * * * does hereby undertake and promise on the part of the appellants that the said appellants will pay all costs and damages which may be awarded against them on the appeal. * * *

"And whereas the appellants are desirous of staying the execution of the said judgment so appealed from in so far as it relates to the delivery of the possession of said lands and premises, the said the United States Fidelity & Guaranty Company does further, in consideration thereof and of the premises, undertake * * * that during the possession of such property by the appellants they will not permit or suffer to be permitted any waste thereon, and that if the said judgment appealed from be affirmed, or the appeal dismissed, they will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof. * * *"

The judgment appealed from was affirmed by the Supreme Court. 145 Cal. 548, 79 Pac. 68, 104 Am. St. Rep. 68. Thereafter Fred W. Fry, as assignee of V. A. Hager, commenced this action against A. Astorg and the appellant, recovering judgment against each of them.

[1, 2] The judgment against the appellant must be reversed. It seems to be the settled rule that where an appeal is taken by one person, and the undertaking thereon purports on its face to be given on an appeal taken by several persons, such undertaking is insufficient to support the appeal, and no recovery can be had against the sureties. In the present case, it is conceivable that the appellant may have regarded A. Astorg's two co-

defendants as alone financially responsible, and would not have been disposed to write a bond for him as the sole appellant. The case of Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685, is very like the present one. There only one of several defendants took an appeal from an order denying a motion for a new trial, while the bond in terms recited that it was given as security on an appeal of the defendants. The court, after referring to this condition of the record, says:

"The sureties undertake upon the part of the appellants (where there is but one appellant) that the appellants will pay all costs and damages which may be awarded against the defendant on said appeal, when costs and damages could only be awarded against the one appealing defendant. Standing upon the strict letter of their contract, the sureties could never be liable for anything upon this undertaking. There never was a joint appeal, and consequently there never could be an award of damage or costs against the defendants. Moreover, the sureties have agreed to stand responsible only for such damages and costs as might be awarded against the two defendants. It is conceivable that they might have refused to go upon the undertaking had they known that but one defendant had appealed. It is conceivable that they might have regarded the other defendant, who they thought had appealed, * * * as the one financially responsible in the event that the appeal should be lost or dismissed. We are unable to perceive, therefore, how the appeal from the order denying the motion for a new trial can be maintained. Appellant might have filed a new undertaking before the hearing, but this she failed to do. Her request that she now be permitted to file it comes too late."

With some exceptions it is true that the maker of a bond is bound by the recitals in it; but that principle of law is not applicable to the facts of this case, for the appellant here is not denying any of the recitals of the undertaking. It is merely denying, in accordance with the fact, that the bond written by it was to secure an appeal by A. Astorg alone, and contends—and we think correctly—that it has incurred no liability upon such an appeal. This position is consistent with the recitals in the undertaking.

The judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

(29 Cal. App. 718)

DOX et al. v. R. E. LOMAX CO. (Civ. 1719.)

(District Court of Appeal, Second District, California. Feb. 19, 1916. Rehearing Denied by Supreme Court April 14, 1916.)

1. CORPORATIONS ⟸452—CONTRACTS—EXECUTION.

A corporation's contract to repurchase its stock from a subscriber which was not regularly executed by the president and secretary with the seal of the corporation attached, and of the existence of which the directors had no knowledge, merely the president and vice president having knowledge thereof, was not properly executed so as to bind the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1796, 1797, 1804, 1805; Dec. Dig. ⟸452.]

2. CORPORATIONS ⟸80(12)—SUBSCRIPTION TO STOCK — MISREPRESENTATIONS — CORPORATE OFFICER.

Where the vice president of a corporation, in fact insolvent, procured a purchaser for a block of its stock, representing that the stock would return 10 per cent. dividends, etc., the corporation thereafter assigning the majority of its stock to trustees for the benefit of creditors, the purchaser could recover the price paid for the stock, since actionable misrepresentations made by an authorized agent for a corporation are chargeable to the corporation and sustain recovery against it for the agent's fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 264; Dec. Dig. ⟸80(12).]

3. CORPORATIONS ⟸80(12)—SUBSCRIPTION TO STOCK—FRAUD—RIGHTS OF CREDITORS.

Where an insolvent corporation sold a block of its stock to plaintiff, and thereafter the creditors, all of whom were such at the time of the sale, took over the business of the corporation, plaintiff's right to recover the price of the stock, the corporation's agent having misrepresented that dividends would be paid, etc., was not barred by any intervening rights of creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 264; Dec. Dig. ⟸80(12).]

4. APPEAL AND ERROR ⟸934(2)—REVIEW — JUDGMENT.

A necessary assumption of fact in support of the judgment below must be made by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. ⟸934(2).]

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Suit by Julia R. Dox and another against the R. E. Lomax Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Norman A. Bailie, of Los Angeles, for appellant. A. W. Sorenson, of Los Angeles, for respondents.

JAMES, J. The plaintiff sued to recover the sum of $1,000, with interest, alleged to have been paid in December, 1912, as the purchase price for 200 shares of the capital stock of defendant corporation. She alleges that coincident with the making of that purchase, and as a part of the contract, the corporation defendant executed in her favor the following writing:

"R. E. Lomax Co.

"Los Angeles, Cal., Dec. 6, 1912.

"This is to guarantee that in event of Mrs. Julia R. Dox wishing to sell her stock at any time—on six months notice the above Co. (R. E. Lomax Co.)—will purchase it at its face value. This also guarantees a profit of not less than ten per cent. per annum.

"R. E. Lomax Co., J. P. T."

In a separate cause of action she alleged that she was induced to purchase the stock by reason of certain false representations made by defendant, to the effect that the corporation was doing a profitable business and earning a profit of not less than 10 per cent. on the invested capital, and that during the whole period of the existence of the

corporation a dividend of 10 per cent. had been paid. There was added by amendment a cause of action for money had and received. A stipulation of facts was filed in the case, and judgment followed in favor of plaintiff for the recovery of $1,000 with interest at 7 per cent. from the date of the purchase of the stock. The appeal is from that judgment.

In the stipulation of facts it is admitted that plaintiff purchased the shares of stock described in her complaint for the consideration therein stated, on or about the 6th day of December, 1912, and "that the negotiations for the sale and purchase of said stock were on the part of said R. E. Lomax Company conducted by one J. P. Tait, who was then and there a director and officer, to wit: Vice president of said R. E. Lomax Company. * * *" It was further admitted that Tait had signed and issued the guaranty contract set out in plaintiff's complaint, and that R. E. Lomax, president and general manager of the corporation, had knowledge of the guaranty and consented thereto; that on the 9th day of June, 1913, the plaintiff notified the company that she elected to sell and dispose of her stock in accordance with the terms of the writing; that upon the expiration of the six months period prescribed in said contract she tendered to the company the certificate of stock, with an assignment thereon properly executed, and demanded the sum of $1,000; and that she had tendered into court the certificate for the 200 shares. It was further stipulated that the corporation had received the $1,000 and had used it in its corporate business. Further facts were stipulated as follows:

"That on or about the 6th day of December, 1912, said J. P. Tait and said R. E. Lomax, in order to induce said plaintiff to purchase said stock, and to pay therefor the sum of $1,000, represented to said plaintiff that said corporation was then and there doing a profitable and lucrative business and earning a large profit on its invested capital. That in truth and in fact said corporation was at said time not doing a profitable and lucrative business and was not earning a profit on its invested capital, and was at said time insolvent. That plaintiff relied wholly on said representations, and she would not have entered into said contract, or paid the said sum of $1,000, or any part thereof for said certificate of stock, had it not been for said representations. That the said plaintiff did not discover the falsity of said representations so made to her by said defendants until on or about the 1st day of June, 1913, and that on the 16th day of December, 1913, she offered to return to said defendants said certificate of stock with a properly executed assignment thereof, and notified defendants, and each of them, of her election to rescind said contract and to return everything of value to defendants, which she had received under and by virtue of said contract, and demanded that defendants pay to her the sum of $1,000. That said stock was at all times worthless. That at the time the aforesaid representations were made by way of inducement, the individuals making them believed them to be true."

Other facts were stipulated showing that in May, 1913, a resolution of the board of directors of defendant corporation was adopted authorizing the president to file a voluntary petition in bankruptcy, or to execute a general assignment for the benefit of creditors; that 9,850 shares of the total 11,600 shares were transferred to two persons as trustees for the benefit of the creditors, who, subsequent to that time, had managed the corporation, and had, up to the time of the filing of the stipulation of facts, realized but 15 per cent. of the amounts due to the general creditors of the corporation; and that the corporation had not assets enough to pay all of the creditors in full. The tender of the stock and the demand upon the acting officers of the corporation were admitted.

[1-4] It is insisted on the part of appellant that the guaranty contract, so called, was never properly executed so as to bind the corporation. It seems that this was so. The contract was not regularly executed by the president and secretary with the seal of the corporation attached, nor was it shown that the directors had knowledge of its existence, other than that the president and vice president had knowledge thereof. Without giving any effect to the alleged contract, we find, however, in the stipulation of facts, as we have quoted above, that Tait, who secured the plaintiff as a purchaser of its stock, represented the corporation in so doing; hence it follows that he was an agent for that purpose and, we must assume, possessed all the usual and ordinary authority of such a sales agent. Actionable misrepresentations made by such an agent, as they were shown to have been made to this plaintiff, in our opinion, may unquestionably be chargeable to the corporation and a recovery be sustained by reason of such fraud. It will be noted that in the stipulation of facts it was agreed that, instead of a profit being derived from the business of the corporation at the time of this stock transaction, the corporation was in fact insolvent. There is but little serious disagreement in the authorities that, under such facts as are here stipulated, a stock purchaser may successfully maintain an action for the recovery of his money. Curtin v. Salmon River, etc., Co., 141 Cal. 308, 74 Pac. 851, 99 Am. St. Rep. 75. It is claimed further on the part of appellant that rights of creditors have intervened since the purchase of this stock, which will be improperly affected if the judgment as entered is allowed to stand. In refutation of this contention, the stipulation of facts may again be referred to. In that stipulation it is shown that at the time of the sale of the stock the corporation was insolvent; it is shown that at a later date the creditors took over the management of the corporation and that they have since conducted its affairs. There is nothing at all shown among the stipulated facts to indicate that any of these creditors became creditors of the corporation subsequent to the time that the sale of stock to plaintiff was made. If they were creditors

at the time of the sale, as we must assume in support of the judgment they were, then they parted with nothing upon the assumption that the $1,000 paid into the corporate treasury by the plaintiff was a part of the assets thereof. Otherwise stated, it appears that the creditors have had the benefit of the money of the plaintiff, which was obtained from her through the fraud of the authorized selling agents; that they have suffered no detriment in reliance upon the illegal contract obtained through the fraud of such agents. The corporation is still in existence and is not in the hands of the court or conditioned in any way which may relieve it from the effect of this action.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J

29 Cal. App. 743

POTRERO NUEVO LAND CO. v. ALL PERSONS CLAIMING INTEREST IN THE REAL PROPERTY DESCRIBED. (Civ. 1487.)

(District Court of Appeal, Third District, California. Feb. 23, 1916. Rehearing Denied March 24, 1916; Denied by Supreme Court April 20, 1916.)

1. PARTITION ⟸117—EFFECT OF PARTITION—SALE OF LEASEHOLD ON REVERSION.

A partition sale of a leasehold interest does not affect the owner of the reversion or remainder.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 454–456; Dec. Dig. ⟸117.]

2. PARTITION ⟸109(1) — TENANCY IN COMMON ⟸19(2) — EFFECT — AFTER-ACQUIRED TITLE.

Where cotenants quitclaim their interest in a leasehold estate to a referee to sell in partition proceedings, and he quitclaims to purchasers, subsequent purchase of the reversion by one of the cotenants does not inure to the benefit of the other cotenants or the purchasers.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 375, 376, 387; Dec. Dig. ⟸109(1); Tenancy in Common, Cent. Dig. § 56; Dec. Dig. ⟸19(2).]

3. PARTITION ⟸109(1)—SALE—EFFECT.

At a sale under a partition decree the purchaser takes only the then interest of the cotenants, and a title afterwards acquired by them does not pass to him.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 375, 376, 387; Dec. Dig. ⟸109(1).]

4. LANDLORD AND TENANT ⟸56(1)—LANDLORD'S TITLE—POSSESSION OF TENANT.

The possession of a tenant or those taking under him is that of his landlord until the contrary appears.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 124; Dec. Dig. ⟸56(1).]

5. LANDLORD AND TENANT ⟸63(1)—ADVERSE POSSESSION OF TENANT.

A tenant cannot acquire an adverse title as against his landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 160, 163, 165–167, 172–174; Dec. Dig. ⟸63(1).]

6. REMAINDERS ⟸17(3) — ADVERSE POSSESSION.

One holding the reversion after a 99-year lease is a remainderman, and therefore not affected by adverse possession during the 99-year term.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 16; Dec. Dig. ⟸17(3).]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent and Bernard J. Flood, Judges.

Action by the Potrero Nuevo Land Company against All Persons Claiming Interest in the Real Property Described. From a judgment for certain defendants, plaintiff appeals. Reversed.

See, also, 158 Cal. 731, 112 Pac. 303.

A. Everett Ball, of San Francisco, for appellant. Thomas, Beedy & Lanagan, Nowlin & Fassett, and F. J. Castelhun, all of San Francisco, for respondents.

CHIPMAN, P. J. This is an action to quiet the title to certain real property known as "beach and water lots," situated in the city of San Francisco. The action is commenced under the so-called McEnerney Act.

Plaintiff alleged that it "is the owner of an estate in inheritance and in the possession actual and peaceable thereof by its tenants or persons holding under it" in certain nine parcels of real property described in the complaint, the same being part of the beach and water lots formerly belonging to the state of California, alleged that on March 26, 1851, the Legislature passed an act granting to the city of San Francisco certain land in said act designated, for the term of 99 years from and after the date of said act (Stats. 1851, p. 307), "except * * * all lands mentioned in the first section of this act * * * which had been sold or granted by any alcalde, * * * and also registered or recorded in some book of record * * * of the recorder of the county of San Francisco, on or before the 3d day of April, A. D. 1850," which said lands were by said act "granted and confirmed to the purchaser or purchasers or grantees aforesaid, by the state relinquishing the use and occupation of the same, and her interests therein to the said purchasers and grantees * * *"; that the use and occupation of the land described in the complaint for 99 years "were sold and conveyed to various persons, unknown to this plaintiff, and they or their grantees are now the owners and holders of said leasehold interest, which will expire March 26, 1950"; that on May 18, 1853, the Legislature passed an act entitled "An act to provide for the sale of the interest of the state of California in the property within the water line front of the city of San Francisco" as defined by the act of March 26, 1851, whereby provisions were made "to sell and dispose of the reversionary interest retained by the state of California after the expiration

of the ninety-nine years' use and occupation, conveyed to the city of San Francisco by said act of March 26, 1851, or to those persons mentioned in the exception in said act" (Stats. 1853, p. 219); that by said act of May 18, 1853, five commissioners were to be appointed by the Governor of the state who should have charge and disposition of said lands at public auction; that said commissioners, acting under said act, sold the land described in the complaint to one John Bensley, and on February 7, 1855, executed and delivered to him a deed thereof, which was duly recorded, and thereby the reversionary interest of the state was duly conveyed to said Bensley, and he thereby became the owner in fee simple thereof, subject to the leasehold interest granted to the said city and to the persons mentioned in the exceptions in said act of March 26, 1851, for the term of 99 years; that the title so conveyed to said Bensley was by divers mesne conveyances conveyed to plaintiff, who is now the owner and holder thereof.

Defendant California Fruit Canners' Association answered that ever since January 1, 1899, "it has been and now is the owner of and in the actual and peaceable possession in fee simple" of certain parcels of land, being part of that mentioned in the complaint, "and that no other person has any right, title, claim, or interest in or to the same, or any part thereof whatsoever"; this defendant claiming the same adversely against all the world, having paid all the taxes thereon since said date.

Defendant Albert Jacobs pleads a judgment duly made and entered on December 30, 1910, in his favor in an action against "All Persons," establishing his title to one of the parcels mentioned in the complaint. He also pleads title by adverse possession.

Defendant Mathilda Schweitzer alleges that she entered into possession of one of the parcels mentioned in the complaint under deed from Chas. C. Bemis and wife dated June 27, 1893, and for a period of 18 years immediately preceding the commencement of the action and ever since said date has continued in the possession of said premises, paying all taxes levied and assessed upon said land.

There were other lands involved in the action as to which the court made findings and entered its decree in favor of plaintiff, but no question arises as to them in this appeal.

The cause was tried by the court, and its findings of fact were: That plaintiff is not the owner of an estate in inheritance of the property claimed by the defendants who answered as shown above, that the property by these defendants claimed was granted to William C. Parker by T. M. Leavenworth, alcalde, "by a grant dated June 24, 1848, and recorded January 7, 1850, * * * and said defendants by divers mesne conveyances hold the said title of said William C. Parker, and ever since the date of the said grant to said William C. Parker have been, and they are now, in the actual and peaceable possession of the property claimed by them under said conveyances, and that the said defendants and all of them, by their predecessors in interest, went into the possession of the respective lots or parcels of land claimed by them in their answers filed herein, and they and their predecessors in interest have held and used the same adversely to the whole world, claiming to be the owners in fee simple absolute ever since the date of the said grant to William C. Parker." It is also found that said defendants paid all taxes levied upon said property during all said time. The court found that the Legislature passed the acts as set forth in the complaint, and that the use and occupation for 99 years of the lands described in the complaint "were sold and conveyed to various persons, unknown to plaintiff," as alleged; also that the Legislature passed the act of May 18, 1853, and the act of March 26, 1851, as alleged; that five commissioners were appointed by the Governor as provided by the act of May 18, 1853, and said board proceeded under said act to sell, and did sell at public auction, "said reversionary interest of the state of California, to the land described herein, to one John Bensley and thereafter, and on the 7th day of February, 1855, made, executed, and delivered to him, a good and sufficient deed thereof." It is then found that on November 3, 1853, said Bensley was the owner of an undivided one-eighth interest in said lands by virtue of said alcalde grant to said Parker and the act of March 26, 1851; that on that day, November 3, 1853, Bensley and other cotenants holding the same title brought suit in partition against other cotenants, alleging fee-simple title, and on March 8, 1854, an interlocutory decree was entered by the consent of all parties in which it was recited that all the parties to the action were seised of the lands mentioned as tenants in common in fee simple, and a referee was appointed to sell said lands; that on April 3, 1854, said Bensley and all other parties to the action executed and delivered to said referee quitclaim deeds to said property, and on the same day the referee made and delivered deeds to the purchasers at the partition sale who are the predecessors in interest of the defendants; that on October 21, 1854, the report of the referee was filed showing the sale of said property, and on the same day the report was confirmed and the referee directed to make the conveyances and receive the money; that on March 3, 1855, the final report of the referee was filed, confirmed, and the referee discharged. It is then found that, on October 26, 1854, said Bensley bought at public auction the state title described in the complaint, under the act of March 26, 1851, and, on February 7, 1855, the commissioners appointed under said act "delivered the deed to the said property

to the said John Bensley, and thereafter said John Bensley conveyed whatever right, title, or interest he had in said lands to plaintiff's predecessors in interest, and they in turn by mesne conveyances conveyed whatever right, title, or interest they had received from said John Bensley to the plaintiff herein."

The foregoing of the findings cover all the controverted questions. As conclusions of law the court found that plaintiff has no right, title, interest, or estate in the lands claimed by the above-named defendants, and the latter are owners in fee simple of the lands claimed by them respectively.

Judgment was accordingly entered, from which, and from the order denying its motion for a new trial, plaintiff appeals.

Appellant states the point at issue thus:

"If the court below was correct in holding that the purchasers at the partition sale obtained by virtue of the referee's deed in partition the after-acquired title of Bensley, then our appeal must fall, but, if the court was in error in that regard, then we must prevail."

Respondents contend that they had possession under the alcalde deed to Parker and under claim of right prior to the act of March 26, 1851, and were in possession when the act passed, and have ever since that time continued their possession actually, openly, and adversely to all the world. In short, they claim that the grant to Parker has ripened into a fee-simple title by adverse possession. They claim, furthermore, that the purchase of the leasehold interest in the property at the partition sale by their predecessors in estate carried with it the title to the reversion afterwards purchased by Bensley; that his purchase inured to their benefit.

The controversy relates exclusively to the claim of plaintiff to the reversion formerly belonging to the state purchased by Bensley after the partition sale. Bensley and his cotenants brought an action to have their interests partitioned and sold. The interest so claimed by them arose "by virtue of said alcalde grant to Wm. C. Parker and the act of March 26, 1851." In their complaint they alleged title in fee simple, and in the interlocutory decree in the action it was recited "that the parties to this action are seised of and entitled to the lands or lots mentioned in the complaint as tenants in common thereof in fee simple." It seems to be conceded, however, that this interest was a leasehold interest to which these cotenants became entitled under the act of March 26, 1851, by reason of having a conveyance from the alcalde and thus coming within the exceptions of that act. While, therefore, they alleged a fee simple, and the decree recited that they were "tenants in common in fee simple," the fact was that the interest sold by the referee was the leasehold mentioned in the statute. This is shown by the subsequent sale of the reversion to Bensley, which defendants insist inured to their benefit, and in fact, if true, would have resulted in giving them the complete title. The form of deed executed by the referee, set out in the transcript, is quitclaim, and purports only to convey "all the right, title and interest in and to the same which the first party [referee] now has." All the cotenants had previously conveyed their interest by quitclaim to the referee, and this interest arose out of the act of 1851.

[1] "It is well settled that a decree of judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the cotenants any new or additional title. After the partition each had precisely the same title which he had before." Wade v. Deray, 50 Cal. 376, 380; Freeman on Cotenancy, § 531; Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334. Mr. Freeman, in explanation, says:

"The truth is that a judgment in partition is as conclusive as any other. It does not create or manufacture a title, nor divest the title of any one not actually or constructively a party to the suit; but it operates by way of estoppel; * * * it divests all titles held by any of the parties at the institution of the suit." Freeman on Cotenancy, § 531.

The state was not a party to this action, and, as the owner of the reversion or remainder, it was not bound by the decree. The leasehold alone was the title in issue.

[2] Did the purchase of the reversion by Bensley, one of the cotenants in partition, inure to the benefit of the other cotenants or the purchasers at the partition sale? We think it did not. On April 3, 1854, Bensley and his cotenants quitclaimed to the referee, "and on the same day the said referee made and executed sufficient deeds (by quitclaim) to the purchasers at the partition sale, who are the predecessors in interest of defendants," as was found by the court. One of these deeds, put in evidence by defendants, executed by the referee, is dated "April 3, 1854, recorded May 30, 1854, in Liber 39 Deeds, page 382. Consideration, $390." The record states "that similar deeds of said referee were made to the predecessors of defendants conveying all the property claimed by defendants." Subsequently, October 21, 1854, the referee made his report, "showing a sale of said property, and on the same day the report was confirmed, and the referee directed to make the conveyances and receive the money." He had, however, already made and delivered the deeds and received the money, and by the order of the court his acts were confirmed. On October 26, 1854, Bensley "bought, at public auction, the state title to the property described in the complaint herein, under and by virtue of the provisions of the act of * * * the 26th day of March, 1851, and on February 7, 1855, the commissioners appointed under and by virtue of the provisions of said act delivered the deed to the said property to the said John Bensley, and thereafter said John Bensley conveyed whatever right, title, or interest

he had in said lands to plaintiff's predecessors in interest, and they in turn, by mesne conveyances, conveyed" this interest to plaintiff.

"The estoppel arising from judgments is usually, if not universally, confined to rights held by the parties to the suit, and which they could not, if so disposed, have asserted. * * * The same rule has been adjudged to be equally applicable to judgments in partition. Hence a party to a partition who subsequently acquired a new and independent title—one that in no way was represented by any of the parties to the partition—was permitted to successfully assert such title when it proved to be paramount to the one involved in the partition suit." Freeman on Cotenancy, § 532.

In the case of Rupert v. Jones, 119 Cal. 111, 51 Pac. 26, plaintiff was permitted to quiet his title against an execution sale made while he was in possession under a pre-emption claim, by showing patent from the United States issued after the date of the sale of the right or title levied upon, holding, as was held in Thrift v. Delaney, 69 Cal. 188, 192, 10 Pac. 475, and other cases, that the after-acquired title did not pass by the sale. Jameson v. Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268, was a partition case in which the rights involved arose out of the act here being considered—the act of 1851. Plaintiff was the owner of an undivided one-tenth of an estate for years, to wit, 99 years, in and to two of the three lots. One George Brown owned an undivided tenth interest of like estate in the third lot. Hayward owned a like estate in nine-tenths in all three lots, and he also was the owner of the whole of the remainder or reversion after the termination of said estate of 99 years. The trial court refused to ascertain and settle the proportionate value of the future estate of Hayward, and entered its decree ordering the sale of the estate for 99 years and refusing to order a sale of the reversion. On appeal the judgment was affirmed. The court said:

"The estate for years, in which all the parties have an interest, has nearly a half a century to run. Plaintiff and Brown have no interest, legal or equitable, in the reversion, and no reason is perceived why a court, proceeding upon equitable principles, should enforce, at their request, the sale of the reversionary interest, which does not concern them."

It was urged by appellants that, when the estate for years and the reversion vested in Hayward, there was a merger, and that as to him the estate for years had ceased to exist. After citing cases holding that "the principles of equity will permit or prevent a merger, as will best subserve the purposes of justice, and the actual and just intent of the parties," the court said:

"In the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all the circumstances, would be best subserved by keeping them separate, the intent so to do will ordinarily be implied. Such is the rule enunciated in the cases cited supra."

[3] Had Bensley purchased the reversion before the partition suit was begun and had objected, his interest could not have been sold. We can perceive no reason why by mere operation of law, so to speak, this reversion, subsequently acquired, can, in effect, be incorporated in the decree. In the case here there is no claim that fraud, accident, or mistake or other ground exists which would alone justify the assumption that it was the intention of the parties or the court in its decree to include the after-acquired title of Bensley. Beyond question the sale under a partition decree is a judicial sale, and we can see no reason why the rule in execution sales does not apply, and the rule there is that:

The purchaser "takes the precise interest of the defendant. An after-acquired title by the judgment debtor does not pass to the purchaser." Frink v. Roe, 70 Cal. 296, 302, 11 Pac. 820, 822.

It remains to inquire whether or not defendants' alleged adverse possession conferred title to the reversion. The court in effect so determined; for it found that defendants, by their predecessors in interest and by themselves, have been in the actual, open, continuous, and adverse possession of the lots from the date of the alcalde deed to Parker, claiming to be the owners in fee simple.

Among the stipulations or admissions found in the record is the following:

"It is also admitted that the said defendants by divers mesne conveyances hold the title conveyed to Wm. C. Parker by the alcalde deed of the property claimed by them, and that said Wm. C. Parker ever since the date of his deed and his grantees and said defendants have been, and now are, in the actual and peaceable possession of said lands claimed by them under said alcalde's deed and the act of March 26, 1851."

In the case of Chapin v. Bourne, 8 Cal. 294, one of these alcalde deeds—Leavenworth, alcalde, to Wm. C. Parker—was before the court. The right of the party claiming under it turned upon the fact that there was no evidence of its recordation as required by the act of 1851, and hence the grant to Parker passed to the city of San Francisco, and the commissioners, under the act of 1853, could only sell the reversion. Speaking of the grant to Parker, the court said:

"At the time when Leavenworth made the grant to Parker the pueblo of San Francisco had no title whatever to the water property; it belonged to the United States, who held it in trust for any new state that might be erected out of said territory, and passed to the state of California on her admission by virtue of her sovereignty. The grant was therefore a nullity. On the 26th of March, 1851, the Legislature passed an act granting to the city of San Francisco, for the term of 99 years, certain property known as the beach and water lot property, of which this is a part. The act contained a reservation, in favor of those claiming under alcalde grants and city sales. Such titles were confirmed to the then holders, provided such conveyances were registered or recorded in some book of record on or before the 3d day of April, 1850, which book was in the possession and under the

control of the recorder of San Francisco at the date of the passage of the act."

Another of the Leavenworth-Parker deeds was before the court in Seabury v. Arthur, 28 Cal. 143. The question there was as to the priority of one of two alcalde deeds to the same beach and water lot. That of Leavenworth to Parker was dated September 25, 1848; the other was by Alcalde Geary to one Sprague, made on January 3, 1850, and the Parker title was held to have priority. Speaking of the two grants, the court said:

"The last sale had no greater validity than the first; and it equally required the confirmatory grant of the Legislature to give it validity."

Concededly the interest thus granted or confirmed by the state was a leasehold interest for 99 years, and nothing more; the state reserving the reversion or remainder, for the sale of which it made provision by the act of 1853. We think it must follow that Parker's possession and that of his successors in interest was, under this state grant, that of a leasehold interest. His deed had no validity other than that derived from the act of 1851. Having claims, as we have seen, under both the Parker deed and the act of 1851, it must be presumed that he was, after confirmation, holding under a valid grant, rather than an invalid one. Wood v. Curran, 99 Cal. 137, 142, 33 Pac. 774. The statute of limitations did not run against the state while the state held the title prior to the grant under the act of 1851. Having entered under the state grant, the statute did not run against the remainder while the state held that interest. Did it begin to run against the holder of the remainder after its purchase by Bensley?

As Parker was holding under the state by virtue of the act of 1851, the case of Millett v. Lagomarsino, 107 Cal. 102, 40 Pac. 25, and like cases cited by defendants do not apply. It was there contended that Millett entered into possession as a tenant and could not initiate an adverse possession without first surrendering possession to his landlord. The court said:

"The rule that it is necessary to surrender possession and again enter before the possession can become adverse obtains only where the person claiming to hold adversely was put into possession by the owner, or has at least had possession under such owner. No such relation ever existed between Millett and Tenney."

Here, as we have seen, Parker held under the leasehold interest vested in him by the statute of 1851.

Defendants rely upon Tewksbury v. Magraff, 33 Cal. 237. It was there laid down as the general rule that a tenant cannot dispute his landlord's title. This general rule, however, was said to be subject to several exceptions. One of these, the exception relied upon here, is thus stated in the opinion:

"So, if the tenant did not take possession under the lease, but was in possession at the time he took the lease, he may dispute the landlord's title without first surrendering the possession; for, not having received the possession from him, he is under no moral or legal obligation to restore it before adopting a hostile attitude."

It is true that in this case Parker went into possession before he obtained his lease under the act of 1851, but, as was held in Chapin v. Bourne, supra, the lot then belonged to the United States, holding it in trust for the state to which it passed upon being admitted into the Union. By continuing his possession under the act of 1851 he accepted the relation thereby created, which was, as we hold, that of landlord and tenant. In the Tewksbury Case the court held (33 Cal. 246) that, if the possession was taken by virtue of the lease, the tenant could not rely upon a title afterwards acquired to defeat recovery.

[4, 5] As a general rule, the possession of the tenant is that of his landlord, and will be so deemed until the contrary appears, and this rule affects all who may succeed to the possession, immediately or remotely, through or under the tenant. Hence so long as the relation of landlord and tenant exists the tenant cannot acquire an adverse title as against his landlord. 1 R. C. L. p. 746.

Possibly some doubt is cast upon the relationship existing between the holder of the leasehold interest under the act of 1851 and the holder of the remainder under the act of 1853 by the case of Potrero Nuevo Land Co. v. All Persons, 158 Cal. 731, 112 Pac. 303, first decided in Department 2. In that case plaintiff's title came down to it through John Bensley, as it did in the present case. In department, speaking through Mr. Justice Melvin, the court said:

"The state having disposed of the fee, subject to the use and occupation for 99 years, its grantees or their ultimate successors in interest occupy the exact position of ownership formerly held by the state. * * * We see no logical escape from the doctrine that the relation of landlord and tenant exists, that the possession of the latter is that of the former, and that appellant has the right to maintain the action."

On rehearing Justices Henshaw and Lorigan, who signed the department decision, reached a different conclusion, holding—

"that the relation of landlord and tenant, within the meaning of the McEnerney Act, does not exist between the holder of the reversionary fee and the holder of the 99 year term in the beach and water lots of the city and county of San Francisco. And, as the McEnerney Act contemplates 'adverse possession' either by plaintiff, by his tenant, or by some person holding under him, and as plaintiff's possession is based wholly upon that of his asserted tenant for years, since such tenancy does not exist, it necessarily follows that plaintiff does not come within the purview of the act, and is not entitled, therefore, to maintain this action."

Three justices, Shaw, Angellotti, and Sloss, concurred in the judgment "solely on the ground that the affidavit accompanying the complaint is defective." They held, however, that plaintiff could maintain the action. In the concurring opinion written by Mr. Justice Shaw it was said:

"One who holds a particular estate for years by grant is by a very common use of language said to be holding under his grantor, although

there is no obligation to pay rent. * * * In like manner he would be holding under the grantee of the remainder. Such remainderman would be entitled to take advantage of the act to establish a record title to the remainder."

Justice Melvin, of Department 2, adhered to his original opinion.

[6] But whether or not the technical relation of landlord and tenant existed as understood by law writers, it is very certain that Bensley was a remainderman. It was said, in Pryor v. Winter, 147 Cal. 554, 557, 82 Pac. 202, 203 (109 Am. St. Rep. 162):

"It has been universally held that the estate of a remainderman is distinct from that of a tenant of a preceding particular estate, and cannot be in any way affected by any act of the particular tenant or his grantee."

Quoting from Jackson v. Schoonmaker, 4 Johns. (N. Y.) 402, the opinion continues:

"Neither a descent cast nor the statute of limitations will affect a right, if a particular estate existed at the time of the disseisin, or when the adverse possession began, because a right of entry in the remainderman cannot exist during the existence of the particular estate; and the laches of a tenant for life will not affect the party entitled."

Quoting further from Tiedeman on Real Property, par. 400:

"The statute of limitations does not begin to run until the remainder takes effect in possession."

See 1 R. C. Law, p. 743, and note.

We do not think the evidence supports the findings, nor do we think the correct conclusions of law were drawn from the findings. Our conclusion is that the finding that plaintiff is not the owner of an estate in inheritance of the property claimed by defendant is not supported by the evidence, nor is the finding that defendants are owners in fee simple of said lands claimed by them respectively.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

(28 Cal. App. 551)

MARSHAL v. POPERT. (Civ. 1381.)

(District Court of Appeal, Third District, California. Nov. 10, 1915. Rehearing Denied by Supreme Court Dec. 8, 1915.)

PLEADING ⊂⊃403(2) — ANSWER — CURE OF OMISSION IN COMPLAINT.

In an action by a judgment creditor against the garnishee, an allegation in the answer that part of the judgment debt had been paid by the debtor, when construed most strongly against the pleader, is an allegation that no more than that amount had been paid, and cured the omission of the complaint to allege specifically that the judgment debt had not been paid.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344–1347; Dec. Dig. ⊂⊃403(2).]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

On rehearing. Petition for rehearing denied.

For original opinion, see 153 Pac. 247.

George L. Popert and Meredith, Landis & Chester, all of Sacramento, for appellant. H. S. Derby, of San Francisco (R. L. Shinn, of Sacramento, of counsel), for respondent.

PER CURIAM. In this case a decision was filed, on October 11, 1915, 153 Pac. 247, as follows:

"The facts in this case are, in all essential features, like the case of U. S. Marshal v. J. H. Wentz (No. 1388) 153 Pac. 244, in which an opinion was filed October 8, 1915. Upon the authority of that case the judgment and order are affirmed."

We are satisfied with the above decision and opinion except in one particular. As counsel in his petition points out, it is true that the record in this case differs from the record in the Wentz Case in this: In the Wentz Case there was no amended answer, and the motion for judgment on the pleadings was granted upon the complaint and answer. In this case, before the motion for judgment on the pleadings was granted, the original answer had been stricken out and an amended answer filed, and, as counsel says, at the time the motion for judgment was granted the original answer, having been stricken out, could not be considered.

The point becomes material in this: In the Wentz Case the answer alleged the insolvency of the corporation, and in our opinion, in considering the claim made that the complaint did not show that the judgment of the plaintiff against the corporation had not been paid, it is said:

"It is the duty of the court to examine the entire record to determine whether prejudicial error has been committed. The defendant's verified answer is a part of the record and may be considered. The complaint shows execution issued and returned unsatisfied a short time before bringing this action and the defendant in his answer alleges: 'That at the time the plaintiff obtained said alleged judgment against said California corporation, that the said California corporation was insolvent and had many creditors and was unable to pay said creditors.' Taking the whole record together, it appears with sufficient certainty that plaintiff's judgment has not been paid, that plaintiff tried to collect it by execution and could not, and that the corporation has been at all times since it was rendered, insolvent and unable, voluntarily to pay it."

And in support of this view authorities are cited.

It follows that that portion of the opinion in the Wentz Case above quoted, wherein reference is made to the allegation of the answer "that the said California corporation was insolvent" and unable to pay its debts, does not apply to the record in this case. Ignoring the original answer in this case and turning to the amended answer, we find this allegation:

The defendant "alleges that prior to the commencement of this action the judgment for three thousand nine hundred and twenty-one ($3,921.00) dollars and interest, given on June 16, 1914, in and by the superior court in favor of U. S. Marshal and against the California

corporation was satisfied to the extent of one thousand two hundred thirty-four and 83/100 ($1,234.83) dollars by said California corporation."

Accepting counsel's view of the law as stated in his petition for a rehearing that a pleading must be construed most strongly against the pleader, when defendant alleges that a certain sum has been paid on the judgment he, in substance and effect, alleged that no more than the sum stated had been paid, and that at the commencement of this action there was unpaid to the plaintiff from the California corporation upon the judgment the sum of $2,686.17.

We are of the opinion that, while it is true, as counsel contends, that the amended answer does not allege the insolvency of the corporation, it does allege facts which, being considered in connection with the allegations of the complaint, show with more certainty than did the record in the Wentz Case that the judgment against the corporation was, when this action was brought, unpaid to the extent of $2,686.17.

The petition for a rehearing is denied.

(29 Cal. App. 552)

PEOPLE v. WILLIAMS. (Cr. 334.)

(District Court of Appeal, Third District, California. Feb. 3, 1916. Rehearing Denied by Supreme Court April 3, 1916.)

1. INDICTMENT AND INFORMATION ⇐125(14)—DUPLICITY.

An information for selling and furnishing alcoholic liquor within no-license territory is not demurrable for duplicity as charging both selling and furnishing, for it states but a single offense under the rule that where a statute enumerates a series of acts, either of which separately or all together may constitute an offense, all of such acts may be charged in a single count, because though each act may by itself constitute the offense, all of them together likewise constitute but one and the same offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 341; Dec. Dig. ⇐125(14).]

2. NAVIGABLE WATERS ⇐2—POWER TO CONTROL AND REGULATE.

Subject to rights of the United States to control of the waters of the Sacramento river for navigation or other purposes the state has the power to partition its territory into counties, including the beds of that stream, and to confer upon such counties the authority to exercise over all such partitioned territory the administration of government.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 2, 63; Dec. Dig. ⇐2.]

3. COUNTIES ⇐18 — GOVERNMENT — COUNTY BOARDS—ORDINANCES.

In dividing territory of a county into supervisor districts by ordinance a board of supervisors must be assumed to intend to include within the boundaries of the several districts all the territory of the county, and not to leave strips of territory, without local government, lying between any two districts, whether such strips consist of land or water or both.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 17, 18; Dec. Dig. ⇐18.]

4. COUNTIES ⇐18 — BOUNDARIES OF DISTRICTS—"GRANT."

The partitioning of the territory of a county into administrative districts is not a grant within Civ. Code, § 830, providing that unless the grant indicates a different intent the owner of upland bordering upon a navigable stream takes to the edge of the stream.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 17, 18; Dec. Dig. ⇐18.

For other definitions, see Words and Phrases, First and Second Series, Grant.]

5. COUNTIES ⇐18 — BOUNDARIES OF DISTRICTS.

Where two adjoining supervisor districts of a county are described as bounded in part by a river flowing between them, the description will be construed to make the thread of the main channel of the river the dividing line between them.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 17, 18; Dec. Dig. ⇐18.]

6. INTOXICATING LIQUORS ⇐148 — OFFENSES —PLACE OF SALE.

Selling liquor on an island in a river between two no-license districts, is selling liquor in no-license territory, as the description of the boundary lines of the two districts will be construed to make the thread of the main channel of the river the dividing line between the districts, so that the island must be included in one of the districts.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. ⇐148.]

7. CRIMINAL LAW ⇐734—TAKING QUESTION FROM JURY—CONSTRUCTION OF WRITINGS.

It is within the province of the court to construe the language used in proceedings of county supervisors to describe district boundaries.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1697–1699; Dec. Dig. ⇐734.]

8. CRIMINAL LAW ⇐814(3)—INSTRUCTIONS—APPLICABILITY.

It is not error to refuse to give an instruction not applicable to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1985; Dec. Dig. ⇐814(3).]

9. CRIMINAL LAW ⇐734 — INSTRUCTIONS — SUBMITTING QUESTION OF LAW TO JURY.

An instruction which would leave a question of law with the jury to determine is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1697–1699; Dec. Dig. ⇐734.]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

R. J. Williams was convicted of selling liquor within no-license territory, and his motion for new trial was denied, and he appeals. Affirmed.

James T. Matlock, of Red Bluff, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Dep. Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was accused of the crime of selling and furnishing alcoholic liquor within no-license territory in the county of Tehama, on or about the 22d day of July, 1915, to wit, "at and on an island in the Sacramento river, near the boundary line of the city of Red Bluff, in said Tehama

county, near the boundary line between supervisorial district No. 1 and supervisorial district No. 3 and within one or both, all of the territory within both said supervisorial districts, said supervisorial districts being then and there no-license territory," etc.

Defendant moved the court that plaintiff be required "to state in which supervisor district the alleged crime took place." The motion was denied. A demurrer to the information on various grounds was overruled, and defendant pleaded not guilty. Upon the trial the jury found defendant guilty as charged in the information, and the court accordingly entered judgment that defendant be imprisoned in the county jail for the period of 75 days. Defendant appeals from the judgment and from the order denying his motion for a new trial.

The evidence is uncontradicted that defendant sold alcoholic liquor as charged, the only question being: Was the liquor sold within no-license territory?

The place where the liquor was sold is a small tract of land called "Coney Island" and lies in the Sacramento river just above the city of Red Bluff. At this point the east boundary line of district No. 1 is described, in the proceedings of the supervisors of September 7, 1880, thus:

"Beginning at the junction of Cottonwood creek with the Sacramento river, running easterly along the west bank of the Sacramento river to Walnut street in the town of Red Bluff."

The west boundary line of district No. 3 is described as "all that portion of Tehama county lying east of the Sacramento river."

It appeared that, about 20 or 25 years ago, this island was formed and was then a small sand bar that "was out of the water in the month of September, and in the course of time some willows and cottonwood trees began to grow on it"; that it grew by accretions until now the island is "between five and six acres in extent. * * * It is overflowed in the wet season of the year, but reappears again in the dry season; * * * it is between four and five feet above the low-water mark." It appeared further that for several years no water ran along the east side of the island in the summer, but now there is water around it at all times; that the main channel is west of the island; that the "main current has always flowed there," as one witness testified who had known the river at that point for 25 years. Between the island and the west bank of the river the distance is 132 feet, and between the island and the east bank it is about 80 feet.

[1] Appellant contends: First, that the demurrer should have been sustained for the reason that the information states two offenses—"one for selling alcoholic liquor, and the other for furnishing alcoholic liquor"; second, that the court erred in denying defendant's motion to make the charge more specific; third, "the main proposition upon which defendant relies for a new trial is this, that the territory in which the alleged alcoholic liquor was alleged to have been sold and furnished is within a 'wet zone,'" and hence not "within no-license territory."

The demurrer was properly overruled. In re Johnson, 6 Cal. App. 734, 93 Pac. 199; People v. Winkler, 162 Pac. 109. The motion was based upon the same ground as urged against the information and was properly denied.

[2] Upon the principal proposition, appellant, at the outset, calls attention to section 2349 of the Political Code, which declares the Sacramento river to be a "public way, between its mouth and the mouth of Middle creek," which latter is in Shasta county. He cites Hendricks v. Feather River Canal Co., 138 Cal. 423, 71 Pac. 496, where it was held:

"If the navigability of the river should be deemed necessary to a boundary of the patent thereby, it must be presumed upon appeal, in the absence of the evidence, that the river was navigable at the point in question."

Section 830 of the Civil Code is cited, which provides that:

"Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders * * * upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

Also section 1016 of the same Code is cited where it is declared that:

"Islands and accumulations of land, formed in the bed of streams which are navigable, belong to the state, if there is no title or prescription to the contrary."

Appellant relies upon the case of State of North Carolina v. Eason, 114 N. C. 787, 19 S. E. 88, 23 L. R. A. 520, 41 Am. St. Rep. 811, which concerned the jurisdiction of a municipality bounded by a navigable river, and it was held that it does not extend beyond low-water mark, in absence of anything in the charter extending the limit of its jurisdiction expressly or by fair implication. As incorporated, the boundaries of the town of Beaufort began "at a cedar post in the Pamlico river," thence by several courses and distances away from the river, "thence on a line parallel with Washington street to Pamlico river, and thence with the river to the beginning." It was held in that case that the same rules of construction apply as in the case of a grant from one individual to another, and that an ordinance of the town of Beaufort prohibiting the throwing of fish or offal into the river was void for lack of jurisdiction; the boathouse from which the fish and offal were thrown being in the river outside the low-water mark, though immediately adjoining the town wharf.

Subject to whatever right the United States reserved to the control of the waters of the Sacramento river, for purposes of navigation or other purposes, undoubtedly the state

was given the power to partition its territory into counties, including the beds of streams navigable or nonnavigable, and was empowered to confer upon such counties the authority to exercise over all such partitioned territory the right to administer its government and to provide for the welfare of its inhabitants—for example, to construct highways, build bridges across navigable streams as parts of such highways, and generally to exercise police powers within such territory.

[3] The exterior boundaries of the county of Tehama fixed by statute concededly embrace all the territory included in the five supervisor districts. These supervisor districts were formed out of the territory comprising the entire county—five of them—at the same session of the board, on September 7, 1880. That was nearly 10 years before this so-called island began to form. It was but a small sand bar 25 years ago. In construing the intention of the board in enacting the ordinance creating these districts, we must consider the then existing conditions; and we must also assume that the board intended to include within the boundaries of these several districts all the territory of the county, for the purpose, as declared, was to divide the county—all of it—into supervisor districts pursuant to law, and to carry out the objects of the statute by which certain duties were devolved upon the board chosen to administer the affairs of the several districts. It is not to be supposed for a moment that the board intended to leave strips of territory, without local government, lying between any two of the districts, whether consisting of land, or water, or both, and before such an intention can be imputed to the board or deduced from its action or nonaction, it should be made very clearly so to appear.

Ever since 1880, a period of 35 years, the supervisors have treated the Sacramento river, which bisects the county, as within their jurisdiction; have built costly bridges over it; established and maintained ferries across the river; and until the question arose in this case their right to so regard the river has never been disputed.

[4] We do not think that the rule applied to grants of land by one person to another is of unqualified application in this case. This partitioning of the territory of the county into administrative districts is not a grant in the sense that term is used in section 830 of the Civil Code, supra. And if the rule as to grants were to apply there is a presumption that the purchaser's title extends as far as the grantor owns in both tidal and fresh waters. Gould on Waters, §§ 195, 196. This presumption, it seems to us, would hold where a legislative body is partitioning for purposes of local government a territory over which it has undoubted jurisdiction.

Mr. Gould states another rule, to wit:

"By the common law the boundary line prima facie between towns and parishes when separated by a fresh-water river, is its thread." Gould on Waters, § 202.

Here the thread of the Sacramento river was shown by undisputed testimony to be to the west of "Coney Island," which latter would by this rule lie entirely within district No. 3.

In King v. King, 7 Mass. 499, it was held that: Where land lying on both sides of a river is partitioned, the land on one side being granted to one and the land on the other side to the other of the parties, the division line will be the center thread of the stream. But apart from the rules of conveyancing, it seems to us that the view expressed in Hamilton v. McNeil, 13 Grat. (Va.) 389, 394, is reasonable and should apply here. In that case the question depended upon the construction of various statutes of the general assembly forming the counties of Bath, Pendleton, and Pocahontas (Va.) and fixing their boundaries. Said the court:

"The court is further of the opinion that these acts being intended merely for the division and arrangement of the territory which they embrace for local municipal purposes and the convenient and economical administration of the government within the same should not be construed with the same strictness which is to be observed in the construction of a grant or of a contract between individuals affecting the rights of property, but that a more liberal, beneficent rule should be adopted, the object being to ascertain the true meaning and intention of the Legislature in any given act by considering the same in connection with all others in pari materia and with the general policy of the Legislature. * * * Weight should be given to the contemporaneous interpretation placed upon the same by the courts and other lawful authorities within the same and by the population at large residing therein."

[5, 6] Without pursuing the question further, our conclusion is that the description of the respective boundary lines of the two districts should be construed so as to make the thread of the main channel of the river the dividing line between them, and hence the jury were justified by the evidence in finding that defendant was guilty of selling and furnishing alcoholic liquor in no-license territory, to wit, in district No. 3.

[7] Error is claimed of an instruction given the jury by the court in which the court said, in construing the language used in defining a boundary of district No. 3:

"I instruct you that when it said east of the Sacramento river it meant east of the main thread of the channel of the Sacramento river. It does not say the east bank. It says, east of the Sacramento river, and that means any land east of the center of the main channel or thread of the Sacramento river. So, in this case, if you find that 'Coney Island' is east of the main thread of the main channel of the Sacramento river, then I instruct you that it is in supervisor district No. 3."

It was within the province of the court to construe the language used in describing the boundary, and the court very properly left it to the jury to say where Coney Island was situated with reference to the thread of the river.

[8] The court did not err in refusing defendant's offered instruction that:

"If you find from the evidence that the east boundary line of supervisor district No. 1 runs along the west bank of the Sacramento river, then in that event, said Coney Island is not within said supervisor district No. 1."

In no view that could have been taken of the evidence was the instruction applicable.

[9] Error is also claimed in refusing an instruction:

"That if you find from the evidence that the *east* boundary line of supervisor district No. 3 runs along the west bank of the Sacramento river, then in that event, said Coney Island is not within said supervisor district No. 3."

Probably defendant meant the *west* boundary line and not the *east* as stated in the instruction, for the *east* boundary line is somewhere in the Sierra mountains. The undisputed evidence was that the thread of the stream—the main channel of the river—was west of Coney Island. The court, as we have held, properly instructed the jury that the description given of the west boundary line of district No. 3 was the thread of the stream. The instruction requested would have left with the jury to determine as a question of fact what the court had rightly disposed of as a question for the court. The instruction, assuming that the west boundary of district No. 3 was meant, would have made it coincident with the east boundary of district No. 1 and west of the Sacramento river and, of course, west of its thread. In that view the island would undoubtedly be situated in district No. 3 and in no-license territory, and the instruction would have become a question of fact directly contrary to all the evidence.

We discover no error in any of the proceedings, and the judgment and order are therefore affirmed.

We concur: BURNETT, J.; HART, J.

29 Cal. App. 539

PEOPLE v. McLEOD. (Cr. 440.)

(District Court of Appeal, Second District, California. Feb. 3, 1916.)

PERJURY ⊂⊃39—NEW TRIAL.

In a trial for perjury upon an information charging defendant, an attorney, with having testified falsely, in an action against him by clients, that he "had not received anything on account of" a judgment specified, evidence that the judgment had been vacated and did not exist, with other evidence, *held* to show no abuse of discretion in granting new trial.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 140; Dec. Dig. ⊂⊃39.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

John R. McLeod was convicted of perjury. From an order granting new trial, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People. J. L. Fleming and Graham & Graham, all of Los Angeles, for respondent.

SHAW, J. Defendant was, upon an information filed charging him therewith, convicted of the crime of perjury. He moved for a new trial upon all the statutory grounds, and the court, by a general order, granted the motion, from which the people appeal.

It appears from the information that J. M. Brennan and Edith W. Brennan brought suit against defendant to recover a sum of money which they alleged he, as their attorney, had, prior to April 7, 1914, collected from one A. Levin upon a judgment obtained in an action wherein Edith W. Brennan was plaintiff and said Levin defendant, all of which allegations were denied by defendant in a verified answer filed in said action so brought against him, and that upon trial thereof defendant, as a witness in his own behalf, testified "that prior to the said 7th day of April, 1914, he, the said John R. McLeod, had not received anything on account of said judgment theretofore entered in said superior court in said action No. B–7786, and entitled Edith W. Brennan, Plaintiff, v. A. Levin, Defendant," which testimony was then and there material to the inquiry then being made; that in truth said testimony so given by defendant was knowingly and willfully false, the fact being that he had, prior to said April 7, 1914, collected and received on account of and in settlement of the said judgment so rendered and entered against A. Levin credits and sums of money in the aggregate of $1,575.

As shown by the mixed and muddled up record presented in support of the appeal, the plaintiff, in proof of the facts alleged in the information as constituting the offense, offered what on its face purported to be a judgment rendered on March 16, 1914, and entered March 21, 1914, in favor of plaintiff in the case of Brennan v. Levin for the sum of $1,500, and interest, which, as shown, is followed by what appears to be a minute order giving title and number of the case, that:

"It appearing to the court that the judgment herein entered on the 21st day of March, 1914, in Book 295 of Judgments, at page 236, contains an error in the computation of the amount therein found to be due, it is ordered that said judgment be, and the same is, vacated and set aside."

It thus appears that this, the only judgment rendered in the case of Brennan v. Levin, so far as we are able to find in the record, was vacated and set aside; hence defendant could not, as alleged in the information, have collected anything on account of or in settlement of said judgment, since none existed.

It further appears by vague and uncertain evidence offered on behalf of the people that in the controversy between Brennan and Levin, wherein defendant acted as attorney for the plaintiff, and one Cheroske acted as attorney for the defendant, the attorneys of the respective parties, about March 16th, entered into some indefinite agreement whereby Cheroske was to receive from Levin certain checks and papers evidencing credits to which it was agreed he should be entitled, together with a satisfaction of the purported judgment again Levin executed by defendant, under which arrangement, as to a large part, if not all, of the amount in controversy, a future settlement and payment was contemplated, and when consummated the satisfaction so executed should become operative. The evidence as to this agreement is indefinite and of a character which might well leave some doubt in the mind of the court as to whether or not, owing to uncertainty as to the nature of the agreement and uncertainty as to the same being fully executed on April 7th, defendant had as alleged received anything which he had a right to deem paid to him in settlement of Brennan's claim against Levin. However this may be, we are satisfied that there was no abuse of discretion on the part of the trial court in making the general order granting defendant's motion for a new trial.

Notwithstanding the fact the order is in terms general, the argument of counsel for appellant is addressed to the alleged error of the court in granting the motion upon the ground that, since in his answer defendant admitted, by not denying, the execution of the satisfaction, he was estopped from denying that he had received full payment of the judgment; that, whether or not defendant received anything, he was liable for the whole amount of the judgment on account of executing the satisfaction. The satisfaction, however, was placed in escrow, and it does not appear that it was filed or even delivered to any one authorized to file it, except upon conditions not shown to have been performed. Moreover, as stated, the action was for money had and received in the sum of $1,575 alleged to have been received by defendant for the use of plaintiffs, and therefore it devolved upon them to show that he had received said sum, or some part thereof, in order to recover judgment. It may be that, had the action been one for damages, any evidence to the effect that defendant received money would be immaterial, since the issue involved would be to what extent the plaintiffs had been damaged by the act of the defendant in satisfying the judgment.

The order appealed from is affirmed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 11

KEHRLEIN-SWINERTON CONST. CO. v. RAPKEN. (Civ. 1634.)

(District Court of Appeal, First District, California. Feb. 29, 1916. Rehearing Denied by Supreme Court April 27, 1916.)

1. CORPORATIONS ⟸514(3) — FORFEITURE OF CHARTER—PLEADING.

In an action by a corporation, defendant's allegation "that plaintiff is not now or was at the time of the filing of the complaint a corporation organized or existing under or by virtue of the laws of the state of California or of any state, and that prior to the commencement of this action, the said plaintiff, after due and regular proceedings for that purpose, had forfeited its charter as a corporation, and as such ceased to exist, and ever since said time had ceased to be a corporation," though loosely and inartificially drawn, was sufficient, in the absence of special demurrer, to put in issue the forfeiture of the plaintiff's charter for its failure to pay its license tax.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2080, 2081; Dec. Dig. ⟸514(3).]

2. EVIDENCE ⟸158(15)—FORFEITURE OF CORPORATE CHARTER — BEST AND SECONDARY EVIDENCE.

In the absence of statute purporting to make the certificate of the secretary of state that a corporation's charter has been forfeited for nonpayment of its annual license tax prima facie or any evidence of the contents of the Governor's proclamation declaring the forfeiture of the charters of such corporations as may have failed to pay the tax, the only proper proof of such proclamation is the original or a certified copy of it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 492, 497, 498, 504; Dec. Dig. ⟸158(15).]

3. CORPORATIONS ⟸613(2) — FORFEITURE OF CHARTER—PROCLAMATION OF GOVERNOR.

The proclamation of the Governor declaring the forfeiture of the charters of such corporations as may have failed to pay their annual license tax, is an essential step in the procedure for forfeiture of the charter of a corporation for such cause.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⟸613(2).]

4. PARTIES ⟸59(1)—FORFEITURE OF CORPORATE CHARTER—ACTION—SUBSTITUTION OF TRUSTEES AS PLAINTIFFS.

In an action for breach of contract by a corporation which had forfeited its charter for nonpayment of its annual license tax, it was error to deny plaintiff's motion for leave to substitute as plaintiffs the names of the trustees of plaintiff, the action being one that the License Tax Act (St. 1905, p. 493) § 10a, as added by St. 1907, p. 746, permits to be begun and maintained by the former directors of the corporation, acting as trustees for its stockholders, seeking to collect assets after forfeiture.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 90; Dec. Dig. ⟸59(1).]

5. PARTIES ⟸59(1)—FORFEITURE OF CORPORATE CHARTER—SUBSTITUTION OF TRUSTEES AS PLAINTIFFS.

In an action by a corporation, where it is brought to the court's attention, either by defendant's pleading and proof, or by plaintiff's suggestion, that the names of the trustees of the corporation should appear in the place of the name of the corporation itself as parties plaintiff, on account of the corporation having forfeited its charter for failure to pay the annual license tax, and when it clearly appears that the cause of action is unchanged, and the real parties in interest remain the same, that meritorious defenses will be unaffected, and that the only purpose and effect of the proposed amendment is the mere formal change in the names, the court should order the substitution made; refusal being an abuse of discretion.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 90; Dec. Dig. ⟸59(1).]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Kehrlein-Swinerton Construction Company against M. A. Rapken. From a order dismissing the action, an order denying a motion to vacate and set aside the order dismissing the action, and judgment for defendant, plaintiff appeals. Judgment and orders reversed.

Wm. M. Cannon, of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for appellant. William G. Weiss, of San Francisco, for respondent.

RICHARDS, J. This action was commenced by the plaintiff as a corporation against the defendant to recover the sum of $600 for the alleged breach of a contract in writing for the supplying by plaintiff to the defendant of certain labor and materials to be used in the construction of a building, which, it is alleged, were furnished, but for which the defendant refused to pay.

The plaintiff averred its corporate existence in the usual form. The defendant denied this allegation and alleged:

"That the plaintiff is not now, or was at the time of the filing of the complaint, a corporation organized or existing under or by virtue of the laws of the state of California or of any state, and that prior to the commencement of this action the said plaintiff, after due and regular proceedings for that purpose had forfeited its charter as a corporation and as such ceased to exist, and ever since said time has ceased to be a corporation."

Upon the trial of the case and after the plaintiff had proffered some of its proofs as to its cause of action, the defendant offered in evidence the certificate of the secretary of state for the avowed purpose of showing that the plaintiff had forfeited its charter in the state of California in the year 1907 through the nonpayment of its license tax. The plaintiff objected to this offer; the court overruled such objection and admitted the paper, which was in the ordinary form of a certificate by the secretary of state as to the existence of the facts which the statute of 1908 provided as predicate for the proclamation of the Governor that the charters of certain delinquent corporations were from and after a specified date to be forfeited. Thereafter and toward the close of the trial the plaintiff offered some evidence showing that the directors of the plaintiff were Emil Kehrlein, Oliver Kehrlein, and Alfred Swinerton; and thereupon moved the court for an order of substitution of the names of said persons as parties plaintiff in place of the said corporation. This motion was denied

by the court, which thereupon of its own motion entered an order dismissing the action, and also thereupon entered judgment in favor of the defendant and against the plaintiff and for costs.

Thereafter the plaintiff moved the court to vacate and set aside its order dismissing the action, which motion was denied. From these two orders and also from the judgment in defendant's favor and for costs, the plaintiff prosecutes this appeal.

[1] Three questions are presented upon this appeal. The first of these has reference to the sufficiency of the defendant's answer in attempting to allege the incapacity of the plaintiff to begin or maintain this action because of the prior forfeiture of its charter, the averment of the answer in that respect being above set forth. While this averment is loosely and inartificially drawn, we think it is sufficient in the absence of a special demurrer to put in issue the forfeiture of the plaintiff's charter.

[2, 3] The next question relates to the form and sufficiency of the defendant's offered proof of such forfeiture occurring through the nonpayment of its license tax. While it may be true that the certificate of the secretary of state will suffice to prove prima facie the existence or nonexistence of certain data of which his office is the only proper place of record—such, for example, as the fact of the nonpayment of the plaintiff's annual license tax—we have had our attention drawn to no statute which purports to make the certificate of the secretary of state prima facie or any evidence of the contents of such a document as the Governor's proclamation declaring the forfeiture of the charter of such corporations as may have failed to pay such tax. In the absence of such a statute the only proper proof of such a document would be the original or a certified copy of it, and this not having been produced, and the proclamation of the Governor being an essential step in the procedure for the forfeiture of the charter of such corporation as the plaintiff was, we are constrained to hold that the certificate of the secretary of state was incompetent to prove the forfeiture of the plaintiff's charter for the nonpayment of its license tax. Murphy v. Sumner, 74 Cal. 316, 16 Pac. 3; 3 Jones on Ev. pages 584, 585.

The next contention of the appellant is that the court erred in denying the plaintiff's motion for leave to substitute the names of the trustees of the plaintiff corporation, and that the court committed the further error of thereupon dismissing the action.

The motion of the plaintiff for leave to make the substitution in the names of the parties plaintiff was made toward the close of the trial, and was necessarily predicated upon the proposition that the charter of said corporation had been forfeited for some cause and at some time prior to the time the motion was made, and since the only pretense of either pleading or proof of any kind presented in the case had reference to the state forfeiture of the plaintiff's charter to which the certificate of the secretary of state related, it must be concluded that this was the forfeiture of its charter upon which the counsel for plaintiff predicated his motion. It might well be questioned whether the plaintiff, by thus assuming that the fact of the forfeiture of its charter had been sufficiently proven to form the basis for its said motion, has not waived the point as to the competency or sufficiency of such proof, but since upon a retrial of the case these defects may be remedied, we deem it proper to pass to what will ultimately prove to be the only vital issue in the case, which is the question as to whether plaintiff had the right to have the names of its trustees substituted for its own name as plaintiff during the trial and after proof or suggestion of the forfeiture of its charter prior to the commencement of the action.

There are two lines of cases which seem to run parallel bearing upon this question. The courts of last resort in this state have gone far in holding that corporations which have permitted themselves to come within the ban of the statute by failing to pay their license tax cannot be permitted to do business in this state while under such disability, and it has also been definitely decided that the institution and maintenance of an action is embraced within the inhibition of the statute with respect to doing business after such forfeiture of a corporate charter. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335; Kaiser L. & F. Co. v. Curry, 155 Cal. 638, 103 Pac. 341; Newhall v. Western Zinc Mining Co., 164 Cal. 380, 128 Pac. 1040; Carpenter v. Bradford, 23 Cal. App. 560, 138 Pac. 946.

On the other hand, it has been held in a long line of well-considered cases bearing upon the rights of partnerships or of corporations to commence or maintain actions until they have complied with certain requirements of the Legislature restricting such right, that the plea and proof that such partnerships and corporations may not maintain actions while under the disabilities provided in such statutes are matters of affirmative defense, and are in the nature of dilatory pleas, which are waived by the failure on the part of the defendant to make the required averments and proof; and that in the absence of such plea and proof a partnership or a corporation, although subject to such disabilities, may still maintain an action and recover and enforce a judgment therein in its own name. Bernheim, etc., Co. v. Elmore, 12 Cal. App. 85, 106 Pac. 720; Cal. Sav. & Loan Society v. Harris, 111 Cal. 133, 43 Pac. 525; Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 576, 112 Pac. 454; Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719. In the case last above cited it was held that the court did not abuse its discre-

tion in allowing the substitution of the names of the directors of the corporation as plaintiffs in lieu of the name of the corporation, after the defendant had set forth in his answer that the charter of the corporation had been forfeited through its failure to pay its license tax. Reed v. Harshall, supra, 12 Cal. App. 704, 705, 108 Pac. 719.

In the recent case of Lowe v. Superior Court, 165 Cal. 709, 714, 134 Pac. 190, the Supreme Court, in considering section 10a of the act relating to the payment of the annual license tax by corporations (and which section was added to said act after some of the cases dealing with the forfeiture of corporate charters and its effect upon their right to sue or to be sued in the corporate name had been decided), held that under said section a corporation defendant, whose charter had been forfeited after the commencement of the action, might have the suit against it maintained either in its own name or in the names of its trustees, and in so deciding the court commented upon the case of Newhall v. Western Zinc Mining Co., supra, as not in conflict with this view.

In the still later case of Brandon v. Umpqua L. & T. Co., 166 Cal. 322, 136 Pac. 62, the Supreme Court cited the Lowe Case with approval, and went further in holding that even when the corporation was an actor after the forfeiture of its charter, as in the taking of an appeal, it could do so in its own name. It is true that in that case the court intimates that this rule would not apply to actions in which the corporation was the plaintiff, but this would only be to furnish a stronger reason why the trial court should permit the substitution of the names of the trustees for that of the corporation whenever the forfeiture of its charter for any cause is made to appear.

[4] It is, however, urged by the respondent that this principle should not be given application to a case wherein the action has been begun by the corporation in its own name after its charter and right to do business has been withdrawn. But we think that this is a distinction which should not in the interests of justice prevail unless the language of the act is so clear and explicit as to require it. The present case is such an action as could well have been begun during the process of winding up the affairs of the defunct corporation, and which the statute expressly permits to be begun and maintained by the former directors of the corporation acting as trustees for its stockholders in thus seeking to collect its assets. An examination of the terms of section 10a of the license tax act (St. 1905, p. 493 as added by St. 1907, p. 746) will show that it is nowhere expressly stated or required therein that the trustees of the defunct corporation, in settling its affairs and in taking such legal proceedings as may be necessary so to do, must act in their own names instead of in the name of the corporation. The fact is that the directors of every corporation, whether it has forfeited its charter or not, are the real persons and actors in actions begun by it or for its benefit, and this being so, it does not seem to be so very material in what name they begin their action so long as the identity of their act as the act of the corporation is undeniable. This is the utmost that the defendant in actions of this character should have the right to require for his own protection against the possibility of being twice vexed upon the same obligation.

A very interesting analogy involving the right and duty of the trial court to permit the substitution of the name of one plaintiff for that of another when no actual change is being effected in the real actors in the litigation, is presented in the case of Reardon v. Balaklala C. C. Co. (C. C.) 193 Fed. 189, the very apt language and citations of which have a direct bearing upon the principle involved in the case at bar.

[5] When in the course of an action it is brought to the attention of the court, either by the pleadings and proof of the defendant or by the suggestion of the fact on the part of the plaintiff, that the names of the trustees of the corporation should appear in the place of the names of the corporation itself as a party plaintiff, and when it clearly appears that the cause of action is unchanged and that the real parties in interest remain the same, and that the meritorious defenses of the defendant will be unaffected, and that the only purpose and effect of the proposed amendment is the mere formal change in the names of the parties plaintiff without any change in the substantial rights and relations of the real actors in the case, the court should order the substitution made, and it was an abuse of discretion for the court to refuse so to do in the instant case.

It follows necessarily that upon both grounds above discussed the court was in error in dismissing the action, and in causing judgment to be entered in the defendant's favor, and for his costs. The motion to dismiss is denied.

The judgment and orders appealed from are reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

(29 Cal. App. 550)

ROSSI v. GHIOTTO et al. (Civ. 1698.)

(District Court of Appeal, First District, California. Feb. 3, 1916.)

JUDGMENT ⇐143(16)—VACATING DEFAULT — DISCRETION.

Evidence that defendant in default judgment was an illiterate foreigner, and that he believed the statement of the agent of plaintiff that after service of summons and complaint he would be notified of the day of trial, and that

he took immediate action on learning judgment was entered, *held* not to show an abuse of discretion in vacating the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 289; Dec. Dig. ⊂⊃143(16).]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Domenico Rossi against G. Ghiotto and others. From an order vacating a default judgment as to the named defendant, plaintiff appeals. Affirmed.

Fabian H. Hillebrandt, of San Francisco, for appellant. O'Gara & De Martini, of San Francisco, for respondent.

PER CURIAM. This is an appeal in an action on a promissory note from an order vacating a default judgment entered against the defendant Ghiotto. The showing made on behalf of said defendant in support of the motion to vacate was to the effect that the defendant, a foreigner, spoke the English language imperfectly and could not read or write the same; that he was not a maker of the note, but signed the same only as a witness to the signatures of the real makers; that he had never before been a party to a lawsuit; that prior to the commencement of the action he had several consultations with an agent of the plaintiff, who had been intrusted with the collection of the note for the purpose of making a settlement; that during those consultations the agent of the plaintiff always evinced a friendly disposition towards the defendant, and expressed a desire to help the latter in his difficulty over the note. Subsequently, on February 2, 1915, the agent of the plaintiff served the summons and a copy of the complaint in the action upon the defendant; that the defendant was unable to read the same, and he did not know and was not otherwise informed that if he failed to answer the same a default would be taken against him; that the agent of the plaintiff told him at that time that before being called upon to pay the note a day for the trial would be set, of which he would be notified, and that upon such trial in the presence of the judge he could make whatever defense he had to the action, and that no step would be taken towards a trial of the action until March 12, 1915; that the defendant had great confidence in the apparent friendship of the agent of the plaintiff and believed implicitly in the statements thus made; that the defendant did not learn that a judgment upon the note had been entered against him until March 9, 1915, whereupon he employed attorneys who immediately instituted proceedings to set aside the judgment.

The defendant's showing in support of the motion was accompanied by a sufficient affidavit of merits. The plaintiff in reply made no showing that he would suffer any prejudice from the order vacating the judgment, or that any injustice would result to him from a trial of the case upon the merits. He did, however, read in evidence upon the hearing of the motion affidavits which tended to contradict all the material averments of the defendant's affidavit; but in the presence of such a conflict in the evidence upon which the motion was heard and determined it is idle to urge upon this court considerations which go only to the weight of the evidence and the credibility of the parties making the respective affidavits. It was for the court below to say which showing it would accept as the truth, and inasmuch as it may be fairly inferred from the showing made by the defendant that his default was induced primarily by the conversations, conduct, and promises of the agent of the plaintiff, we are not prepared to say that the lower court abused its discretion in making the order complained of. See Berri v. Rogero, 168 Cal. 736, 145 Pac. 95.

The order appealed from is affirmed.

29 Cal. App. 683

RINDGE CO. v. CITY COUNCIL OF CITY OF LOS ANGELES et al. (Civ. 1880.)

(District Court of Appeal, Second District, California. Feb. 15, 1916. Rehearing Denied March 15, 1916; Denied by Supreme Court April 13, 1916.)

MUNICIPAL CORPORATIONS ⊂⊃491—NOTICE OF ASSESSMENT—PUBLICATION.

In assessment proceedings under the street opening Act of 1903 (St. 1903, p. 376) and amendments, the failure of the council clerk, after publication of notice to file objections, to lay before the council at its next meeting, as required by section 19 of the act, the assessment and objections filed, is cured by his subsequent republication and proper presentation of objections.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1145, 1153–1155; Dec. Dig. ⊂⊃491.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Certiorari by the Rindge Company against the City Council of City of Los Angeles and others. From a judgment for petitioner, defendants appeal. Reversed, with directions.

Albert Lee Stephens, City Atty., and Howard Robertson and Charles S. Burnell, Asst. City Attys., all of Los Angeles, for appellants. Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles, for respondent. Hanson, Hackler & Heath, of Los Angeles, amici curiæ.

SHAW, J. This is an appeal from a judgment rendered in a proceeding instituted in the superior court of Los Angeles county, whereby it was sought to have certain acts of the city council of the city of Los Angeles in confirming an assessment made to cover the cost of opening Broadway from Tenth street to Pico street declared null and void for want of jurisdiction. The writ was is-

sued, and upon return thereto a hearing was had, wherein the court caused to be entered a judgment as prayed for by petitioner, declaring said action of the city council void, from which judgment this appeal is prosecuted.

It appears that under the street opening act of 1903 (St. 1903, p. 376) and the several amendments thereto the city council of Los Angeles in May, 1913, initiated proceedings for the opening of Broadway, a street in said city, from Tenth street to Pico street, all of which proceedings, up to and including the making of the assessment, plat and diagram and the filing of the same with the clerk of the council on December 30, 1914, it is conceded were duly had and taken as provided for by the act. On December 31, 1914, the clerk, as required by section 18 of the act, gave notice by due publication thereof, requiring all persons interested in the matter to file with him their objections to the confirmation of the assessment. Within 30 days after the first publication of said notice a number of parties owning property affected by the assessment filed protests and objections thereto with the clerk of the city council, as provided by section 19 of the act, which section also provides that:

"The clerk shall, at the next regular meeting of the city council after the expiration of the time for filing objections, lay said assessment, and all objections so filed with him before the council; and said council shall hear all such objections at said meeting, or at any other time to which the hearing thereof may be adjourned, and pass upon such assessment."

The next regular meeting after the expiration of the 30 days required for the publication of said notice so given by the clerk was held on the 1st day of February, 1915, at which time the clerk should have presented the assessment and the objections so filed against the confirmation thereof to the council. Through inadvertence or other cause —the reason not appearing—the clerk, however failed and neglected to present or lay the assessment and objections before the council at this regular meeting so held on February 1, 1915; but at the meeting next following he did lay the same before the council, which, assuming jurisdiction to act, proceeded with the hearing of the objections to the assessment so filed, and, after ordering certain corrections and modifications thereof made, confirmed the assessment as thus corrected. Thereafter the plaintiff instituted in the superior court a certiorari proceeding, No. B–23218, wherein it sought to have the order and action of the city council so had and taken declared null and void. The question there presented and upon which the court rendered its judgment appears to have been identical with that involved in the case of Stoner v. City of Los Angeles, 8 Cal. App. 607, 97 Pac. 692. In that case it was held that the publication of the notice required by section 18, pursuant to which objections to the assessment had been filed, in the absence of presentation thereof made by the clerk to the council at its next regular meeting held after the 30 days specified in the notice for filing objections, no action at such meeting having been had by the council as to the hearing of the objections, did not authorize the council, at a subsequent meeting, to act upon said assessment and objections. In rendering judgment upon the application for writ of review in said case hereinbefore referred to as No. B–23218, the court followed the law as laid down in the Stoner Case, and held that, by reason of the clerk's failure to present the assessment and protests to the council at its first regular meeting following the expiration of the 30 days fixed for filing objections, no jurisdiction was conferred upon the council by the notice so given to act in confirmation of the assessment at a subsequent meeting. From this judgment, as to the correctness of which we entertain no doubt, the council, by resolution, resolved that it would prosecute no appeal, and instructed the clerk to publish the notice required by section 18 of the act. Thereafter, on April 28, 1915, the clerk of the city council, as provided in said section 18, caused to be duly published a new notice requiring all persons interested to file with him their objections, if any they had, to the confirmation of the said assessment, and within 30 days immediately following the first publication of said notice certain protests and objections to the confirmation of the assessment were filed, which together with the assessment, at the first meeting of the council following the expiration of 30 days from the first publication of the notice, the clerk presented to the council, which proceeded regularly and in accordance with the provisions of the act to hear the protests and objections filed, after which, on June 14, 1915, it made an order confirming the assessment. Thereafter plaintiff instituted this proceeding for certiorari, wherein the trial court adjudged the action of the council in making the order confirming the assessment null and void for want of jurisdiction.

The chief contention of respondent and ground upon which it is apparent the trial court based its decision is that by reason of the failure of the clerk to present the assessment and objections thereto at the regular meeting of the council following the publication of the first notice the council, notwithstanding all steps in the matter prior to such omission of the clerk had been duly had and taken, lost jurisdiction of the entire proceeding, and this notwithstanding the provisions of section 4 of the act, under and pursuant to which, it must be conceded, all steps necessary to vest in the council jurisdiction to order the improvement described in the ordinance had been taken. In the Stoner Case this court, in discussing the failure of the clerk to present the assessment

and protests at the first regular meeting following the giving of the notice, said:

"The council, having failed to take any action at the next regular meeting after the expiration of the time for filing objections, either in the way of according a hearing or adjourning the hearing to some subsequent day, lost jurisdiction to act in the matter, *except upon a republication of the notice in accordance with the provisions of section 18 of the act.*"

While in this excerpt the court expressed its views upon the question now presented, counsel for respondent insist that the language therein which we have italicized was not necessary to the decision of the question presented, and must therefore be regarded as dictum. Nevertheless we are of the opinion that what was dictum in that case is the law when applied to the facts presented in the case at bar.

The only question here involved is the validity of the order confirming the assessment. Not until the clerk performed certain duties imposed upon him by law, namely, the due publication of the notice and due presentment of the assessment and protests at the first regular meeting after said publication, was the council authorized to take action in confirming the assessment. The giving of the notice, and, within a limited period of time specified therefor, laying the assessment and protests before the council, both ministerial in character, in fact constituted but one act, the performance of which was a necessary prerequisite to any action upon the assessment by the council. By reason of the clerk's neglect to present the assessment and objections thereto, the notice as published could perform no function whatever. In the absence of presenting the assessment to the council at the specified time, the publication of the notice, so far as vesting the council with jurisdiction to act upon the assessment, was as futile for the purpose intended as though notice had not been published at all. Certainly it could not be said as to an order confirming an assessment void for want of proper notice that the council by such vain action had lost jurisdiction of the entire proceeding. Nor did its act, ineffectual by reason of the clerk's neglect, deprive it of jurisdiction to make the order of confirmation when, following due publication of notice within the time required therefor, the clerk presented the assessment and protests thereto for its action. It was then empowered to act as fully upon the second publication of notice as though the first, proving abortive, had never been made. We adhere to what was said by this court in Stoner v. City of Los Angeles, supra, as reiterated in S. M. Bernard Co. v. City of Los Angeles, 18 Cal. App. 626, 124 Pac. 88, that by reason of the clerk's neglect to present the assessment and objections to the council at the time in the statute specified therefor the council had no power to make the order, save upon a republication of the notice, followed by due presentation of the documents, all of which appears to have been duly and regularly done. This is not only in accord with reason, but in line with the principle enunciated by the Supreme Court in Bliss v. Hamilton (Sup.) 152 Pac. 303, Haughawout v. Percival, 161 Cal. 491, 119 Pac. 649, Ann. Cas. 1913D, 115, Dougherty v. Foley, 32 Cal. 403, Cake v. City of Los Angeles, 164 Cal. 705, 130 Pac. 723, O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020, and other cases to the effect that after jurisdiction has been acquired to do the work abortive attempts by officers to perform acts upon which the taking of other steps in the proceedings depend does not exhaust the power of the officer, within the time fixed therefor, to make good his futile effort by a due performance thereof as fully as though no attempt had been made to perform the act.

It is apparent from what has been said the judgment rendered by the superior court in No. B-23218, involving the validity of the order made under the first publication, did not affect the order made in the exercise of the power conferred by the republication of the notice and proceedings had pursuant thereto. It was correctly rendered upon a state of facts justifying the decision.

The judgment is reversed, and the trial court directed to enter judgment affirming the validity of the proceedings attacked.

We concur: CONREY, P. J.; JAMES, J.

29 Cal. App. 774

SPADER v. ROLPH, Mayor. (Civ. 1724.)

(District Court of Appeal, First District, California. Feb. 28, 1916. Rehearing Denied by Supreme Court April 27, 1916.)

1. MUNICIPAL CORPORATIONS ⟸176(3)—REMOVAL OF OFFICERS—STATUTES—VALIDITY.

San Francisco Charter, art. IX, c. II, § 2, providing that no officer, member or employé of the fire department shall be removed except after trial, was at the time of its enactment in violation of Const. art. 20, § 16, providing that, if the term of an officer was not named, he should hold office at the pleasure of the appointing authority.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 429, 434; Dec. Dig. ⟸176(3).]

2. MUNICIPAL CORPORATIONS ⟸124(5)—REMOVAL OF OFFICERS—STATUTES—VALIDITY.

Provisions of charters adopted after adoption of the amendment to Const. art. 20, § 16, which provided that the charter should govern dismissal of municipal officers, are excepted from the general provisions of such section and valid, though in terms conflicting with it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 294; Dec. Dig. ⟸124(5).]

3. MUNICIPAL CORPORATIONS ⟸124(5)—REMOVAL OF OFFICERS—STATUTES—LEGALIZING PROVISIONS.

On the adoption of amendment to Const. art. 11, § 8½, providing that charter provisions may regulate appointment and dismissal of city

officers, and that all provisions of prior enacted statutes in accordance with the amendment were confirmed and declared valid, no readoption or change in San Francisco Charter, art. IX, c. II, § 2, relating to tenure of office and trials for dismissal, was required to make it effective.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 294; Dec. Dig. ⇐ 124(5).]

4. Municipal Corporations ⇐124(5)—Removal of Officers—Statutes—Construction.

Such amendment confirms all charter provisions in accordance with itself, and not merely those theretofore constitutional.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 294; Dec. Dig. ⇐ 124(5).]

5. Municipal Corporations ⇐195—Removal of Officers—Grounds.

Where fire commissioners, contrary to advice of the city attorney and instructions from the mayor, removed a member of the fire department from office without charges or trial, they deliberately violated Charter, art. IX, c. II, § 2, requiring such trial, and were subject to removal by the mayor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 535–537; Dec. Dig. ⇐ 195.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition for writ of review by C. T. Spader, against James Rolph, Jr., Mayor of the City and County of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

Keough & Olds, H. I. Stafford, and J. T. Thornton, all of San Francisco, for appellant. Percy V. Long and George Lull, both of San Francisco, for respondent.

KERRIGAN, J. The plaintiff applied to the superior court, praying that a writ of review be issued directed to the defendant, as mayor of the city and county of San Francisco, requiring him to certify to said court a transcript of the proceedings had in a certain hearing and trial by said defendant of the members of the board of fire commissioners of said city and county (of which the plaintiff was one), as the result of which trial an order was made by the defendant dismissing the members of said board from office. The prayer of the petition is further that said order be annulled and adjudged void. An order to show cause being thereupon issued, the defendant demurred to the petition. The demurrer was sustained, with leave to the plaintiff to amend, and upon his failure so to do a judgment was entered in favor of the defendant and for costs. The plaintiff appeals.

The controversy arises out of the fact that the board of fire commissioners removed one Thomas R. Murphy from his position as chief engineer of the department without assigning a cause therefor and without trial. This fact appeared in the petition for the writ; and it is the contention of the appellant in support of his appeal that the board in so removing Murphy acted in conformity with the provisions of the charter of the city and county, and that consequently the removal by the defendant of the board of fire commissioners—based as it was upon their action in thus discharging Murphy—was wrongful.

The San Francisco charter as adopted in 1900 provided, in effect, that no officer, member, or employé of the fire department should be removed from office except for cause and after trial, and in this respect the charter has remained unchanged. The removal of Murphy took place in December, 1914.

The petitioner claims that as a matter of law the board was justified in its action in not according to the removed member of the fire department a hearing or trial, inasmuch as the charter fixes no term of office for the chief engineer of the department, and that therefore its provisions limiting the right of the board to remove or dismiss such officer "except for cause" and only "after trial" were void at the time of its adoption by reason of their conflict with section 16 of article 20 of the Constitution, the terms of which we give below. It is also claimed in support of the appeal that, even if the petitioner, as a member of the board of fire commissioners, did violate the charter in the respect mentioned, such action was no more than an honest mistake, and therefore furnished no sufficient ground for his removal.

At the time of the adoption of the charter in the year 1900, section 16 of article 20 of the Constitution just referred to read as follows:

"When the term of any officer or commissioner is not provided for in this Constitution, the term of such officer or commissioner may be declared by law; and if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years."

Section 2 of chapter II of article IX of the charter provides:

"No officer, member or employé of the department shall be dismissed or transferred except for cause, nor until after a trial. The accused shall be furnished with a written copy of the charges against him at least three days previous to the day of the trial. He shall have the right to appear in person and by counsel and examine witnesses in his behalf. All witnesses shall be examined under oath, and all trials shall be public."

[1] It thus clearly appears that at the time of the adoption of the charter the provision thereof just quoted was in violation of section 16 of article 20 of the Constitution, and therefore void, and that, the term of office of the chief engineer not being fixed by law, he held the office at the pleasure of the appointing power, to wit, the board of fire commissioners. Sponogle v. Curnow, 136 Cal. 580, 69 Pac. 255; Wall v. Board of Directors, 145 Cal. 469, 78 Pac. 951.

[2] But in November, 1906, and subsequent to the time when the cases just cited were decided, and prior to the removal of Murphy, section 16 of article 20 of the Constitution was amended by the addition of the following provision:

"In the case of any officer or employé of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employé, shall control."

This amendment was enacted not long after the decision in the case of Coffey v. Superior Court, 147 Cal. 525, 82 Pac. 75, where it was held that the provisions of the municipal charter of the city of Sacramento were not such as to show an intention to confer upon the city trustees exclusive jurisdiction to remove the chief of police, and that the superior court, under section 758 of the Penal Code, had concurrent jurisdiction in that matter. And no doubt, as was said in the cases of Dinan v. Superior Court, 6 Cal. App. 217, 221, 91 Pac. 806, and Craig v. Superior Court, 157 Cal. 482, 108 Pac. 310, this amendment was in line with the policy of the state and the tendency of the late decisions and constitutional amendments to broaden the authority of municipal corporations, governed by charters, to prescribe their own rules and regulations in purely municipal affairs. There can be no serious question that the object of the amendment of 1906 to section 16 of article 20 of the Constitution was to make it clear that the provisions of a freeholders' charter should control in the matter of the dismissal from office of any officer or employé of a municipality. Craig v. Superior Court, supra. In other words, as counsel for the defendant says:

"The Constitution itself exempts municipal officers from the provisions of the section so far as tenure of office or dismissal from office are concerned."

[3] But the amendment to the Constitution above set out was made after the enactment of the San Francisco charter containing the requirement of preferment of charges and trial of a municipal employé before discharge; and it is contended that its effect must be limited to charters thereafter enacted, and that it could not vivify a void statutory provision already in existence.

However that may be, we think there can be no doubt that this previously invalid provision of the San Francisco charter was effectively validated and given force and effect by a further amendment to the state Constitution adopted on November 3, 1914, viz., an amendment to section 8½ of article 11, which took effect before the action of the board of fire commissioners in dismissing Murphy. Subdivision 4 of that amendment reads, in part, as follows:

"It shall be competent in any charter framed in accordance with the provisions of this section, or section eight of this article, for any city or consolidated city and county, and plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and employés whose compensation is paid by such city or city and county, excepting judges of the superior court, shall be elected or appointed, * * * and for the number of deputies, clerks and other employés that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employés. *All provisions of any charter of any such city or consolidated city and county, heretofore adopted, and amendments thereto, which are in accordance herewith, are hereby confirmed and declared valid.*"

Under this amendment to the Constitution no change in section 2 of chapter II of article IX of the San Francisco charter, or re-enactment thereof, was necessary in order to make it valid and constitutional.

[4] Nor does this amendment mean, as claimed by appellant, that only such provisions of the charter as were in accordance with the Constitution are confirmed and declared valid. One of its plain purposes was to exempt from the possible operation of section 16 of article 20 of the Constitution the matters of the tenure of office, appointment, and dismissal of municipal employés. The amendment so declares in express terms. The concluding sentence of the amendment above set out, and which we have italicized, is too plain to admit of any other construction. The words "in accordance herewith," contained in said concluding sentence, grammatically and logically refer, not to the Constitution as a whole, but to section 8½ thereof, the particular section to which the amendment relates.

The case of Banaz v. Smith, 133 Cal. 102, 65 Pac. 309, is not in conflict with the conclusion we have arrived at in this case. When the facts in that case arose there had been no amendment to the Constitution by which the invalid provisions of the charter of Los Angeles were confirmed and declared valid.

From these considerations we conclude that by virtue of the last-mentioned amendment to the Constitution, irrespective of amendments previously adopted, the provisions of the charter of San Francisco as found in section 2 of chapter II of article IX, relating to the right of an officer, member, or employé of the fire department to a trial upon charges before dismissal from the department, are valid and in full force and effect.

[5] Turning now to the second point relied upon by the appellant, it appears that the members of the board of fire commissioners, after being advised by the city attorney that they had no power to do so, and after they had been notified by the mayor that they must desist, nevertheless proceeded to and did, without preferring charges and without a trial, remove the chief engineer of the department from office. This con-

stituted a deliberate and arbitrary violation of an express provision of the charter in a matter of grave importance, and undoubtedly afforded a sufficient ground for the exercise by the defendant of his power to remove after trial all the members of the board.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

29 Cal. App. 600

PEOPLE v. HARLAN. (Cr. 460.)

(District Court of Appeal, Second District, California. Feb. 7, 1916.)

1. CRIMINAL LAW ⊂⊃374—EVIDENCE—OTHER OFFENSES.

In cases involving sexual offenses evidence of similar offenses committed between the parties, both prior and subsequent to the act charged, if not too remote, is admissible only after the prosecution has selected some particular act and elected to rely on it and has introduced evidence to support it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 835; Dec. Dig. ⊂⊃374.]

2. CRIMINAL LAW ⊂⊃678(3)—RECEPTION OF EVIDENCE—ELECTION BETWEEN ACTS.

Where the prosecuting officer, when at liberty to prove one of several different offenses under the indictment, does not inform the defense upon proof of what specific offense he intends to rely, the first evidence that tends to prove an offense is deemed a selection, entitling defendant to acquittal unless that precise offense is proven.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1581; Dec. Dig. ⊂⊃678(3).]

3. CRIMINAL LAW ⊂⊃763, 764(17)—INSTRUCTION—OTHER OFFENSES.

An instruction that other lewd acts were "shown in evidence" "for the purpose of proving the illicit relations of defendant" with another than the prosecutrix is error, as invading the province of the jury in determining what the evidence shows, and because the purpose of the evidence is wrongly stated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1747; Dec. Dig. ⊂⊃763, 764(17).]

4. CRIMINAL LAW ⊂⊃1186(4) — APPEAL — REVERSAL—TECHNICALITIES.

Where part of the uncorroborated story of the prosecutrix was incredible, disregard of errors of the trial court as technical under Const. art. 6, § 4½, would not be justified.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ⊂⊃1186(4).]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Wilson P. Harlan was convicted of crime, and appeals. Reversed.

H. L. Welch, of El Centro, and Duke Stone, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

SHAW, J. Defendant was, by information filed charging him therewith, convicted of the offense defined in section 288 of the Penal Code, and sentenced to prison for a term of five years. He prosecutes this appeal from the judgment and order of court denying his motion for a new trial.

[1, 2] As stated in the information, the act constituting the crime occurred on April 3, 1915. As usual in such cases, the verdict is based upon the uncorroborated testimony of the prosecutrix, a girl 12 years of age, who was the stepdaughter of defendant. Notwithstanding defendant was charged with an alleged act committed on April 3d, the district attorney, as he might do, in presenting the case first proved the commission of a similar act, claimed to have been committed on April 17th. After presenting in full detail the occurrences of April 17th, he then directed the attention of the witness to alleged acts of defendant, constituting the same offense, committed on April 3d, whereupon defendant's counsel demanded that the district attorney make an election as to which particular act (that committed on April 3d or that committed on April 17th) he relied upon for a conviction of defendant, to which the trial judge replied:

"I don't consider that it is necessary to, under the information on file, make any election as to the different offenses, if more than one was committed there."

Therefore, however, and after much colloquy between counsel and the court, all in the presence of the jury, the court made a ruling, stating:

"It will be necessary to proceed to prove the corpus delicti in regard to the alleged offense that occurred on the 3d day of April,"

—but overruled defendant's motion to strike out all evidence as to the offense alleged to have been committed on April 17th, proof of which, as stated, had theretofore been made. The prosecution then proceeded to question the witness as to what occurred on April 3d, the answers to which tended to prove the commission of the crime alleged as of that date; and also offered evidence as to several other acts alleged to have been committed with her by defendant. After completing the examination of the prosecutrix, and with all this evidence as to the several offenses before the jury, the district attorney then stated that he elected to rely for the conviction of defendant upon the evidence touching the commission of the offense on April 3d. In cases involving sexual offenses, such as adultery, rape, and the offense with which defendant is charged, the law seems to be well settled that evidence of similar offenses committed between the parties, both prior and subsequent to that with which a defendant is charged, may, if not too remote, be introduced. But, as stated in People v. Koller, 142 Cal. 621, 76 Pac. 500:

"They are never admissible as independent substantive offenses, upon any of which a conviction can be had, and evidence of them is only admissible *after* the prosecution has selected some particular act of a date certain, and *has elected* to rely on proof of such act for a conviction of the defendant, and *has introduced evi-*

dence tending to support the selection." (Italics ours.)

Measured by this rule, it was clearly error for the court to permit the prosecution to offer evidence as to acts constituting a similar offense, alleged to have been committed on April 17th, as corroborating proof of the offense with which defendant was charged as having committed on April 3d, there being, at the time, no evidence whatever adduced tending to prove the commission of such last-mentioned offense; and hence it was likewise error for the court to deny the motion made by defendant that such evidence be stricken out. In People v. Williams, 133 Cal. 165, 65 Pac. 323, Justice Temple of the Supreme Court, in discussing a question similar to that here involved, said:

"I think the prosecuting officer, when he commences the trial of a case of this class, where he is at liberty to prove one of several different offenses under the indictment, should, at least as early as the commencement of the trial, inform the defense upon proof of what specific offense he intends to rely, and if he does not, the first evidence which would tend in any degree to prove an offense shall be deemed a selection, and unless that precise offense is proven, the defendant is entitled to an acquittal."

Applying this rule, the prosecution should be deemed to have selected the act claimed, as shown by the prosecutrix, to have been committed April 17th, as that upon which to rely for a conviction of defendant. However this may be, it was at least but fair to the defendant, since the district attorney, notwithstanding the date specified in the information, might have selected either the alleged act committed on April 17th or that committed on April 3d, in proof of both of which he offered evidence, that the court should, at the stage of the proceedings when demanded by defendant, have required the prosecution to make an election between said acts.

[3, 4] The court stated to the jury, in one of the instructions given, that:

"Evidence of other acts of lewd and lascivious conduct of the defendant toward ———, prior to and subsequent to the acts relied upon for a conviction herein, have been shown in evidence. This evidence is introduced for the purpose of proving the illicit relations of the defendant with ———, and the lewd and lascivious disposition of the defendant, and his proneness to commit a crime of the particular nature involved."

The effect of the first part of this instruction was for the court to invade the province of the jury by stating that other lewd and lascivious acts had been shown by the evidence to have been committed by defendant, and this notwithstanding the fact that her uncorroborated statements with reference thereto were denied by defendant. It was for the jury, not the court, to determine whether or not such alleged facts had been shown by the evidence. Moreover, the evidence was not introduced for the purpose, as stated, of proving illicit relations of the defendant with ———, but merely to show, if it did show, a disposition and tendency on his part to commit lascivious acts with the prosecutrix, thus rendering it probable that he had, on April 3d, committed the offense with which he was charged, and for no other purpose. People v. Mathews, 139 Cal. 527, 73 Pac. 416. While these errors may be technical, nevertheless, considering the entire evidence, together with the fact that at least a part of the uncorroborated story of the prosecutrix seems incredible, we are of the opinion that they are not mitigated by section 4½, art. 6, of the Constitution.

The judgment and order are therefore reversed.

We concur: CONREY, P. J.; JAMES, J.

(29 Cal. App. 473)

HILL v. NERLE et al. (Civ. 1641.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

1. PLEADING ⊂⊃422 — MOTION TO STRIKE OUT—MODIFICATION.

An unverified answer is not a nullity; but unless objection to lack of verification is raised by motion for judgment or to strike out, the defect is waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1414–1417; Dec. Dig. ⊂⊃422.]

2. APPEAL AND ERROR ⊂⊃1151(2)—EXCESSIVE JUDGMENT—MODIFICATION.

Where a complaint alleges $190.85 due for goods sold and delivered and $217.50 for freight advances, a judgment for $336.36, based on a finding that the latter sum was due for goods sold and delivered, but with a finding that defendants were not indebted for $217.50 or any other sum for freight advanced, will be modified by striking therefrom all in excess of $190.85.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4500, 4503–4505; Dec. Dig. ⊂⊃1151(2).]

3. PARTNERSHIP ⊂⊃64—CERTIFICATE OF PARTNERSHIP—SUFFICIENCY.

Under Civ. Code, §§ 2466, 2468, requiring the filing and publishing of a certificate showing the names in full of all partners, a certificate, stating the names of partners, with the initials by which they are generally known, is sufficient.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87–91; Dec. Dig. ⊂⊃64.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by Fred B. Hill against V. P. Nerle and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

J. T. Summerville, T. G. Elliott, Nathan C. Coghlan, and Charles H. Hincken, all of San Francisco, for appellants. Fred L. Dreher, of San Francisco, for respondent.

PER CURIAM. Appeal from judgment upon the judgment roll alone. The plaintiff's complaint in this action consisted of two counts: one for the sum of $190.85 alleged to be the balance due for goods sold and delivered by plaintiff's assignors to the de-

fendants; the other for the sum of $217.50 alleged to be due to the plaintiff's assignors from the defendant for moneys advanced for the payment of freight and transportation charges, etc., upon the goods alleged in the first count to have been sold and delivered to the defendants. The defendants, answering, denied generally and specifically all of the material allegations of the plaintiff's complaint. The complaint was verified; the answer was unverified. The case went to trial upon the pleadings as presented, and the trial court made its findings of fact, wherein it found that the sum of $336.36 was due from the defendant for the goods sold and delivered, notwithstanding the fact that the complaint alleges in the first count that there was due for and on account of such sale only the sum of $190.85. The trial court further found that the defendants did not, as alleged in the second count of the complaint, become indebted to plaintiff's assignors in the sum of $217.50, nor in any other sum for moneys paid and advanced by plaintiff's assignors in payment of freight and transportation charges upon the goods found to have been sold and delivered to the defendants. The plaintiff prayed for judgment in the sum of $336.36, and that amount, it will be noted, is the aggregate of the sums separately stated and set forth in each of the two counts of the conplaint.

The point is now made in support of the appeal from the judgment that the judgment is not supported in its entirety by the findings as made, and therefore should be modified to the extent of striking therefrom the sum of $217.50 which the court allowed in its judgment, but which it found was not owing by the defendants. Counsel for the plaintiff answers this contention by asserting that the defendants, having failed to verify their answer to the plaintiff's verified complaint, the allegations of the complaint with respect to the payment by plaintiff's assignors for the benefit of the defendants of the sum of $217.50 for freight charges, etc., stand as admitted; and it is insisted that the finding, therefore, that the defendants were not indebted in any sum to the plaintiff's assignors for moneys advanced for transportation charges is contrary to an admitted fact in the case, and may be treated as surplusage, and the admitted fact of the complaint resorted to in aid and in support of the judgment.

[1] We do not understand it to be a rule of pleading that an unverified answer to a verified complaint admits all of the allegations of the complaint to be true in the absence of a seasonable objection to the failure of the defendant to verify his answer. The remedy of the plaintiff in such a contingency is to move the trial court to strike out the answer or for judgment upon the pleadings for want of an answer (McCullough v. Clark, 41 Cal. 298), and we understand it to be the rule that if the case goes to trial and is heard and determined upon the issues purporting to have been raised by the pleadings of the parties without a previous objection upon the part of the plaintiff to the lack of verification of the defendant's answer, the defect will be deemed to have been waived. Greenfield v. The Gunnell, 6 Cal. 67; McCullough v. Clark, supra; People v. Reis, 76 Cal. 269, 18 Pac. 309; City & County, etc., v. Itsell, 80 Cal. 57, 22 Pac. 74. No motion to strike out or for judgment on the pleadings was made in the present case. The findings indicate with sufficient certainty that the case was tried and determined upon the issues purporting to have been made by the complaint and answer thereto, and consequently the plaintiff will not now be heard to complain of the want of a verification to the defendant's answer.

[2] The finding of the trial court that the defendants were indebted to the plaintiff's assignors in the sum of $336.36 for goods sold and delivered is not fully supported by the allegations of the complaint, and inasmuch as the trial court found that the defendants were not indebted to the plaintiff's assignors in the sum of $217.50, it is obvious that the judgment entered upon the findings is excessive and must be modified.

[3] There is no merit in the contention that the judgment is not supported by the complaint or findings, for the reason, as claimed, that the complaint alleges that "a certificate stating the names in full of all the members of said copartnership," etc., in compliance with sections 2466 and 2468 of the Civil Code, was filed and published, whereas it was found that the names in full of all the members of said copartnership were not set forth in said certificate. The findings show that initials were used in the certificate for the respective partners' given names, but they also show that said partners were generally known by the names as thus given, and it has been held that a certificate which states the names of each of the partners, with the initials by which they are generally known, is sufficient. Meads v. Lasar, 92 Cal. 221, 28 Pac. 935.

For the reasons above set forth it is ordered that the judgment be modified by striking therefrom all in excess of the sum of $190.85, and, as thus modified, it shall stand affirmed.

29 Cal. App. 537

PEOPLE v. VILLALOVAS. (Cr. 452.)

(District Court of Appeal, Second District, California. Feb. 2, 1916.)

CRIMINAL LAW ⟸742(1), 745 — HOMICIDE — TRIAL—JURY QUESTION.

The question whether the state's witness should be believed or his testimony rejected because he was unfriendly to accused, as well as the effect to be given to accused's remaining

in the neighborhood of the homicide, is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1718, 1719; Dec. Dig. ⟸ 742(1), 745.]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Estaquio Villalovas was convicted of murder, and from the judgment and an order denying new trial, he appeals. Affirmed.

Dorn & Parker, of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted of committing the crime of murder in the second degree; the judgment of the court being a sentence to imprisonment for a term of 15 years. He appeals from the judgment and from an order denying his motion for a new trial. The ground upon which defendant's attorneys argue for a reversal is that the evidence is insufficient to justify the verdict.

It appears that Samuel Smith, an old man 87 years of age, lived alone in a shack located upon the water front in San Diego; that about 4 o'clock p. m. June 10, 1915, he was discovered in his house with wounds on the back and front of his head which had apparently been inflicted by a blood-stained club found near him. The blood resulting from his wounds was dry, indicating long exposure. It also appeared that defendant, for some three or four nights immediately preceding the attack, had slept at the house of deceased, and that he left the city on the evening of the day when deceased was found in his wounded condition. While other facts and circumstances were established tending to prove defendant's guilt, the chief evidence, as to the competency of which no attack is or was made, was that given by one Isais as to a conversation had with defendant wherein the latter told him that he had, for the purpose of obtaining money which he knew Smith possessed, attacked him with the club, striking him in a manner calculated to inflict the wounds which, as shown by other evidence, caused the death of deceased.

The defendant, over plaintiff's objection, in presenting his defense, was permitted to testify that a feeling of unfriendliness existed between him and the witness Isais, by reason of which fact his counsel insist that the jury should not have believed the testimony so given by the latter. It also appeared that after the commission of the crime defendant had been in and out of said city, where he was known, and hence it is argued that, had he been guilty, it is improbable that he would have returned to the scene of the crime.

These were proper questions to present to the jury, since they in the first instance were the judges of the credibility of the witnesses, and to the trial court before which such witnesses appeared, in presenting a motion for a new trial; but upon appeal they constitute no sufficient ground for reversal by this court. It may be, as claimed, that had the jury not given credit to the testimony of Isais, it would have rendered a different verdict. So conceding, it was nevertheless the exclusive province of the jury, under the circumstances shown, to determine the weight which they should accord the testimony touching the alleged confession. People v. Raich, 26 Cal. App. 287, 146 Pac. 907. According to appellant's theory, it believed the testimony, admittedly competent, to be true.

The record discloses no error of law which would justify this court in disturbing the verdict, and the judgment based thereon and the order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; JAMES, J.

29 Cal. App. 547

SAMPLE v. ROUND MOUNTAIN CITRUS FARM CO. (Civ. 1631.)

(District Court of Appeal, First District, California. Feb. 3, 1916.)

1. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS BASED ON CONFLICTING EVIDENCE.

Where the evidence is in conflict, a finding of the trial court will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸ 1011(1).]

2. PRINCIPAL AND AGENT ⟸23(1) — ACT WITHIN SCOPE OF EMPLOYMENT — SUFFICIENCY OF EVIDENCE.

In an action against a farm company for the destruction of plaintiff's growing crops by fire originating on defendant's land, evidence *held* sufficient to warrant the inference that the person who started the fire on defendant's land was defendant's agent acting within the scope of his employment at the time.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. ⟸ 23(1).]

3. PRINCIPAL AND AGENT ⟸23(3)—AGENT'S TORT—PRIMA FACIE SHOWING OF AUTHORITY.

In an action against a farm company for destruction of plaintiff's growing crops by fire originating on defendant's land, proof of the fact that the person who acknowledged responsibility for the origin of the fire on the lands of defendant was found, after or about the time of starting the fire, openly acting as superintendent of defendant's land, and the work being done thereon, made a prima facie showing of the existence of the relation of principal and agent between defendant and such person, and, in the absence of showing to the contrary, was sufficient to support finding that the relation existed at the time of the fire.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. ⟸ 23(3).]

4. EVIDENCE ⟸242(7)—ADMISSIONS—AGENT'S TORT.

In an action against a farm company for destruction of plaintiff's growing crops by fire

originating on defendant's land, statements of defendant's agent in charge of defendant's land at the time of the fire concerning its origin, and his subsequent offer to settle for the damage resulting therefrom to plaintiff, were admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 901; Dec. Dig. ⟹242(7).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by D. C. Sample against the Round Mountain Citrus Farm Company. From a judgment for plaintiff, and an order denying defendant new trial, the latter appeals. Judgment and order affirmed.

E. A. Williams, of Fresno, for appellant. Geo. Cosgrave, of Fresno, for respondent.

PER CURIAM. In this action the plaintiff sought and recovered a judgment for damages alleged to have accrued to him by the destruction of some 615 acres of feed standing upon his land, as the result of a fire, which it was alleged was purposely started upon the lands of the defendant and negligently permitted to spread to the adjacent lands of the plaintiff. The answer of the corporation defendant admitted that at the time of the fire it was the owner of and in the possession, use, and occupation of the land upon which the fire originated. The trial court in effect found that the defendant on August 10, 1914, through its agents, servants, and employés, caused to be set upon its lands a certain fire, which spread to and over the lands of the plaintiff. The sufficiency of the evidence to support this finding is assailed. In this behalf it is contended that the evidence does not show that the fire in question was started by the agent of the defendant; and, conceding for the sake of argument, that the evidence may be found sufficient in this particular, it is insisted that there is no evidence tending to show that when starting the fire such agent was acting within the scope of his employment.

[1, 2] The evidence as to the cause of the fire upon the lands of the plaintiff is in substantial conflict upon the question as to whether it originated from a lighted cigarette dropped upon the lands of the defendant by an employé, or resulted from the burning of grass upon the lands of the defendant for the purpose of clearing the same by a person who claimed to be acting as the agent of the corporation defendant. In the presence of this conflict in the evidence the finding in question must, under the familiar rule, be held to be sufficiently supported by the evidence in so far as it purports to find and fix the cause of the fire; and although the evidence adduced in the case is almost entirely circumstantial, nevertheless it warrants the inference that the person who started the fire upon the lands of the defendant was the agent of the defendant, and was at the time he started the fire acting within the scope of his employment. Among other things it was shown in evidence that several individuals who were employed upon the lands of the defendant recognized the person who admitted starting the fire as "the boss," and that that person, when approached for information concerning the origin of the fire, admitted that he was responsible for it, and stated that they (evidently meaning the employés under him) were "burning grass and the fire got the best of them."

After the fire had spread to the lands of the plaintiff and destroyed the growing crops thereon, this same person—the boss—came to the home of the plaintiff, and offered to settle for the damage done to the plaintiff's lands by the fire; and when informed by the son of plaintiff that a settlement could not be made without first ascertaining by measurement the extent in acreage of the burned area, said in effect that when such measurement was made he would settle for the damage done to plaintiff, but inasmuch as a corporation was involved he would before making the settlement have to "make a report to the company."

[3] Whether the person who acknowledged responsibility for the origin of the fire upon the lands of the corporation defendant was or was not the agent of said defendant was a matter peculiarly within its own knowledge; and therefore the fact that such person was found upon the lands of the defendant at or about the time of the starting of the fire openly acting in the capacity of superintendent of defendant's lands and the work being done thereon was a circumstance which carried with it the implication of authority to so act from the corporation defendant, and sufficed to make a prima facie showing of the existence of the relation of principal and agent between the corporation defendant and such person, which, in the absence of a showing to the contrary, was sufficient to support the finding of the trial court that such relation did exist at the time of the fire. 1 Labatt on Master and Servant, § 22, pp. 69 to 73; Elsner v. State, 30 Tex. 524; Indiana, etc., Ry. Co. v. Adamson, 114 Ind. 282, 15 N. E. 5; Reynolds v. Collins, 78 Ala. 94.

[4] If we be correct in the conclusion just stated, it follows that the trial court did not err in permitting in evidence over the objection of the defendant the statements of the person who was in charge of the defendant's lands at the time of the fire concerning its origin, and his subsequent offer to settle for the damage resulting therefrom to the plaintiff's lands. It is not disputed that if the evidence supports the finding in question it likewise supports the further finding that the fire spread to the lands of the plaintiff as the result of the negligent failure of the defendant's agent to keep it under control.

This disposes of all the points made in support of the appeal, and for the reasons stated the judgment and order denying the defendant a new trial are affirmed.

29 Cal. App. 484

FOSTER v. NATIONAL ICE CREAM CO. (Civ. 1726.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

NEW TRIAL ⊂=150(4) — NEWLY DISCOVERED EVIDENCE—DILIGENCE.

The defendant's affidavit on motion for a new trial for newly discovered evidence, which did not show the diligence employed by it in preparing for the first trial, and such facts as would make clear to the court that the failure to produce the alleged newly discovered evidence and the presenting of it at the first trial was not attributable to the want of diligence of the defendant, was insufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 310; Dec. Dig. ⊂=150(4).]

Appeal from Superior Court, Alameda County; Wm. H. Donohue, Judge.

Action by W. J. Foster against the National Ice Cream Company. From a judgment for the plaintiff and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Geo. K. Ford, of San Francisco, and R. W. Palmer, for appellant. H. L. Breed and Walter J. Burpee, both of Oakland, for respondent.

PER CURIAM. This is an action for goods sold and delivered. Judgment was entered against the defendant. Its motion for a new trial was denied, and the appeal is from the judgment and the order. The only point made in support of the appeal is that the court erred in denying the motion for a new trial because the allegation of the defendant's affidavit filed in support thereof asserting the existence of newly discovered evidence was uncontradicted. Conceding this to be so, there was no showing in the affidavit referred to of due diligence on the part of the defendant which would warrant the granting of a new trial on the ground of newly discovered evidence.

This was conceded at the oral argument. In support of its motion for a new trial upon the ground of newly discovered evidence it was incumbent upon the defendant to show the diligence employed by it in preparing for the first trial, how the alleged new evidence was discovered, and why it was not discovered before the first trial, and such other facts as would make it clear to the court below that the failure to produce the alleged newly discovered evidence, and present it at the first trial of the case, was not attributable to the fault or want of diligence of the defendant. The affidavit presented in support of the motion for a new trial was clearly deficient in the particulars just stated, and therefore, in so far as the ground of newly discovered evidence was concerned, a new trial was rightfully refused.

No error appearing upon the face of the record before us, it is ordered that the judgment and order appealed from be affirmed.

29 Cal. App. 485

MAYERS v. SAN FRANCISCO CORNICE CO., Inc. (Civ. 1627.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

CONTRACTS ⊂=350(2) — TERMS — EVIDENCE — SUFFICIENCY.

In an action by a subcontractor for work done in covering metal doors with leather, evidence *held* insufficient to support the defendant's contention that instructions were given to cover the doors with canvas before attaching the leather.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1820, 1821; Dec. Dig. ⊂=350(2).]

Appeal from Superior Court, City and County of San Francisco; Stanley A. Smith, Judge.

Action by M. L. Mayers, as trustee for J. Frank & Co., against the San Francisco Cornice Company, Incorporated. From a judgment for the plaintiff, defendant appeals. Affirmed.

Jas. P. Sweeney, of San Francisco, for appellant. Henry A. Jacobs, of San Francisco, for respondent.

PER CURIAM. This is an action brought by the plaintiff, as assignee for the benefit of the creditors of J. Frank & Co., a corporation, against defendant for $425, claimed to be the balance due under two separate contracts for covering with leather a number of metal doors of the University of California.

Plaintiff's assignor, being the lowest bidder as a subcontractor for the work, a contract was entered into between it and the defendant, whereby the former was to do the work for the sum of $650. While the contract called for the work to be done strictly according to specifications, there were in fact no specifications, and the work was to be done according to oral instructions. The manager of the subcontractor, it further appears, as well as others interested in the work, regarded it as somewhat experimental. He felt doubtful whether, even if he followed the instructions given, the work would prove satisfactory to the defendant, and therefore proposed that one door should first be completed so that they might be better able to judge if the method proposed to be followed was suitable. This was done, and the door as thus covered was pronounced satisfactory by the defendant and the architect of the building, whereupon the remainder of the work was performed in the same manner, and the doors were all immediately installed. About three weeks later the leather commenced to peel off, and after some negotiations the subcontractor and the defendant entered into a second contract, which was in all particulars like the first one, except that under it the subcontractor was to do the work for a little more than one-half the original contract price, viz., $375. Upon removing the leather from some of the doors the defendant claims that it learned for

the first time that the leather had not been placed thereon according to instructions and to the understanding between it and Frank & Co. in the particular that the doors had not first been covered with canvas, to which the leather was to be subsequently glued, but that strips of canvas merely had been placed along and over the seams. The sole question presented for determination, as we view the record, is whether these instructions were in fact given to Frank & Co.

The manager of this concern testified in so many words that he carried out the instructions as given in covering the doors, and that he was not directed to cover them with cloth or canvas before placing thereon the leather. It further appears from the evidence that after it was learned that the work under the first contract was not satisfactory, there was a dispute among the parties concerned on the question of responsibility, with the result that Frank & Co. agreed to do the work over in the method now found to be necessary, and for about one-half of the original contract price, one-third of which the architect was willing to pay, he thinking, as stated by him in a letter to the defendant, that perhaps they were all a little to blame for the unsatisfactory character of the first work upon the doors, and being anxious to have the job completed as early as possible. In the letter he wrote as follows;

"I will pay one-third of that amount, the remainder being made up by you or your subcontractor. If, however, you had originally a guaranty from your subcontractor, he should pay for the whole cost himself without involving either you or me. * * * Owing to a variety of causes, especially the difficulty of getting satisfactory information regarding this class of work, too long a time has already elapsed, and it is consequently doubly important that the execution of the work should be completed at the earliest possible moment."

The judgment and order are affirmed.

29 Cal. App. 499

MARTIN v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 1652.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

REPLEVIN ⇐113 — ENFORCEMENT OF JUDGMENT—TENDER OF POSSESSION.

Where the return of an automobile was tendered to the plaintiff four months after judgment had been rendered in her favor in a replevin suit, it not being alleged in the complaint or appearing in the agreed statement of facts that a depreciation of $500 since the time the automobile was originally taken was due to the delay in making the tender, or that the plaintiff had suffered any loss from the delay, or that it was due to willfulness on the part of the defendant, or that it was other than such a lapse of time as frequently occurs between rendition and enforcement of a judgment, defendant acted in substantial compliance with the judgment, and plaintiff was bound to accept the tender.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 445; Dec. Dig. ⇐113.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Maria E. Martin against the United States Fidelity & Guaranty Company. Judgment for the defendant, and plaintiff appeals. Affirmed.

John C. Scott, of Oakland, for appellant. Thomas, Beedy & Lanagan, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of the defendant in an action commenced by the plaintiff to recover a judgment against the defendant for the sum of $1,500, alleged to be due upon an undertaking for the seizure of an automobile in an action for replevin. The case comes before us upon an agreed statement of facts, from which it appears in brief that on or about April 13, 1913, Flora A. Graham and William H. Graham commenced an action in replevin against E. H. Wilson, Eula W. Wilson, and several fictitious defendants for the recovery of the possession of a certain automobile, which at the time of the commencement of said action and for some time previous thereto had been in the possession of the plaintiff in this action, who was served as a fictitious defendant and thus brought into the case. The value of said automobile was stated in said complaint to be $1,500. A replevin bond was thereupon executed by the defendants in this action in the sum of $3,000, which said bond provided "for the return of the said property to the said defendants (in the former action) if return thereof be adjudged," or for the payment to said defendants of such sum which may for any cause be recovered against the said plaintiff not exceeding the sum of $3,000. Thereupon the car was taken from the plaintiff in the present action and placed in the possession of the defendant herein. That in said former action a judgment in favor of defendant Maria E. Martin in that action was rendered, by the terms of which it was adjudged that "Maria E. Martin do have and recover from the said plaintiffs and their surety the possession of the said automobile, and that the same be returned to her, and if return cannot be had that she then recover the sum of $1,500, the value of said property."

This judgment was rendered and entered on December 24, 1913. On April 9, 1914, the defendant herein tendered to the plaintiff herein the said automobile, which tender the plaintiff herein refused to accept, but on the contrary commenced this action to recover from said defendant the sum of $1,500, the same being the value thereof as stated in said judgment.

The agreed statement of facts further shows that at the time said automobile was

taken from the possession of this plaintiff its value was $1,500, but that on the said 9th day of April, 1914, when its return was tendered, it was of the value of but $1,000, and that it was on account of this depreciation in the value of the property between the time of its original taking and the time of the tender of its return that the plaintiff herein refused to receive back the said property. It further appears, however, that the said automobile was not used by the defendant herein during the period it was in its possession, and that it had suffered no damage or depreciation by reason of any such use or of any neglect or want of care on the part of said defendant, but that its depreciation in value was due solely to its natural depreciation by age, and that it was the identical automobile which had been replevined which was tendered for return.

Upon the foregoing agreed statement of facts the court rendered its findings and conclusions of law, and gave its judgment in accordance therewith in favor of the defendant.

The sole point urged by the appellant on this appeal is that she was not bound to receive back said automobile from the defendant herein when the same was tendered four months after judgment had been rendered in her favor in the replevin suit, in view of the fact that between the time that said property was originally taken from her and the time of the tender of the return thereof it had suffered a depreciation in value to the extent of $500. It is not, however, alleged in the plaintiff's complaint, nor does it in any way appear from the agreed statement of facts that the said depreciation in the value of said property was due in any way to the delay of four months in making the tender of its return after judgment for its said return had been given; nor does it appear either that the plaintiff suffered any loss from said delay, or that the same was due to any willfulness on the defendant's part, or that it was other than such a lapse of time as frequently occurs between the rendition and the enforcement or compliance with a judgment. In a word, so far as this record discloses, the plaintiff was in precisely the same position at the time the tender of the return of the property was made as though such tender had been made on the day the judgment in her favor was given. Such being the state of the record it is clear that the defendant was acting in substantial compliance with the terms of said judgment in tendering the return of the property at the time such tender was made; and this being so, the plaintiff was bound to accept such tender, together with the costs of the former action also then offered in full satisfaction of the terms of her said judgment; and that not having done so she cannot maintain this action.

Judgment affirmed.

29 Cal. App. 596

BRYSON v. SECURITY TRUST & SAVINGS BANK. (Civ. 1847.)

(District Court of Appeal, Second District, California. Feb. 7, 1916.)

1. BANKS AND BANKING ⟸301(4)—SAVINGS BANKS — DEPOSITS — "NEGOTIABLE" PASSBOOK.

A passbook showing deposits in a savings bank is not negotiable, but the bank is always under the duty of ascertaining if the book when presented is in the hands of the legal holder.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1159, 1166–1168; Dec. Dig. ⟸301(4).

For other definitions, see Words and Phrases, First and Second Series, Negotiable.]

2. BANKS AND BANKING ⟸301(5)—SAVINGS BANKS—REPAYMENT OF DEPOSITS.

St. 1909, p. 87, amended by St. 1911, p. 1007, providing that the public administrator upon an order of court may withdraw without notice money of a decedent, authorizes the administrator to withdraw his decedent's deposit from a savings bank, although not presenting the passbook, where it has been lost, and the bank knows of the loss and has not paid out the deposit to another.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1174, 1176; Dec. Dig. ⟸301(5).]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Frank Bryson as administrator against the Security Trust & Savings Bank. From a judgment for plaintiff, defendant appeals. Affirmed.

L. H. Roseberry and J. H. Shankland, both of Los Angeles, for appellant. Mott & Dillon, of Los Angeles (G. C. O'Connell, of Los Angeles, of counsel), for respondent.

JAMES, J. Plaintiff, as public administrator acting in the estate of J. D. O'Neil, deceased, brought this action to recover a sum of money alleged to have been deposited with the defendant, a banking corporation doing a savings business, by his intestate. The judgment was in favor of the plaintiff, and the defendant appeals, presenting its several contentions for reversal upon the judgment roll.

After alleging preliminary matters respecting the death of O'Neil and the appointment of the administrator and the deposit of the sum of $500 by said O'Neil with the defendant, it was stated in the complaint that plaintiff has been unable to surrender to the defendant the deposit book issued to decedent, and "that said deposit book has never come into the possession of said plaintiff, and that said plaintiff has never had any knowledge or information as to the whereabouts of said deposit book, and said plaintiff is informed and believes and therefore alleges that said deposit book was lost by said deceased prior to his death, and that accordingly said plaintiff is unable to comply with any demand or requirement of said defendant banking corporation for the

return to it of said deposit book." As to this latter allegation the answer of defendant contained no denial. The answer did, however, admit that the defendant held a deposit to the credit of J. D. O'Neil in the sum of $448.80. It was then alleged that the depositor had agreed with the bank that the deposit should remain without withdrawal, except by mutual consent, for a term or period of six months, and that the contract should be evidenced in writing by a passbook which was delivered to the depositor under an agreement that no payment should be made in any case unless the passbook should be presented and the amount entered therein, and that the passbook should be presented at the bank with every deposit made and check drawn; that a provision of the by-laws of the defendant corporation to which the said O'Neil assented was as follows:

"At the final settlement of a deposit account, any passbook relating thereto shall be returned to the corporation, to be placed there on file. In case any depositor shall lose his passbook, or the same shall be destroyed or fraudulently abstracted, immediate notice thereof shall be given to the corporation, and after, first, notice of loss, destruction or fraudulent abstraction published once a week for four consecutive weeks in a daily newspaper published in the city of Los Angeles at the expense of the depositor; and, second, after the corporation shall have been properly indemnified and secured against all loss and liability to loss, a duplicate passbook may be issued to the depositor."

It was further alleged that printed in the passbook was a clause to which the depositor assented in the following terms:

"Depositors are alone responsible for the safekeeping of the book and the proper withdrawal of their money. No withdrawal will be allowed without the book and the book is the order for the withdrawal."

It was denied that any notice of loss or destruction of the passbook had been given to defendant. The court made up its findings determining the issues in favor of the plaintiff, and found that at the time of the making of the deposit there was in force and effect a by-law, a copy of which was printed in the passbook issued to O'Neil, embodying the matter set out in the answer as first above quoted; also that there was printed in the passbook the last clause quoted above.

[1, 2] It is insisted, first, by the appellant that the finding respecting the loss of the passbook was insufficient. We must bear in mind that no issue was raised as to the loss of the book by the answer, and therefore no finding as to that matter was necessary to be made. There was no demurrer to the complaint. However, we have examined the allegations of the complaint and think that the statement as to the loss of the passbook was sufficient as an allegation of the fact, and that there was no inconsistency between the allegation as to plaintiff's lack of knowledge of the whereabouts of the book and his allegation as to its loss. A statute of this state provides that the public administrator, upon an order countersigned by a judge of the superior court, may withdraw, without notice, money of a decedent where the same may be required for the purposes of administration, "or otherwise." Stats. 1909, p. 87, as amended in 1911; St. 1911, p. 1007, § 4. Under the state of the case as presented by the record submitted, we do not think it necessary to here determine whether the acceptance of a passbook by a depositor, with conditions printed therein, but not expressly assented to by the words or signature of the depositor, binds the depositor to all of the conditions so printed in the book. For the purposes of this decision, we may assume that it does. What, then, is the legal situation presented? We have it here admitted that the book was lost; hence it follows that if it has gotten into the hands of a third person, that third person as a finder of it would have no claim against the bank and could not show any legal title to the book or the credit represented therein. The bank has made no claim that it has paid out any money to any holder of the book other than the original depositor. With the knowledge that the book had been lost, any action of the bank in paying over money to the finder or holder of the book would be with the knowledge that the person presenting the same had no right thereto. It has been held in cases where the conditions stated in the book were phrased in such a way as to make a stronger case upon this contention in favor of the bank debtor, that such books were not negotiable. Allen v. Williamsburgh Savings Bank, 69 N. Y. 314. Counsel for appellant are undoubtedly correct in saying that the contract requiring the production of the book at the time of withdrawal of money and that the bank would pay to the holder of the book money on deposit, is one which is binding upon the parties. In the case just cited, however, it is said:

"The book was not a negotiable instrument. Though such an evidence of a right may be assignable by delivery, the delivery must be accompanied with the intent to assign. That intent is not established by the possession of the book merely. An officer, in the exercise of ordinary care, would or should in such a case ask for further evidence of right to demand payment. The natural and easy evidence to be given would be the order of the depositor upon the bank for the payment of money to the holder of the book. So, when an order is required, or is produced with the book without previous requirement, it is a material thing, whether it be forged or not, and the paying agent of the bank is called upon to scrutinize, and compare, and verify it."

In addition to the case cited, there may be added reference to Smith v. Brooklyn Savings Bank, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653, and Schoenwald v. Metropolitan Savings Bank, 57 N. Y. 418. In other words, that there is a duty in such cases always resting upon the bank to use ordinary care to ascertain that the passbook is in the hands of a legal holder. The condition stated in the printed notice accompanying the passbook as issued to O'Neil contemplated, where mon-

ey was withdrawn, not only that the book should be presented, but that checks should be drawn; therefore the plain understanding was that an order signed by the depositor, separate from the book, should be a prerequisite to the payment of the deposit. We are going somewhat afield in this last discussion for, as has already been pointed out, in no event could the bank be made liable to a third person for the deposit of the money of O'Neil. The book is admitted to have been lost and not to have been regularly transferred by the depositor. Assuming that whether threatened with possible liability or not, the bank might, as between itself and its depositor, insist upon a literal compliance with the conditions as to publication of notice of loss of the book and the furnishing of indemnity for the issuance of a new book, the same right, we apprehend, does not exist in the bank where the depositor has died and the money is required by the administrator. The statute referred to authorizes the public administrator to collect summarily, where his order is countersigned by a judge of the superior court, moneys on deposit with a savings bank, and we think this creates a special right which must be complied with upon the part of the bank, with the condition that a compliance with those provisions of the statute will not impose upon the bank a liability against which it is not provided to be indemnified. In so far as the statute might effect the latter result, it, of course, would be beyond the power of the Legislature to enact. In the view we have taken of the matter, no liability will be cast upon the defendant by payment to plaintiff of the amount of the deposit.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

29 Cal. App. 481

GILBERT v. ODOM et al. (Civ. 164.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

1. APPEAL AND ERROR ⟸1170(7)—REVERSAL—SUBSTANTIAL ERROR.

Judgment will not be reversed where the appellate court cannot say substantial error was committed by the trial court in ruling on the addmission of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4543; Dec. Dig. ⟸ 1170(7).]

2. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDING BASED ON CONFLICTING EVIDENCE.

An appellate court will not disturb the finding of the trial court based on conflicting evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸ 1011(1).]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Grace Gilbert against W. R. Odom and the United States Fidelity & Guaranty Company. From a judgment for plaintiff, the surety company appeals. Judgment affirmed.

Geo. Cosgrave, of Fresno, for appellant. W. D. Crichton and C. K. Bonestell, both of Fresno, for respondent.

PER CURIAM. This is an action to recover the sum of $500, which was deposited by the plaintiff with the defendant W. R. Odom, a justice of the peace in Fresno county, as bail for the release of one Maggie Taylor who was charged with a misdemeanor. Upon trial Maggie Taylor was acquitted, and the bail exonerated. In the present action the court gave judgment for the plaintiff and against the defendants in the sum sued for, with interest and costs. The appeal is by the surety company upon the official bond of defendant Odom.

At the trial Odom claimed that he rendered services to the plaintiff in the matter of securing a liquor license, and also in procuring or attempting to procure the removal of a certain marshal whose activities in the performance of his duty were obnoxious to her and detrimental to an enterprise conducted by her in Coalinga, and that it was understood and agreed by plaintiff and him that he should in payment for those services retain the value thereof out of the bail money on deposit with him.

[1] While perhaps it may be said that the trial court should have been more liberal in its ruling on the admission of evidence on the cross-examination of Odom, still we are unable to say that any substantial error was committed in that regard.

[2] Concerning the evidence in the case it is sufficient to say that there is a conflict therein, in view of which, under well-settled law in this state, this court will not disturb the finding of the trial court.

Judgment affirmed.

30 Cal. App. 19

HASSEY v. RUGGLES et al. (Civ. 1740.)

(District Court of Appeal, First District, California. Feb. 29, 1916. Rehearing Denied by Supreme Court April 27, 1916.)

1. EXCHANGES ⟸7—PROPERTY IN SEAT OR MEMBERSHIP.

Where the constitution and by-laws of a stock exchange provided that all property should vest in the officers in trust for the members, that no member had any individual right in the property, except upon the final dissolution, that on the death of a solvent member, the board should dispose of his seat to the best advantage for the benefit of his widow and children or those designated by will, that the seat of a delinquent member should revert to the board in trust to be sold and proceeds devoted to the discharge of his obligations among fellow members, and that the seat of a member should be a continuing security for his debts, the deceased being at his death a member in good standing, and not having disposed of his seat and privileges, the attempted action of the president of the board to dispose of the share of the deceased and a distribution of money de-

rived from the sale of property belonging to the board, to alleged creditors of deceased, was illegal and ineffectual to divest the president of the sum, whether in his capacity as trustee or as the authorized agent of the board, or to relieve him or his fellow members of their duty to account for it to the successors of interest to the deceased.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.]

2. Exchanges ⟸7—Division of Assets—Decedent Member.

Members of a stock exchange having the power to alter their original agreement providing that no member had a divisible interest in the property of the exchange before the final dissolution, and to agree to divide the proceeds of the sale of property, the successors in interest of a deceased member not being given an opportunity to participate in the agreement, by the institution of this action assented thereto, and are entitled to an equal share.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.]

3. Exchanges ⟸7—Members—Rights as to Property.

Where an agreement by the members of a stock exchange to divide the proceeds of the sale of property, and the receipt therefor was expressly made broad enough to include all members living or dead, the successor in interest of a deceased member was entitled to his proportionate share, since the agreement constituted a waiver on the part of other members to claim any portion of his share, and they cannot be heard to claim that the distribution was illegal.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.]

4. Exchanges ⟸7—Burden of Proof—Admissions of Fact.

Where the defendant members of a stock exchange admitted in their answer that the decedent was a member in good standing at the time of his death, and that the sum recovered by its president represented his share of the larger sum to which he would have been entitled, had he been a member in good standing having no creditors in the association at the time of distribution, the burden was on defendants to show a rightful distribution of the money to persons other than the decedent or his successors in interest, who were proven to be existing creditors at the time of his death.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.]

5. Exchanges ⟸7—Evidence—Sufficiency.

In an action for the decedent's share in the distribution of the proceeds of the sale of property by the defendant stock exchange, evidence *held* to sustain a finding that the decedent was not indebted to any of his fellow members at the time of his death.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.]

6. Appeal and Error ⟸1071(5)—Review—Harmless Error.

Where the receipt and agreement signed by the members of a stock exchange for their share in the distribution of money expressly waived and released all claim to any portion to said money, error in finding that the decedent was not indebted to his fellow members at the time of his death was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4238; Dec. Dig. ⟸1071(5); Trial, Cent. Dig. §§ 940, 942.]

7. Exchanges ⟸14—Action—Share of Deceased Member—Finding.

The issue presented by the defendant stock exchange that under its constitution and by-laws, the equitable interests of every member shall remain a continuing security for his obligations to fellow members, was covered by the finding of the court that the decedent was a member in good standing in said association and owed no obligations to any members thereof.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. § 17; Dec. Dig. ⟸14.]

8. Appeal and Error ⟸195—Preservation of Objections—Amendments—Parties.

Where the plaintiff brought an action as administrator of decedent and was allowed without objection to amend his complaint and substitute himself in his own right as only child and heir of the decedent, defendants cannot on appeal complain that the plaintiff was not entitled under the constitution and by-laws to bring the action as administrator.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1149; Dec. Dig. ⟸195.]

9. Exchanges ⟸7—Liability for Acts of Officer.

Where one defendant received the money subject of suit, as the president and authorized agent of the defendant stock exchange, the members are individually and collectively liable for his actions.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Stuart A. Hassey, administrator of F. A. Hassey, deceased, against Mary A. Ruggles, administratrix of A. B. Ruggles, deceased, and others. From a judgment for plaintiff, and an order denying a motion for new trial, the defendants appeal. Affirmed.

Aitken & Aitken, of San Francisco, for appellants. Cushing & Cushing and Grant & Zimdars, all of San Francisco, for respondent.

RICHARDS, J. This is an action originally commenced by the plaintiff as the administrator of the estate of F. A. Hassey, deceased, against A. B. Ruggles and a number of other persons comprising the membership of the San Francisco Stock and Exchange Board, an unincorporated association, to recover the sum of $4,000.

The facts out of which this alleged indebtedness arose are substantially undisputed. The San Francisco Stock and Exchange Board was organized in the year 1862 by the voluntary association of its members for the purpose of mutually facilitating the business in which they were severally engaged. Articles of agreement creating the association were adopted which formed and still form its constitution and by-laws, and set forth the object and functions of the association, the powers and duties of its officers and the rights and privileges of its membership. By the terms of these articles of agreement it was provided that the legal title and ownership of all the property, effects, and assets of the association should vest in its officers in trust for the benefit and enjoyment of its

members; that no member under any circumstances should be deemed to have or claim or possess any individual right, title, or interest in the property or assets of the association except when the same should be finally dissolved and its effects distributed among its remaining membership; that in the event of the death of a solvent member the board should dispose of his vacant seat to the best advantage for the benefit of his widow and children, or of those persons who should be designated by him in his last will and testament as entitled thereto, provided that no nominee of a retiring or deceased member should acquire any right to such seat or privileges of membership until elected thereto as provided by the constitution; that in the event of the suspension or delinquency of a member his seat and privileges of membership should revert to the board, the president of which was in such event constituted a trustee, with authority to sell the said seat and privileges of such delinquent member, and devote the proceeds of such sale to the discharge of the obligations to his creditors among his fellow members of the association. It was further provided that the seat and privileges of every member should be deemed and taken to be, as long as he remained a member, a continuing security to all members of the board with whom he might deal according to its rules for the performance of his contracts and the fulfillment of his engagements.

The record in the present cases discloses that F. A. Hassey became a member of the association a few years after its formation, and continued to be such member thereof up to the time of his death in the year 1897; and that at the said time of his death said F. A. Hassey was a member in good standing therein, and had not been suspended or declared delinquent, nor had his seat or privileges therein ever been sold either for the benefit of his heirs, or his creditors among his fellow members of the board or otherwise. The record in the present case further discloses that at an early date in its history the association, desiring for the convenience of its members and their business a building, purchased a certain property, raising the purchase price therefor by contributions and fees of membership. At the time of this purchase it was deemed advisable to form a holding corporation in order to take the title and manage the said property. This was done; a membership corporation known as the "Company of Associated Stockbrokers" was formed, having no capital stock, and with its membership limited to the members of the San Francisco Stock and Exchange Board, and which corporation had no other purpose for existence than to hold the legal title to the property and manage the same for the benefit of the members of said board. The property thus purchased and held was retained until the year 1903, when it was sold for the net sum of $270,000. Thereupon the then living members of the San Francisco Stock and Exchange Board concluded to divide said sum of money among themselves and among certain successors of deceased members, and accordingly there was caused to be prepared and executed a receipt in the following form:

"San Francisco, Cal., July 24, 03.

"Received of the Company of Associated Stock Brokers the sum of three thousand dollars ($3,000.00) being my proportion of the sum of $270,000.00 distributed by the said company as part of the proceeds realized from its real estate on Pine street in San Francisco.

"And I do hereby ratify each and every act done by said corporation or its directors or officers in connection with said sale and distribution; and I hereby consent that in said distribution all of the owners of seats, whether delinquent or otherwise in the San Francisco Stock and Exchange Board, shall be recognized as entitled to participate in said distribution. And I hereby waive and release all interest in or claim to the proceeds of said sale except as paid to me herewith. [Signed]"

Upon signing the foregoing receipt each of the members of the association executing the same received the sum of $3,000, and every member of the association, or the representatives of the deceased members thereof, signed the said receipt and received the said sum of $3.000 as his or their proportionate share in the division of said larger sum of money, except the estate or legal representatives of F. A. Hassey, deceased, who were not given an opportunity to sign and execute said receipt and who received no portion of said sum of money. Instead, the said Company of Associated Stockholders paid over the sum of $3,000, representing the Hassey share in the aforesaid division, to A. B. Ruggles, who received the same as the president of the San Francisco Stock and Exchange Board, and who, while admitting the receipt of said money, refused to pay over any portion thereof to the estate or legal representatives of F. A. Hassey, but, on the contrary, claimed and exercised the right to distribute the same among certain persons whom he asserted and now asserts to have been the creditors of said F. A. Hassey at the time of his death; and this action having been thereafter brought, he and his fellow defendants herein undertook to justify such refusal and action on his part upon said ground and under the provisions of the constitution and by-laws of the association above set forth.

The trial court rendered judgment in favor of the plaintiff as the successor in heirship and interest of said F. A. Hassey, deceased, and against all of the said defendants for the said sum of $3,000, with legal interest up to the time of such judgment; and from such judgment and the order denying the defendants' motion for a new trial they prosecute this appeal.

The chief, and in fact the only substantial, contentions of the appellants herein are that the evidence in the case is insufficient to sustain the findings of the court, and that

the findings in their turn do not support the judgment. A careful examination of the record, however, convinces us that the foregoing facts are fairly deducible from the evidence in the case, and they are substantially set forth in the findings with certain immaterial exceptions to be hereafter noted; and hence that the only real issue before us is as to whether the findings support the judgment.

The solution of this question will depend upon the answer to be given to the following inquiries: (1) What interest did F. A. Hassey have during his lifetime in the particular property of the San Francisco Stock and Exchange Board, the title to which was held by the Company of Associated Stockbrokers, and from the sale of which the money was derived, for his proportionate share of which his successor in interest brings this action? (2) What effect did the execution of the receipt and agreement of the several members of the association other than F. A. Hassey, executed by them upon the distribution of said money, have upon his right or that of his successor in interest to recover in this form of action?

The relation between the members of the San Francisco Stock and Exchange Board and the Company of Associated Stockbrokers was considered in the early case of Clute v. Loveland, 68 Cal. 254, 9 Pac. 133, wherein it was decided that the property standing in the name of the latter corporation was in equity the property of the members of the said Stock and Exchange Board. This being the case, and the membership of said corporation being composed wholly of the membership of the said board, the existence and actions of the said corporation as to the holding or disposing of this particular property, and also as to the distribution of the proceeds of the sale thereof among the members of the said Stock and Exchange Board, who were at all times and in all forms the equitable owners thereof, becomes an immaterial factor; for the case stands as though the property at all times had been held in the names of the denoted officers of the Stock and Exchange Board who, under its constitution and by-laws, were invested with the title to all its property in trust for the benefit of the membership of the unincorporated association. Under the articles of agreement creating the said Stock and Exchange Board the rights and equities of its members with respect to the assets, and the particular advantages which accrued to each member thereof, were all comprised within and defined by the terms "the seat and privileges of membership." By its constitution and by-laws a retiring member in good standing could dispose of his seat and privileges of membership, and with the consent of the board might introduce his successor in interest into the body of its membership. In the case of a deceased member the board itself was given the right and charged with the duty of disposing of the seat and privileges of the deceased member for the benefit of his widow and children, or of those persons designated in his will as entitled thereto. In case of a member delinquent in the matter of keeping his contracts or paying his obligations as to his fellow members, the president of the board became invested with a trusteeship over the seat and privileges of the said delinquent, with power to dispose of the same in the same manner that a person retiring while in good standing might dispose of his seat and privileges, and of distributing the proceeds of such distribution among those of his fellow members who were his creditors. These provisions of the constitution bounded, defined, and limited the control of the members of the association over their equitable interest therein, and also bounded, limited, and defined the rights and powers of the board and its officers in respect of the equitable interests of delinquent members, as well as the method by which alone those powers and rights could be exercised. Shannon v. Cheney, 156 Cal. 567, 105 Pac. 588.

From this discussion the following conclusions logically result: If F. A. Hassey at the time of his death was a member of the board in good standing, and had not otherwise disposed of his seat and privileges therein, the board became invested with the right and duty of disposing of the same for the benefit of his widow and children or designated devisees; and in case the board failed to exercise this right or perform this duty the heirs or successors in interest of said deceased could doubtless have compelled such action by some appropriate legal proceeding; and in such action the form in which the property of the board then was, whether real estate or money, would be quite immaterial, for the reason that in every or any form it was comprised within the term by which the members of the board, in their articles of agreement creating it, had seen fit to define the equitable interests of each member therein, viz., "the seat and privileges of membership." So also in the case of a delinquent member the only method by which his equitable interest in the properties and valuable privileges of the board could be distributed by the president of the board among those of his fellow members who were his creditors, was by a similar disposition of his "seat and privileges of membership," and any other method of disposing of or distributing the equitable interest of the delinquent member in the property of the board or in any portion thereof would be illegal as outside of the articles of agreement and beyond the power of the president of the board, who was invested with a trusteeship over the said equitable interest of such delinquent member in such property.

[1] Applying these conclusions to the facts of the instant case, it would necessarily follow that the attempted action of A. B. Ruggles, as president of said board, in the way

of distributing the sum of $3,000 which had come into his hands as the trustee of whatever equitable interest the successors of F. A. Hassey, deceased, had therein, among certain persons who were asserted to be creditors of said F. A. Hassey, deceased, was illegal, and hence ineffectual either to divest the said A. B. Ruggles of the said fund, either in his capacity as trustee thereof or as the authorized agent of said board in its possession, and was also ineffectual to relieve said A. B. Ruggles or his fellow members of said board of his or their duty to account for the same to the successor in interest of said F. A. Hassey in some appropriate form of action.

[2, 3] At this point, however, another element enters into the case affecting materially the rights of the members of the San Francisco Stock and Exchange Board in their relation to each other, and to their equitable interests in that particular portion of the property of said association which was derived from the sale of the real estate held for their benefit by the Company of Associated Stockbrokers. After the sale of said property and receipt of said money by said holding company, the living members of the San Francisco Stock and Exchange Board, being also the entire membership of said holding company, entered into the agreement to divide said money among themselves, and also among the representatives of deceased members, which agreement is evidenced by the receipt above set forth, and which said receipt and agreement was signed by every living member of said board and by the representatives of every deceased member thereof except F. A. Hassey; and thereupon in accordance wherewith every member of said board or his successor in interest, with this single exception, received his or their proportionate share of said money, amounting in each case to the sum of $3,000. By the terms of this writing and by its execution the provisions of the original articles of agreement between the members of the association with respect to their rights and interests in this property—or rather, in this particular portion thereof—were altered to the extent that whereas, under their original agreement no member of the association had any divisible interest in any specific portion of its property prior to its final dissolution, the members thereof now agreed and undertook to presently divide this particular sum of money among themselves. That the members of an unincorporated association may, by the consent of all their number and by an appropriate writing, thus alter the terms of their original articles of association there can be no doubt. And if it is claimed that F. A. Hassey or his successor in interest, not having signed or executed such agreement, may not have or take an equal advantage therefrom, the answer is twofold: First, the record shows that the successor in interest of F. A. Hassey, deceased, was not given an opportunity to sign or execute this agreement or to participate in its benefits; and, second, that notwithstanding this fact the plaintiff has chosen to assent to it, and has manifested that assent by the institution of this action. And it further appears by the terms of said receipt and agreement that it was expressly made broad enough to include every member of the association, living or dead, within its terms, and thus to give to F. A. Hassey or his successor in interest not only the same right to a distributive share of this money which all of his fellow members undertook to exercise, but also to constitute a waiver on their part of all right or claim to any portion of his share in said fund. The defendants herein, having thus admitted the right of F. A. Hassey, whether delinquent or not, to his equal distributive share of said money, and having expressly surrendered by said writing all of their interest therein, cannot now be heard to claim either that said distribution was illegal, or that the successor in interest of said F. A. Hassey is not entitled to receive the proportionate share thereof which would otherwise have been the share of F. A. Hassey had he been a living member of said association at the time of the distribution of said fund.

[4, 5] The appellants make the further contention that the findings of the court to the effect that F. A. Hassey was not indebted to any of his fellow members of the association at the time of his death, and hence had no creditors to whom the president of the board could lawfully have distributed the money in question, are entirely unsupported by the evidence in the case. The record upon this subject shows that it is averred by the complaint, and admitted by the defendants in their answer, that F. A. Hassey was at the time of his death a member of the board in good standing. It is also admitted therein that the particular sum of $3,000 received by the president of the association represents the share in the larger sum to which F. A. Hassey would have been entitled had he been a member in good standing having no creditors among his fellow members of the association at the time of the distribution of said fund. These being the defendants' admissions, the burden was unquestionably cast upon them to show a rightful distribution of this money to persons other than F. A. Hassey or his successor in interest, who not only claimed or were asserted to be his creditors, but who were actually proven to have been such existing creditors at the time of his death. No such proof was proffered by the defendants; no showing was made that any claims of such creditors had been presented to the estate of Hassey; no single creditor was produced to testify that he was such; no evidence of such debts was presented; and whatever was said by the witnesses for the defendants upon the subject of Hassey's creditors was so evidently hearsay as to amount at most to no more than the statement of these witnesses that there

were some persons who claimed to be creditors of Hassey, but of what nature or legality, or in what amounts these claims consisted, was nowhere stated. Under such conditions it is clear that the finding of the court can be justified by the absence of proof upon the subject.

[6] But beyond this it affirmatively appears by reference to the receipt signed by every member of the board other than F. A. Hassey or his successor in interest, and hence by every person who could have been his creditor among its members, that each and all of them expressly waived and released all claim to any portion of said money, and agreed that whether delinquent or not F. A. Hassey or his successor in interest was entitled to said distributive share of said fund. This being so, it became immaterial whether or not F. A. Hassey was indebted to his fellow members of said board in any sum whatever at the time of his death, and hence it is immaterial what the court found upon that subject.

[7] The appellants further maintain that the court has failed to find upon the issue presented in their answer that under the constitution and by-laws of the association the equitable interests of every member therein shall be and remain a continuing security to all members of the board with whom he might deal for the performance of his contracts and the fulfillment of his obligations. A reference to the findings will show that such a clause existed in the constitution and by-laws of the association; and if any further finding upon the subject was necessary it was covered by the finding of the court that at the time of his death F. A. Hassey was a member in good standing in said association and owed no obligations to any members thereof.

The appellants further contend that under the constitution and by-laws of the board the equitable interest of a member thereof in the event of his death was not given to the estate of the deceased member, but was to be disposed of by the board, the proceeds of such disposition to go immediately to his widow and children, or to his devisees in case of a will; and that this being so, they have been sued by a plaintiff in the person of an administrator of the estate of F. A. Hassey, deceased, who was not entitled to sue. The appellants also contend that the judgment in this case has been made to run in favor of a person not originally a plaintiff therein, to wit, Stuart A. Hassey.

[8] In view of the fact that it is averred in the last amended and supplemental complaint, filed by the plaintiff herein without objection on the part of said defendants, that F. A. Hassey was a widower at the time of his decease, and that Stuart A. Hassey was his only child, and that by proper proceedings in probate his estate has been distributed to said Stuart A. Hassey as his only son and heir; and these averments being admitted to be true by the defendants through their failure to deny the same, it would seem that their two last-named contentions are inconsistent; for, even if it be conceded that, strictly speaking, Stuart A. Hassey, as administrator of his father's estate, was not entitled to commence this action, he was confessedly entitled to do so as the only child and heir of F. A. Hassey; and since without objection at the time on the part of the defendants he was permitted to correct this error, if any, by the substitution of his name as plaintiff in his own right in his final pleading, we think that neither of the foregoing contentions of the appellants can now be maintained.

The appellants have presented a large number of assignments of errors of law on the part of the court committed during the trial; but an inspection of the record will reveal that the asserted merit of each of these assignments depends upon the acceptance of the appellants' theory of the case, which neither the trial court nor this tribunal has seen fit to adopt, and that otherwise there is no merit in any of these.

[9] Finally the appellants assert that the judgment herein should not have been rendered against any of the defendants other than the defendant Ruggles, for the reason that he is the only one of the defendants who is shown to have received the said sum of $3,000; but the record shows indisputably that said Ruggles, at the time he received and claimed the right to disburse the said sum, was the president and authorized agent and representative of the entire membership of the board in so receiving and disbursing the same, and hence that for his action in the premises the members of the board must individually and collectively be held responsible.

No substantial error appearing, the judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(29 Cal. App. 543)

PEOPLE v. FREEMAN. (Cr. 459.)

(District Court of Appeal, Second District, California. Feb. 3, 1916.)

1. BANKS AND BANKING ⊂⊃21 — CRIMINAL OFFENSES—IMMATERIAL VARIANCE.

In a prosecution for passing a check without having sufficient funds in the bank to pay it, where the information charged that the check was passed on or about the 12th day of March, 1915, and, as set out in the information, the date line of the check ran "3-2 1915," while the check, when offered in evidence, was dated "3-12 1915," the evidence showing that the omission of the figure 1 before the figure 2, as stated in the information, was a clerical error, while it was shown that no other check was received by complainant on the date charged, the variance was immaterial.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. ⊂⊃21.]

2. CRIMINAL LAW ⟸1169(3)—APPEAL AND ERROR — HARMLESS ERROR — ADMISSION OF EVIDENCE.

In a prosecution for passing a check without sufficient funds in bank, error in permitting the bank cashier to testify from the sheet made up from the books of the bank as to the state of defendant's account and the checks drawn against his credit, was harmless, where the matters which the inadmissible evidence tended to show were admitted by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3139; Dec. Dig. ⟸ 1169(3).]

3. BANKS AND BANKING ⟸21—CRIMINAL OFFENSES—TRIAL—INSTRUCTION.

In a prosecution for passing a check without sufficient funds in bank, the court properly modified an instruction offered by defendant advising the jury that his intent was "the all-important element," to read it was "an" important element.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. ⟸21.]

4. BANKS AND BANKING ⟸21 — CHECK DRAWN TO CASH OR BEARER—STATUTE.

A check drawn to "cash or bearer" is such an instrument as is described in Pen. Code, § 476a, denouncing the making or drawing of any check or draft without sufficient funds.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. ⟸21.]

5. BANKS AND BANKING ⟸21 — PASSING WORTHLESS CHECK.

In a prosecution for passing a check without sufficient funds in bank, where there was defective proof as to presentment of the check, conviction was nevertheless proper where it was shown that at the time of making the check and thereafter defendant had no credit at the bank upon which it was drawn.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. ⟸21.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

H. L. Freeman was convicted of crime, and from the judgment and an order denying new trial, he appeals. Judgment and order affirmed.

John A. Berry, of El Centro, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged with and convicted of the crime of passing a check without having sufficient funds to his credit in the bank upon which it was drawn to pay the amount specified therein. The check was drawn to "cash or bearer" and was signed by the defendant. The jury returned a verdict of guilty, with a recommendation for probation. The court ignored the recommendation and sentenced defendant to serve a term of three years in prison. He appeals from that judgment, and from an order denying his motion for a new trial.

[1] The information charged that the check was passed on or about the 12th day of March, 1915, and as set out in the information, the date line of the check read as follows: "Brawley, Cal. 3-2 1915." The check when offered in evidence corresponded in all respects with the copy set out in the information, except that the figure "1" appeared in the date line, making the wording "3-12 1915," instead of "3-2 1915." To the introduction of the check objection was made on the ground that there was a material variance between the allegations and the evidence offered. The objection was overruled. It is now claimed that the court in making this ruling committed error prejudicial to the rights of the defendant. It may be admitted that there was a variance, and the question presented is as to whether that variance was of such a nature as might permit of the appellant being prosecuted for a separate offense based upon the check as it appeared in its form different from that described in the information. If the variance was of that kind, then it must be said that a miscarriage of justice would result upon this conviction. The question to be answered is, as expressed in the decision in People v. Terrill, 132 Cal. 497, 64 Pac. 894, where the court quotes from Underhill on Criminal Evidence:

"Does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged, that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense?"

In People v. Arras, 89 Cal. 223, 26 Pac. 766, the court said:

"A material variance between the proof and the information arises when an acquittal of the defendant under the information would be no bar to a further prosecution for the same offense."

Considering the variance there presented, the court further declared that:

"The discrepancy did not in any respect affect the validity of the information, nor could it in any way have misled or prejudiced the defendants in their defense; it affected none of their substantial rights; the variance was therefore immaterial."

Examining the evidence in this case, it seems to have been shown clearly enough that the omission of the figure "1" before the "2" in the date line, was, as stated by the district attorney, a clerical one, and all of the evidence identified the check as being that which it was charged the defendant had unlawfully passed. It was shown that no other check was received from the appellant by the complainant on the date charged, to wit, the 12th day of March, 1915. As we view the evidence, there could have been no question but that the check offered in evidence was the one by the use of which the crime charged was perpetrated; and we have no doubt at all but that the appellant would not be embarrassed in making proof under a possible subsequent charge made affecting the same check that he had theretofore been convicted of the crime, and hence had been once in jeopardy. It follows, then, that the variance was immaterial.

[2] It appeared that the appellant had, prior to the date of the transaction referred

to in the information, a bank account with the banking institution upon which the check described was drawn. The bank cashier, over the objection of appellant, was permitted to testify from a sheet made up from the books of the bank as to the state of the account, and the checks drawn against the credit which appellant had had at the bank were introduced in evidence. All of this testimony was objected to. It would be profitless to discuss the question of the competency of this evidence, in view of the requirement which the law imposes upon us that we shall examine the whole of the evidence to determine whether in a given case there has been a miscarriage of justice. The defendant could, of course, have rested on the proof offered by the prosecution, but he did not do so and proceeded to furnish testimony himself, and from this testimony it appears that he admitted the passing of this particular check; and admitted that the time he drew it he had no funds on deposit at the bank, but claimed that the situation was explained to the complainant, and that the complainant understood that there would be funds at the bank to meet the check at a time some few days in the future. Defendant furnished this evidence by his own mouth, and if there was any error committed in the introduction of the bank's statement or checks (it is not determined that there was such error), it was cured by the admissions made of those facts which the evidence objected to was offered to prove. There was evidence showing that, even at the date when defendant claimed that he had promised to have money in the bank to meet the check, the funds were not provided.

[3-5] Appellant claims that the court erred in modifying an instruction offered by him which advised the jury that the intent of the defendant was "the all-important element." The court changed the language and made the instruction read that the defendant's intent was "an" important element. The modification, we think, was properly made; proof of intent was no more an important requisite than proof of the passing of the check itself. If the intent was an important element, as the court told the jury, it was, as the court properly said in another instruction which is objected to, "a mental process" to be gathered from evidence of words and acts of the party charged. The check described in the information, notwithstanding that it was drawn to "cash or bearer," was such an instrument as is described in section 476a of the Penal Code. That section describes a check or draft "for the payment of money." The check issued by appellant was unmistakably an order for the payment of money, drawn by him as such and accepted with that understanding. If there was any defect of proof as to the presentment of the check, as is claimed by appellant, there would be no error in the conviction where it was shown, as appeared by the appellant's own admission, that at the time of the making of the check and thereafter he had no credit at the bank upon which the check was drawn. Upon the whole record, it cannot be said that any right of the defendant in the conduct of his trial has been so infringed upon as to suggest the conclusion that there has been in this case a miscarriage of justice.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(29 Cal. App. 478)

PEOPLE v. ECTON. (Cr. 441.)

(District Court of Appeal, Second District, California. Jan. 28, 1916.)

1. JURY ⟸131(2)—EXAMINATION OF JURORS.
The limitation of examinations of jurors upon their voir dire to determine propriety of peremptory challenge is in the discretion of the judge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 562; Dec. Dig. ⟸131(2).]

2. CRIMINAL LAW ⟸1119(4)—APPEAL—RECORD—MATTERS NOT SHOWN.
An objection to refusal of trial court to allow counsel to read in his argument "extracts from daily papers" will not be considered on appeal where the extracts do not appear in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2929; Dec. Dig. ⟸1119(4).]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

George Ecton was convicted of murder, and appeals. Affirmed.

E. M. Barnes, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted of the crime of murder and sentenced to imprisonment for life. The appeal is from the judgment and from an order denying his motion for a new trial.

The alleged errors complained of by appellant are that the court improperly limited his counsel in the examination of jurors; that the court refused to permit him to ask certain questions in cross-examination of one of the state's witnesses; and that the court refused to allow appellant's counsel in his argument to the jury to read to the jury, by way of illustration, "extracts from the daily papers of Los Angeles," which extracts were not in evidence.

[1] On the first point it is insisted that counsel was entitled to ask the questions for the purpose of obtaining information which would enable him to determine whether he would or would not exercise a peremptory challenge. The limitation of examinations of jurors on their voir dire for that purpose is very completely within the discretion of the judge, and defendant is not

entitled to "embark in a general exploration for the sole purpose of satisfying himself whether it will be safe to be tried by a juror against whom no legal objections can be urged." The rulings were correct. People v. Edwards, 163 Cal. 752, 127 Pac. 58.

The court's refusal to allow defendant's counsel to cross-examine the witness Stevens with respect to his testimony at the preliminary examination affected only the form of the questions, and did not go to the extent of denying the right to ask appropriate questions showing contradiction or inconsistency between the testimony of Stevens at this trial and that given by him at the preliminary examination.

[2] As to the refusal of the court to allow the reading in argument of extracts from newspapers, it need only be said that the record fails to show what the offered extracts were or what relation, if any, they might have had to the subject-matter of this case. The "suggestion of diminution of the record" attempted to be made by counsel is wholly insufficient.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 559

PASSOW & SONS v. HARRIS et al.

(Civ. 1705.)

(District Court of Appeal, Second District, California. Feb. 4, 1916.)

1. SALES ⇐150(3) — CONTRACTS — CONSTRUCTION—"ON OR ABOUT."

Where a contract of sale required articles to be delivered on or about a certain day, delivery 10 or 12 days thereafter is within a reasonable time and sufficient compliance with the contract, though time was made of the essence; the expression "on or about" not being equivalent to the fixing of a day certain.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 356; Dec. Dig. ⇐150(3).]

2. SALES ⇐176(1)—TIME OF DELIVERY—ESTOPPEL.

Where, after the seller failed to deliver the property on the day fixed, the buyer requested delivery to be made at a subsequent day, and countermanded his order only the day before the one so last fixed, the buyer is estopped, not having raised the matter before, to urge that the seller's noncompliance excused his performance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436, 438, 443, 444; Dec. Dig. ⇐176(1).]

3. SALES ⇐175—TENDER OF PROPERTY—NECESSITY.

Under Civ. Code, § 1440, declaring that, if a party to an obligation gives notice to another before the latter is in default that he will not perform, the other party is entitled to enforce the obligation without performing or tender of performance, a seller, the buyer having notified him that he would not comply with the contract, need not tender delivery before instituting suit thereon.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 435; Dec. Dig. ⇐175.]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Passow & Sons, a corporation, against Herman Harris and F. J. Harris, doing business as Harris Bros. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Henry K. Norton and Wilbur Bassett, both of Los Angeles, for appellants. Schweitzer & Hutton, of Los Angeles, for respondent.

JAMES, J. Defendants by written contract agreed to purchase from the plaintiff three billiard tables for an aggregate price of $975. The office of plaintiff was at the city of San Francisco. In this contract it was agreed that $225 should be paid as the initial payment, and the sum of $30 per month thereafter paid until the whole amount mentioned had been satisfied. The contract also contained this clause:

"Shipped to Los Angeles on or about the 5th day of June, 1913. * * *"

The contract in its other terms provided that, when the total price had been paid, a bill of sale should be given, and further provided that:

If the purchaser should "refuse to accept delivery of or to return the said goods, then the entire unpaid balance of this contract, with interest, shall in either of said cases immediately become due and payable, and the said Passow & Sons may enforce payment of the entire amount, principal and interest, then unpaid, or, if they so elect, they may cancel this contract and take possession of said goods, without legal process."

A clause in the latter portion of the writing reads as follows:

"In all matters herein mentioned time is declared the essence of this contract."

Defendants at the time they entered into this contract owned three old tables which it was agreed should be valued at $225, and that amount credited as the initial payment on the contract for the new tables. Defendants refused to receive the new tables when offered to them, and converted the old tables to their own use; whereupon this action was brought to recover the balance due under the contract for the sale of the new tables, and also the sum of $225 as the value of the old tables. Judgment was in favor of plaintiff. A motion for a new trial being denied, this appeal was taken from the order made in that regard, and also from the judgment.

The evidence showed that upon the making of the contract plaintiff caused the new tables to be shipped from Chicago to San Francisco, at which latter place they were received. On June 9th the tables had not been shipped from San Francisco to the vendees in Los Angeles, and on that date the defendants wrote to the plaintiff that they had not sold any of the old tables, but that the plaintiff could, any time after June 20th, ship the three new tables to them. In a letter dated June 10th the defendants again wrote the plaintiff as follows:

"I am writing to let you know that we sold the 3 tables about 1 hour after I wrote you yes-

terday. * * * You can ship 3 tables any day that will be convenient to you."

In a letter dated June 11th the plaintiff replied:

"Your three new tables will be shipped from here June 17th, and will arrive in your city about three days later."

In a letter dated June 16th defendants wrote the plaintiff as follows:

"I wish to say that it will not be necessary for you to ship the tables ordered, and I herewith notify you that I countermand this order, as I have made other arrangements."

The plaintiff immediately wired in response to this letter, stating to the defendants that it would insist upon the contract being enforced, and in a letter of the same date reiterated their determination in that regard, and requested that defendants give advice as to what date they desired the tables shipped; otherwise that the plaintiff would proceed against them. To this letter the defendants made response by telegram as follows:

"Do not ship tables we revoked and countermanded order letter June sixteenth refuse to accept."

The testimony showed that immediately following the receipt of this telegram the agent of plaintiff came to Los Angeles and demanded the delivery of the three old tables purchased by the plaintiff, and was told by one of the defendants that the tables were gone, and that he did not know where they were. Defendants offered no testimony, but depended for their defense upon two principal contentions: First, that the condition as to delivery of the new tables on or about the 5th of June was not complied with, and that therefore the plaintiff was in default as to its obligation in that particular; second, that there was no sufficient tender made of the articles purchased prior to suit brought.

[1, 2] We think there is no merit in either of these contentions, and that the failure of the defendants to fulfill their agreement is wholly without excuse in the law. It would appear that the phrase in the contract making time the essence thereof was more particularly designed to affect the conditions required of the defendants in the matter of the making of payments. But, even though it may be said that strict compliance was agreed to be made as to all matters embraced within the terms of the contract, the parties themselves failed to make the delivery date certain and specific, for they provided that the delivery of the new tables should be "on or about the 5th day of June, 1913." "On or about" does not mean exactly, and to such a phrase the court would apply the construction that that condition is satisfied where delivery was made within a reasonable time after the 5th of June. And it may be fairly said that there had been no unreasonable lapse of time when, on June 9th, the defendants wrote, stating, in effect, their inability to then receive the tables, and requesting that they be shipped after the 20th of June. Then on the 10th of June, after giving this last-mentioned notice, they advised the plaintiff that the three tables might be shipped on any day that was convenient. The plaintiff immediately advised them that the tables would be shipped on the 17th, one week later. No objection was raised to this date until the day before the 17th, when the defendants attempted to rescind their contract. In their correspondence they seem not to have complained of any delay in the matter of the delivery of the new tables, and it is very apparent that the reason for their action was something quite foreign to a contention of that sort. There is every reason for holding that the defendants by their conduct are estopped from raising any question as to the failure of the plaintiff to deliver in time. We think that the trial judge's conclusion, as it inferentially appears from the findings made, that no default was committed by the plaintiff in the performance of any of its obligations, is fully sustained by the evidence.

[3] The plaintiff, upon the announced refusal of the defendants to proceed further under their contract or to accept the tables purchased, was under no obligation to make a tender of the physical property agreed to be sold. It acted strictly in accordance with a term of the contract which we have quoted, which covered the precise contingency that arose between the parties to the contract here involved. Moreover, plaintiff's action was directly in accordance with the provisions of the statute:

"If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party." Civ. Code, § 1440.

There are no further points presented which call for or merit consideration.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; SHAW, J.

29 Cal. App. 488

ALEXANDER et al. v. STONE et al.

(Civ. 1557.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

1. SALES ⇐87(3)—EVIDENCE—SALE BY SAMPLE.

Where goods were purchased after an examination, or an opportunity to examine, though the samples were sent to the defendants to aid them in soliciting orders, evidence *held* insufficient to sustain a finding that the sale was by sample.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 245–247; Dec. Dig. ⇐87(3).]

2. SALES ⟸270 — WARRANTIES — IMPLIED WARRANTY OF QUALITY — INSPECTION BY BUYER.

Where the defendant's representative had an opportunity to examine goods, there was no implied warranty as to quality, although the representative failed to take advantage of the opportunity.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 766–768; Dec. Dig. ⟸270.]

3. SALES ⟸261(5) — WARRANTIES — REQUISITES OF EXPRESS WARRANTY—"PUFFING."

Where both parties to a sale of goods had expert knowledge by reason of their occupation, an expression by the plaintiff at the time of sale that the goods were first-class, being what is termed "puffing," or an expression of opinion of judgment, and not a representation of fact upon which the defendants relied, there was no express warranty as to quality.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 731; Dec. Dig. ⟸261(5).]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Jacob Alexander and another against Charles Stone and others. From a judgment for the defendants on their cross-complaint, plaintiffs appeal. Reversed.

Henry A. Jacobs, of San Francisco, for appellants. James W. Cochrane, of San Francisco, for respondents.

PER CURIAM. This is an appeal by plaintiffs from a judgment in favor of defendants on their cross-complaint.

In the early part of the year 1911 Max Lewis, one of the members of the defendant concern, went from San Francisco to Chicago and purchased from the plaintiffs 21 bolts of certain varieties of woolen goods, and agreed upon the terms of the sale.

[1, 2] The evidence in the case does not sustain the finding of the court that the sale was by sample. The order for the goods was given by Lewis after an examination, or an opportunity to examine them, and Lewis then and there paid part of the purchase price, and an arrangement was entered into between him and the plaintiffs, fixing the times of payment of the balance, and of the shipment of the goods. True, the plaintiffs at the request of Lewis sent samples of the goods to the defendants in San Francisco, but apparently those were sent in order that the latter might solicit orders from their customers for suits and cloaks, to be made up from the cloth from which the samples were taken when the cloth should arrive. It is plain that they were not sent to enable the defendants to make purchases by sample, for, as just stated, the purchase had already been made and completed. The authorities sustain this position. 35 Cyc. 223; Civ. Code, § 1766; 15 Am. & Eng. Ency. of Law, 1218, 1221. The defendants, through their representative, as the evidence clearly shows, having had an opportunity to examine the goods, there was no implied warranty as to the quality, even if the representative of the buyers failed to take advantage of the opportunity for examination given him. 15 Am. & Eng. Ency. of Law, 1218, 1221; Civ. Code, § 1771.

[3] Nor can the judgment be sustained upon the theory that there was an express warranty as to the character of the goods. Plaintiffs introduced evidence tending to show that they were first class, and defendants presented evidence tending to contradict this, and this evidence is the nearest approach to anything in the record upon which it can be contended that the plaintiffs at the time of the sale represented the goods to be first class. Assuming for the sake of argument that this may be considered as some evidence to that effect, still it could not be held to amount to an express warranty. It amounts to no more than what is termed "puffing," or an expression of opinion or judgment. Both parties, by reason of their occupation, had expert knowledge of the kinds of cloth in question, and the expression by the plaintiffs at the time of the sale —if we can assume it was made—must be considered a mere relative term, and not a representation of a fact upon which the defendants relied, in which event only could it be considered an express warranty as to quality. 35 Cyc. 381, 383.

There was no claim, nor was the case tried on the theory, that the samples sent to the defendants were not taken from the goods shipped, or that there was a substitution of the goods shipped for those inspected and purchased; and it is also a significant fact in the case that without inspection the defendants refused to accept the first shipment of goods, which were sent by express, payable cash on delivery, and did not repudiate the entire sale until later, when they received and examined a shipment of goods by freight.

The judgment is reversed.

29 Cal. App. 502

UNION TRUST CO. OF SAN FRANCISCO v. JOURNEAY et al. (Civ. 1662.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

ABATEMENT AND REVIVAL ⟸9—ANOTHER ACTION PENDING.

An action to enforce the primary liability of defendants as stockholders, under Civ. Code, § 322, upon an alleged indebtedness of the corporation, evidenced by a promissory note, is not abated by the pendency of an action against the corporation on the note, or an action pending on a written instrument, constituting a general guaranty of all the indebtedness of the corporation, in which five of the defendants were also defendants; such actions not involving the same parties or the same cause of action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 73–85; Dec. Dig. ⟸9.]

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by the Union Trust Company of San Francisco against W. E. Journeay and

others. From a judgment for the plaintiff and from an order denying a motion for new trial, defendants appeal. Affirmed.

Daniel O'Connell, of San Francisco, for appellants. Heller, Powers & Ehrman, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in plaintiff's favor and from an order denying defendants' motion for a new trial.

The action is one brought upon the alleged statutory liability of the defendants as stockholders of a corporation known as Ensign-Baker Refining Company, upon an alleged indebtedness of said corporation evidenced by a promissory note of the Ensign-Baker Company, executed by its duly authorized officers and delivered to the plaintiff, upon which a balance remained unpaid, at the time of the institution of this action, amounting to $12,500 with accumulated interest. The only substantial question raised by the defendant's answer and urged upon this appeal is that arising from their plea of another action or actions pending.

The facts upon which this alleged defense to this action and objection to the judgment herein is based are these: On December 15, 1910, the Ensign-Baker Company, a corporation, of which these defendants were then stockholders, borrowed from the plaintiff the sum of $20,000, executing a promissory note therefor in said sum. At or prior to this time the plaintiff was the holder of a written instrument, constituting a general and continuing guaranty of all indebtedness of the Ensign-Baker Company to it, signed by the defendants W. E. Journeay, E. J. Ensign, L. E. Ensign, F. C. Ensign, and E. C. Dickinson. The particular indebtedness above referred to not having been liquidated, the plaintiff on October 13, 1913, commenced an action against said corporation to recover judgment upon its promissory note evidencing said indebtedness. On October 15, 1913, the said plaintiff also commenced an action against the five above-named persons, who had executed said guaranty to recover judgment upon their liability for said particular indebtedness as guarantors. Each of these actions proceeded to judgment, which was entered in each action in the early part of the year 1914, and in each of which cases an appeal was immediately taken. The present action was begun by plaintiff about two months before the entry of the said judgments in the two preceding actions. None of the defendants herein were parties to the first of said actions begun against said corporation, but five of the nine defendants in the present action were also defendants in the second action which, as we have seen, was brought to recover judgment upon their general guaranty of the indebtedness of said corporation.

The foregoing statement of the character of these several actions and of the parties thereto will serve to show that there is no merit in the defendants' contention upon the trial of this case and upon this appeal. Neither of the two former suits was an action pending against the same parties or for the same cause of action. These are the distinctive essentials to a successful plea of another action pending. Hall v. Susskind, 109 Cal. 203, 41 Pac. 1012, and cases cited. This is an action upon the stockholder's liability of each of these defendants, which, by the terms of section 322 of the Civil Code as construed in numerous decisions, is made a primary and statutory liability, which is in no wise affected by actions against the corporation of which they are stockholders to recover upon its contractual obligations. And for the same reason and by the same authorities this action would be unaffected by the action brought against some of these defendants upon their contractual liability as general guarantors of the indebtedness of said corporation, in which their relation to it as stockholders is in no wise involved.

It follows that the judgment and order should be affirmed, and it is so ordered.

(29 Cal. App. 470)

LINZ v. McIVER & BECKER. (Civ. 1692.)

(District Court of Appeal, First District, California. Jan. 28, 1916.)

1. PLEADING ⟸193(9)—VARIANCE BETWEEN PLEADING AND INSTRUMENT COPIED.

A variance between the direct allegations of a complaint and a copy of an instrument set forth therein or an exhibit attached thereto can be attacked successfully only by special demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 438; Dec. Dig. ⟸193(9).]

2. JUDGMENT ⟸101(2)—ESSENTIALS—PLEADINGS—VARIANCE.

A default judgment upon a note against a defendant individually is sufficiently supported by a complaint charging him as an individual maker, although it contains a copy of the note which shows he signed his name only as member of a partnership.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 168; Dec. Dig. ⟸101(2).]

Appeal from Superior Court, Alameda County; William H. Donohue, Judge.

Action by F. J. Linz against McIver & Becker. From a judgment for plaintiff, defendant F. G. Becker appeals. Affirmed.

Robinson, Gillis & Sizer, of Oakland, for appellant. J. R. Moulthrop, of San Francisco, for respondent.

PER CURIAM. In this action the plaintiff and respondent, F. J. Linz, procured a judgment to be entered against the defendant F. G. Becker upon the latter's default. The judgment purports to run against him individually and not as a member of the copartnership. The general allegations of the com-

plaint were sufficient, in the absence of a general demurrer, to charge the defendant as an individual maker of the promissory note sued upon. The complaint, however, contains a copy of the note, which shows that defendant Becker signed his name thereto as a member of the firm of McIver & Becker and not as an individual maker thereof. The only question involved upon this appeal is whether the variance between the general allegation of the complaint and the face of the note is fatal to the plaintiff's judgment.

[1] The rule in this state is that a variance between the direct allegations of a complaint and a copy of an instrument set forth therein, or an exhibit attached thereto, can be successfully attacked only by special demurrer, and cannot be taken advantage of by general demurrer. Mendocino Co. v. Morris, 32 Cal. 145. In the case of Blasingame v. Home Insurance Co., etc., 75 Cal. 633, 17 Pac. 925, the appellant therein relied for a reversal of the judgment upon a variance between a direct allegation of the complaint as to the identity of a person to whom a policy of insurance was payable, and an apparently contrary statement in the copy of the policy set forth in the complaint. The court there held that the complaint was sufficient to support the judgment when tested by a general demurrer.

The most recent reaffirmance of the foregoing principle is to be found in San Francisco Sulphur Co. v. Ætna Indemnity Co., 11 Cal. App. 695, 106 Pac. 111, in which Mr. Justice Kerrigan, rendering the decision of the court said:

"Under the authorities in this state the variance between the exhibit and the allegations of the complaint cannot be raised by general demurrer and as the point was not made by special demurrer, the complaint must be held to be good"—citing Mendocino Co. v. Morris, supra; Palmer v. Lavigne, 104 Cal. 30, 37 Pac. 775; Blasingame v. Home Insurance Co., etc., supra.

[2] Upon the record before us we are satisfied that the complaint is sufficient to support the judgment, and it is therefore affirmed.

29 Cal. App. 608

PEOPLE v. TURCO. (Cr. 461.)

(District Court of Appeal, Second District, California. Feb. 9, 1916.)

1. WITNESSES ⟸275(5) — CROSS-EXAMINATION.

Under Pen. Code, § 1323, providing that accused cannot be compelled to be a witness against himself, but if he offers himself as a witness he may be cross-examined as to all matters about which he was examined in chief, his cross-examination is not necessarily confined to the particular details expressly contained in questions on direct examination, but where the fact denied by the defendant covers the whole case, or any branch of the case, the matter to be tested by the cross-examination is the truth or falsity of that denial; the people having the right on cross-examination to draw out anything which would tend to contradict evidence of the defendant adduced on his direct examination, or to weaken or modify its effect.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 971; Dec. Dig. ⟸275(5).]

2. WITNESSES ⟸275(5)—CROSS-EXAMINATION OF DEFENDANT.

In a prosecution for arson, where a witness testified that the defendant gave B. money to buy gasoline and cotton, that B. set the fire, that defendant assisted the witness and B., that witness and defendant had previous conversations concerning the fire, that the witness had assisted defendant in securing the insurance, and defendant denied giving the money for gasoline or having anything to do with the preparation for the fire, but his direct examination contained no direct reference to previous conversations with the witness, questions on cross-examination concerning the alleged conversations were permissible, as closely related to and calling for answers tending to discredit the testimony of the defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 971; Dec. Dig. ⟸275(5).]

3. WITNESSES ⟸282—IMPEACHMENT.

In a prosecution for arson, where a witness was recalled and testified to statements made by the defendant to him, which had been denied by the defendant, and which were in addition to conversations of the witness testified to originally, although the questions were leading and suggestive, in that they asked whether certain quoted statements were made, instead of requiring the witness to state the conversations in his own language, they were in the proper form of a question asked in rebuttal for the purpose of impeachment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 927, 989; Dec. Dig. ⟸282.]

4. CRIMINAL LAW ⟸511(2) — TESTIMONY OF ACCOMPLICE—CORROBORATION.

In a prosecution for arson under Pen. Code, § 1111, providing that a conviction cannot be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense, corroborative evidence *held* sufficient, in showing the circumstances of the commission of the crime and tending to connect the defendant therewith, to sustain a verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1129; Dec. Dig. ⟸511(2).]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Salvatore Turco was convicted of the crime of burning and destroying property insured, and he appeals. Affirmed.

Carter & Torchia and E. E. Kirk, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Roberto B. Camarillo, for the People.

CONREY, P. J. The defendant appeals from the judgment and from an order denying his motion for a new trial. He and one Joe Barbera were jointly indicted and accused of the crime of burning and destroying property insured, for the purpose of defrauding the insurance company. The defendants were tried separately. The separate appeal of the defendant Barbera has been determined in accordance with an opinion of this court this day filed. 157 Pac. 532.

The defendant Turco claims that the court erred in permitting the district attorney to

cross-examine him on matters which were not included in his direct examination. One Remeggio, a witness for the people, had testified that on the 7th or 8th of August, 1915, this defendant had given to Barbera the sum of $2.50 with which to buy some demijohns of gasoline, and had given to the witness 50 cents to buy cotton, and that these materials were to be used in burning the building of Turco. The building was actually set on fire by Barbera at about 2 o'clock on the morning of Tuesday, August 10th. Turco had gone to San Diego on Sunday, and did not return to the premises in question, in the city of Los Angeles, until Tuesday morning, a few hours after the fire had occurred. Remeggio had testified that he and Barbera had purchased the gasoline and the cotton, as requested by Turco, and that Turco had assisted in arranging these materials in preparation for the fire. Remeggio further testified to some conversations which he had with Turco in June and in July, looking towards the transaction which culminated on August 10th, and that he had assisted Turco in securing the insurance which was obtained by Turco on or about the 2d day of August, 1915.

As a witness on his own behalf the defendant denied that he had given any money to Barbera or Remeggio, denied that he had anything to do with the preparations for the fire or any knowledge thereof, and denied a statement in the testimony of Remeggio to the effect that Turco had offered him a sum of money to burn the property in question. His counsel also asked him, "When you went to San Diego, did you know there was going to be any fire there that Sunday?" to which he answered, "No, sir." The direct examination of defendant contained no direct reference to previous conversations with Remeggio (sometimes called Costa), except as to the particular matters above mentioned. On cross-examination the district attorney asked the defendant a series of questions covering the conversations to which Remeggio had testified, and also asked whether at certain dates in June and July he had made sundry other statements to Remeggio, which we need not repeat in detail, but which were on the subject of insuring the property and burning it or causing it to be burned.

The brief of counsel for appellant does not quote or cite any of the decisions declaring the law bearing upon the subject of cross-examination by the people of a defendant who has become a witness on his own behalf, but they simply rely upon section 1323 of the Penal Code, which reads as follows:

"A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding."

[1] The question presented relates to the permitted scope of cross-examination of the witness under a rule which limits such examination to "all matters about which he was examined in chief." Undoubtedly the cross-examination under such circumstances is not necessarily confined to the particular details expressly contained in the questions on direct examination. Where a fact denied by the defendant in his testimony covers the whole case or any branch of the case, the matter to be tested by the cross-examination is the truth or falsity of that denial, just the same as if it had been a denial of some more particular detail of fact. The people have the right on the cross-examination to draw out anything which will tend to contradict the evidence of the defendant adduced on his direct examination or weaken or modify its effect. People v. Rozelle, 78 Cal. 93, 20 Pac. 36; People v. Buckley, 143 Cal. 388, 77 Pac. 169; People v. Gallagher, 100 Cal. 466, 35 Pac. 80; People v. Dole, 122 Cal. 491, 55 Pac. 581, 68 Am. St. Rep. 50. In People v. Gallagher, supra, the Supreme Court said:

"The right of cross-examination affords the most effective mode of testing the accuracy or credibility of a witness, and should not be restricted beyond the requirements of the statute. It was not the intention of the Legislature to give to a defendant the opportunity of making any statement upon his direct examination which he might choose, in reference to the issue before the court, and to preclude the prosecution from showing out of his own mouth that such statement is false."

And in People v. Dole, supra:

"Any fact may be called out on cross-examination which a jury might deem inconsistent with the direct testimony of a witness, and a defendant testifying in his own behalf is in this respect put upon the same plane with other witnesses."

[2] If on this cross-examination the defendant had admitted that he had previously made to Remeggio the statements called for by the questions to which these objections were and are directed, such answers would have had a tendency to discredit the testimony of the witness to which we have referred as given by him on his direct examination. These questions were so closely related to the testimony previously given by the witness that they were fairly within the range and purpose of the "matters about which he was examined in chief."

[3] In rebuttal the witness Remeggio was recalled and testified to several statements made by the defendant in conversation with him between June 9 and August 1, 1915, these being the conversations which had been denied by defendant, and being in addition to the conversations to which Remeggio had testified originally as a witness for the people. It was objected that the questions were not rebuttal, and were leading and suggestive, in that they asked whether certain quot-

ed statements were made, instead of requiring the witness in his own language to state what was the conversation. Manifestly these questions were intended as impeachment of the defendant as a witness, and they were in the proper form of a question when asked for that purpose. Our decision above stated on the subject of cross-examination of the defendant is conclusive in favor of the propriety of these questions as asked in rebuttal.

[4] Finally, it is insisted that the verdict was contrary to law in that the conviction was had upon the testimony of an accomplice, without corroboration by other evidence tending to connect the defendant with the commission of the offense. Such corroboration is required by section 1111 of the Penal Code, which further states that:

"The corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."

Of course it is a sufficient compliance with this rule if the corroborative evidence showing the circumstances of the commission of the offense also tends to connect the defendant therewith. This defendant admitted that he was present in the building in question until noon of Sunday, the 8th day of August; the defendant had taken out insurance on the property on the 2d day of August; and an examination, immediately after the fire, of his stock of goods in the storeroom occupied by him in the building which was set on fire, developed that a very large proportion of the shoe boxes, shirt boxes, etc., constituting the apparent stock of goods on his shelves, were empty boxes. The insurance agent testified that on August 1st, when negotiating for his insurance policy, the defendant stated that the stock of goods in his building consisted principally of "gent's furnishing goods and shoes," and that the stock of goods was worth $1,600. The policy issued was for $1,200 on this stock and $800 on the building and fixtures. The witness who examined the stock immediately after the fire qualified as an expert upon such values, and testified that he made an inventory of this stock of goods and valued it at $176, figured on a retail basis. The defendant testified that when he closed his store at noon on Sunday, the 8th day of August, he left the store locked. Officers who examined the premises that Sunday night (warning having been secretly given them that the premises were to be burned) gave testimony showing that in the rear of the building they found a loose board of the wall which could be pushed aside so as to gain entrance; that in that way they entered and found in the storeroom certain jars of gasoline, cotton fuse, and a candle, arranged in connection with each other as described by them. They had been watching the premises since 9 or 10 o'clock in the evening, and made this entry at 2 o'clock in the morning. The fire did not take place until the next night.

Although it seems clear that the defendant Turco was absent from the city of Los Angeles from Sunday afternoon until Monday night, and although no witness other than Remeggio gave testimony directly connecting Turco with the preparations made for the fire, we are of opinion that the testimony of the other witnesses to which we have just now referred shows circumstances not only tending to prove preparations made for the conflagration, but also tending to show the probability that the defendant had knowledge of those preparations. All that can be said in favor of the defendant's position in this regard is that the evidence leaves open a possibility that at some time between noon and 9 o'clock in the evening of Sunday, August 8th, some person other than the defendant, unknown to him, might have gained access to his storeroom, and might have placed therein three demijohns, containing 15 gallons of gasoline, with cotton arranged as a fuse and a candle ready to be lighted. But for us to say that the jury was unauthorized to treat such testimony as corroborative evidence tending to connect the defendant with the commission of the offense would be to deny a legitimate and natural effect of the evidence.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

30 Cal. App. 123

WELCH v. SANTA CRUZ COUNTY.

(Civ. 1687.)

(District Court of Appeal, First District, California. March 11, 1916. Rehearing Denied by Supreme Court May 4, 1916.)

1. COURTS ⊜121(2)—JURISDICTION—AMOUNT IN CONTROVERSY.

It is the amount of a demand that determines the jurisdiction of the superior court in actions at law seeking a money judgment, and the fact that the demand is made up in part of items which may prove not to be recoverable does not make the complaint demurrable upon the ground.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 414; Dec. Dig. ⊜121(2).]

2. COUNTIES ⊜200—CLAIMS—LIMITATIONS.

Under Pol. Code, § 4075, providing that the board of supervisors must not consider any claim in favor of any person against the county, or allow any claim against the county funds, unless it be itemized and be presented to the clerk of the board within 1 year after the last item of the account or claim accrued, a claim of plaintiff, in an action to recover $500 alleged to have been expended in the discharge of his official duties as fish and game warden of the county for the 20 months from June, 1909, to December, 1910, and for the month of April, 1912, filed with the board April 27, 1912, was barred, except as to the items thereof accruing in April, 1912.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 315; Dec. Dig. ⊜200.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Walter R. Welch against the County of Santa Cruz. Judgment for plaintiff, and the defendant appeals. Modified and affirmed.

George W. Smith, of Santa Cruz, for appellant. Charles B. Younger, of Santa Cruz, for respondent.

KERRIGAN, J. This is an action instituted for the recovery of the sum of $500, which the plaintiff alleges he expended and paid out in the discharge of his official duties as fish and game warden of the defendant, the county of Santa Cruz, for the 20 months from and including June, 1909, to December, 1910, and for the month of April, 1912. The action is based upon a claim for the aggregate of the items covering the whole of the period filed with the board of supervisors of the county by plaintiff on the 27th day of April, 1912. The board allowed the claim in a sum of $25 only. The items constituting the claim were set forth in detail in an exhibit attached to and made a part of the complaint. Defendant interposed a general and special demurrer to the complaint. One of the grounds of the demurrer is—

"that the claim or claims set forth in the complaint and the cause of action based thereupon as set forth in the said complaint are barred by the provisions of sections 4075 and 4076 of the Political Code of California."

The demurrer was overruled by the court, whereupon the defendant answered, and after trial judgment went for the plaintiff in the amount of his demand. The appeal is before us on the judgment roll alone.

Section 4075 of the Political Code reads as follows:

"The board of supervisors must not hear or consider any claim in favor of any * * * person * * * against the county, nor shall the board credit or allow any claim or bill against the county or district fund, unless the same be itemized * * * and is presented and filed with the clerk of the board, * * * within a year after the last item of the account or claim accrued."

The first point made by the appellant in support of his appeal is that the demurrer to the complaint should have been sustained for the reason, as contended, that all but $25 of the sum demanded in the complaint was barred by the provisions of section 4075 of the Political Code above quoted, and consequently the complaint states a cause of action for the sum of $25 only.

[1] But it is the amount of the demand that determines the jurisdiction of the superior court in actions at law seeking a money judgment; and the fact that the demand is made up in part of items which may prove not to be recoverable will not make the complaint subject to demurrer upon that ground. As was stated in the case of Nelson v. Merced County, 122 Cal. 644, 55 Pac. 421:

"There being but one cause of action pleaded in the complaint, if a recovery could be had for any part of the claim it [the demurrer to the complaint] should have been overruled."

[2] But, so far as the amount for which the court rendered judgment is concerned, it appears to us that the appellant's contention that the board of supervisors of the county had no jurisdiction to allow any of the items of the plaintiff's claim except those items thereof amounting to the sum of $25 which accrued in the month of April, 1912, and that accordingly the plaintiff could not recover more, must be sustained. It is true, as pointed out by the respondent, that the last item of the account accrued within 1 year before it was presented and filed. But, on the other hand, at the time of the accrual of this item more than a year had elapsed since the accrual of the item next preceding it, which is dated December 31, 1910. The plaintiff had until December 31, 1911, in which to present and file with the clerk of the board his demand therefor, and, not having done so, it was barred together with all earlier items. The fact that 14 months later he has a new demand against the county will not revive the stale items. We think the analogy between the situation here presented and that of the application of the statute of limitations to an account current is quite clear. The rule as to the latter is thus stated in 25 Cyc. p. 1127:

"Where the mutual dealings have ceased for the statutory period after the date of the last item, so that during that time there are no items on either side of the account, the whole account is barred; and in such a case subsequent items are unavailing to remove the bar."

The language used by the Supreme Court in Nelson v. Merced County, supra, upon this last point is not applicable to the facts of this case. In that case some of the items of the account were attacked because incurred more than a year before the presentation of the account; and it was held that, inasmuch as the last item was within time, the fact that the first item was more than a year old was immaterial; but an examination of that case will disclose that there was not, at any time before the presentation and filing of the claim, a point at which the account was barred. In other words, the interval of time between items was always less than one year. The decision in that case is not therefore authority for the contention of the respondent.

For the reasons stated, we think the court erred in giving judgment for any but the last items of the account aggregating $25. The judgment is therefore modified by striking therefrom the sum of $475, and, as thus modified, it will stand affirmed; appellant to recover its costs of this appeal.

We concur: LENNON, P. J.; RICHARDS, J.

(30 Cal. App. 39)

COELHO v. JUDSON MFG. CO. (Civ. 1690.)

(District Court of Appeal, First District, California. March 2, 1916. Rehearing Denied March 31, 1916; Denied by Supreme Court May 1, 1916.)

EVIDENCE ⟸507—OPINION EVIDENCE—EXPERT TESTIMONY.

In a servant's action for damages for the loss of an eye, where a medical expert testified as to test made, but admitted he did not test the servant's eyesight with charts, questions as to whether the servant would have been able to have seen ordinary oculist's charts, and whether the loss of one eye would affect his capacity for work, were properly excluded; for the jury were as competent as the oculist to draw their own conclusions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2310; Dec. Dig. ⟸507.]

Appeal from Superior Court, Alameda County; James W. Bartlett, Judge.

Action by Frank Coelho against the Judson Manufacturing Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Myrick & Deering, of San Francisco (James Walter Scott, of San Francisco, of counsel), for appellant. J. Leonard Rose and St. Sure, Callaghan & Rose, all of Oakland, for respondent.

PER CURIAM. The action was brought by the plaintiff to recover damages for the loss of the sight of his right eye, occasioned by its penetration by a chip of steel, brought about through the alleged negligence of the defendant. As the result of a trial before a jury judgment was entered in favor of the plaintiff for the sum of $1,250. The appeal is by the defendant from the judgment and from an order denying its motion for a new trial.

Several points are discussed in the briefs, but at the oral argument counsel for the defendant stated that the defendant relied upon but one of those points for a reversal of the judgment, viz., that the trial court committed prejudicial error in refusing to allow the following questions on the cross-examination of an oculist, who had attended the plaintiff for about five weeks, and was produced as a witness in his behalf:

"(1) Do you consider the wound one that would interfere at all with the labor activity of an ordinary laboring man?"

"(2) Do you consider that it would interfere with his work as a factory man, for example?"

"(3) Would it interfere with such work as he was doing, chipping steel with a sledge hammer?"

"(4) Take one of the ordinary charts used by opticians, with figures upon it; would he be able to see that chart?"

We cannot agree with the contention of defendant. The testimony of the witness to which the last of the above enumerated questions was directed was, in substance, as follows:

"I made a physical test, asking to see if he saw my fingers and saw my features, and so forth, and I understood the answers to be 'Yes.' * * * I did not make any of these chart tests while I was treating him."

So that it appeared that the witness himself had not ascertained whether or not the plaintiff could see the figures on the ordinary chart used by opticians, and he had just told the jury what tests he had made. They were therefore in as good position to judge whether he could see the figures on such a chart as was the witness himself.

Likewise as to the other questions. The expert had testified fully on direct examination as to the nature and extent of the injury; and it therefore seems to us that the jury were, so far as this expert witness was concerned, in possession of sufficient facts to enable them to know to what extent the injury to the plaintiff's eye impaired his ability to earn a livelihood.

The judgment and order are affirmed.

(29 Cal. App. 576)

PEOPLE v. OLIVER. (Cr. 332.)

(District Court of Appeal, Third District, California. Feb. 5, 1916.)

1. INFANTS ⟸20 — DELINQUENCY — SUFFICIENCY OF INFORMATION—STATUTE.

Under Juvenile Court Law March 8, 1909 (St. 1909, p. 213) § 1, as amended by St. 1913, p. 1287, § 3, defining the words "dependent person," and section 28, providing that any person causing, encouraging, or contributing to the dependency or delinquency of any person under 21, or any person who by any act or omission or persuasion endeavors to entice any such person to do or perform any act or follow any course of conduct causing such person to become and remain a delinquent or dependent person, shall be guilty of a misdemeanor, an information charging that the alleged dependent minor was a female child of the age of 15 years, without a parent or guardian capable of exercising proper parental control, for want of which she was wayward and in danger of being brought up to lead an idle, dissolute life, and that defendant encouraged and contributed to her delinquency by enticing and persuading her surreptitiously, and without the consent of her father, to remain away from home and to meet and remain with defendant until a late and unusual hour of the night, sufficiently charged the offense.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. ⟸20.]

2. CRIMINAL LAW ⟸369(1)—EVIDENCE—OTHER OFFENSES.

Evidence of the commission of other similar offenses to the one charged is generally inadmissible to prove the specific charge set out in the information or indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dgi. ⟸369(1).]

3. CRIMINAL LAW ⟸372(1)—EVIDENCE—OTHER SIMILAR OFFENSES—ACTS SHOWING INTENT.

In a prosecution under Juvenile Court Law March 8, 1909 (St. 1909, p. 213) § 1, as amended by St. 1913, p. 1287, § 3, and section 28, specifically charging that defendant enticed and persuaded a minor female child, without the consent of her father, to remain away from home with defendant until a late hour of the night, evidence that defendant on other occasions had been guilty of improper conduct with the child was admissible showing his disposi-

tion to commit an offense of the nature of the one charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. ⟸ 372(1).]

4. CRIMINAL LAW ⟸372(1)—EVIDENCE—OTHER OFFENSES.

Under such statute any conduct upon the part of a person toward a minor which either causes or tends to cause such minor to become or remain a dependent or delinquent person may be shown, and such conduct may consist of one act only or of a series of acts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. ⟸ 372(1).]

5. INFANTS ⟸20—DELINQUENCY—EVIDENCE—PARENT OR GUARDIAN—"DEPENDENT PERSON."

In a prosecution under Juvenile Court Law March 8, 1909 (St. 1909, p. 213) § 1, as amended by St. 1913, p. 1287, § 3, providing that the words "dependent person" shall include any one having no parent or guardian willing to exercise or capable of exercising proper parental control, for the want of which such person is wayward and addicted to vicious habits and in danger of being brought up to lead an idle or dissolute life, evidence *held* to show that the minor named was without a parent or guardian willing to exercise or capable of exercising the proper parental control.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. ⟸20.]

For other definitions, see Words and Phrases, First and Second Series, Dependent.]

6. INFANTS ⟸20—DELINQUENCY—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution under Juvenile Court Law, March 8, 1909 (St. 1909, p. 213) § 1, as amended by St. 1913, p. 1287, § 3, and section 28, for contributing to the dependency of a delinquent or dependent child, *held* sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. ⟸20.]

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

William B. Oliver was convicted of the crime of contributing to the dependency of an alleged dependent child, and from the judgment and order denying a new trial, he appeals. Judgment and order affirmed.

M. G. Gill, of San Francisco, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted in the superior court of Shasta county of the crime of contributing to the dependency of an alleged dependent child, and appeals to this court from the judgment and the order denying him a new trial.

[1] The information upon which he was tried and convicted reads as follows:

"That on or about the 14th day of June, 1915, at the town of Cottonwood, in the said county of Shasta, state of California, one Josephine Fa Mar, then and there a female minor child, under the age of eighteen years, to wit, of the age of 15 years, was then and there a female dependent minor child, in this, that the said Josephine Fa Mar had no parent or guardian capable of exercising proper parental control over the said Josephine Fa Mar, and for want of such parental control said Josephine Fa Mar was and is wayward and addicted to vicious habits, and was and is in danger of being brought up to lead an idle, dissolute, and immoral life, and that the said defendant then and there willfully, unlawfully, and feloniously, on or about the said 14th day of June, 1915, at Cottonwood, in the said county of Shasta, state of California, did encourage, cause, and contribute to the dependency of said Josephine Fa Mar, by the said defendant then and there enticing and persuading said Josephine Fa Mar, surreptitiously and without the consent of W. W. Fa Mar, the father of the said Josephine Fa Mar, to leave and remain away from the home of said Josephine Fa Mar, in the said town of Cottonwood, and to meet, be, and remain with said defendant under cover of darkness until a late and unusual hour of the night."

The defendant contends that the information does not state a public offense and that the evidence is insufficient to support the verdict.

The information states an offense under the so-called juvenile court law (St. 1909, p. 213), and the demurrer thereto was therefore properly overruled.

By section 1 of said law, as amended by the Legislature of 1913 (Stats. 1913, p. 1285 et seq., § 3), it is, among other things, provided that:

"Within the meaning of this act the words 'dependent person' shall include any person: 1. Who has no parent or guardian willing to exercise, or capable of exercising proper parental control, and for the want of such proper parental control such person is wayward and addicted to vicious habits, and is in danger of being brought up to lead an idle and dissolute, or immoral life. * * *"

Section 28 of said act reads, in part, as follows:

"Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause, encourage or contribute to the dependency or delinquency of any person under the age of twenty-one years, as defined by any law of this state, or any person who shall, by any act or omission, threats or commands or persuasion, endeavor to induce any such person, under twenty-one years of age, to do or perform any act or follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become, or to remain a dependent or delinquent person, shall be guilty of a misdemeanor," etc.

The information, it will be observed, after alleging that the alleged dependent minor is a female child of the age of 15 years, that she is without a parent or guardian capable of exercising proper parental control over her, and that for want of such proper control, she "was and is wayward and addicted to vicious habits, and was and is in danger of being brought up to lead an idle, dissolute, and immoral life," with clearness and directness charges the defendant with the commission of certain specific acts toward said minor which, if true, could certainly have no other effect than to tend to contribute to said minor's dependency within the description of that offense as it is defined by the statute. Indeed, if the acts of the defendant, as charged in the information, toward

and with a female child of the immature age of 15 years, did not constitute an endeavor on the part of said defendant to induce the said child to follow a course of conduct which would "cause or manifestly tend to cause" her to become a dependent person or to remain one if already such a person, then it is difficult to conceive of conduct upon the part of a male person toward such a minor, short of that of outraging her person, which would have such effect. And the specific acts of which the defendant is accused are set forth in the information with sufficient clearness definitely to apprise him of the precise nature of the charge which he was thereby called upon to meet, and, when this is done, an information or indictment meets all the requisites of such a pleading, assuming, of course, that an offense known to the law is so stated.

[2, 3] It is next contended that, in permitting the people to show that the defendant on other occasions than the specific date laid in the information had been guilty of improper conduct with the minor, the court committed error damaging to the rights of the accused, since, so it is claimed, the district attorney, at the beginning of the trial, elected to rely upon the specific acts alleged to have been committed "on or about the 14th day of June, 1915."

It is argued in support of that contention that the rule is that evidence of the commission of "other similar offenses" to the one charged is never admissible to prove the specific charge set out in the information or indictment. The general rule is as stated by counsel for the defendant, but it has its exceptions. There are certain classes of crime, to corroborate the proof of the commission of which, or to show a disposition in the accused to commit offenses of the nature of the one charged, other acts or offenses similar to the one specifically charged may be shown. Among these classes are the crimes of rape, seduction, and the like, and even some offenses of an entirely different nature. Such other acts or offenses, however, "are never admissible as independent substantive offenses, upon any of which a conviction can be had, and evidence of them is only admissible after the prosecution has selected some particular act of a date certain, * * * and has introduced evidence tending to support the selection." People v. Koller, 142 Cal. 621, 624, 76 Pac. 500, 501, et seq., and authorities therein cited.

[4] But, as we conceive the situation presented here, evidence of the several acts of the defendant which were shown for the purpose of establishing against him the crime charged in the information is admissible not alone upon the theory of the rule above stated. Under the so-called juvenile court law, any conduct upon the part of a person toward a minor which either causes or tends to cause such minor to become or remain a dependent or delinquent person may be shown, and such conduct may consist of one act only or a series of acts. While one of such acts may be sufficient to constitute the specific crime of contributing to the dependency of the minor, a number of different acts leading to the same result can have the effect of doing no more. For illustration, a male person might, on a single occasion, persuade and induce a female minor to resort to the grossest acts of immorality. This would be sufficient to establish the crime of contributing to the dependency of such minor within the clear intent of the statute. On the other hand, the male person might succeed, only after repeated acts of persuasion, in leading the female minor into the course of conduct which would put the stamp of dependency upon her under the statute, in which case the male person would be guilty, not of as many different and distinct crimes as there are acts leading to the same general result, but, as in the case of the one act as above illustrated, of the single crime of contributing to the minor's dependency. Therefore, while it is true that the information alleges that the crime of which the defendant is thereby accused was committed "on or about the 14th day of June, 1915," it was competent to prove that, in addition to the particular act mentioned in the information, other acts of a similar character and tendency had been committed by the accused upon said minor.

[5] It is next insisted that one of the elements of the offense as it is described by the statute and charged in the information is that the minor named therein was without a parent or guardian willing to exercise or capable of exercising proper parental control over her, and that, since said minor was shown to have a father, at whose home she resided, that requisite of the offense charged was not proved. But the record contains sufficient evidence to show that the child's father, who was her only guardian at the times concerned here, was either incapable of exercising or unwilling to exercise proper parental care over her.

Fa Mar, father of Josephine, is a musician by profession, and at the times of the occurrences resulting in the preferring of the charge alleged in the information against Oliver was engaged in teaching music in the Lincoln public school at Red Bluff. He resided, however, in the village of Cottonwood, Shasta county, a short distance from Red Bluff, and upon the day appointed for the teaching his classes in music he would go by train from his home to Red Bluff. His wife was and had been for some months an inmate of the Napa state hospital for the insane, and his family, all living with him in Cottonwood, then consisted of six children, the eldest of whom was Josephine, the alleged dependent, aged about 16 years. The other children, of whom one was a boy, ranged in age from 4 to 13 years. Josephine, after her mother was committed to the state

hospital, took charge of the home and was supposed to look after the younger children. Fa Mar testified that Josephine had a very bad disposition. Often she would become angry at her father and would not speak to him for a period of 10 days or 2 weeks, and on occasions would, while in a passion, break the dishes used at the eating table. In brief, without going further into the details of the evidence directly presented by the people upon this point, it is enough to say that the general trend and tenor and effect of Fa Mar's testimony was that either he was incapable of properly controlling Josephine or was unwilling to attempt to do so. But not upon the testimony of the prosecution alone is it necessary to found the conclusion that Fa Mar was either wholly incapable of exercising proper control over the young woman or wholly unwilling to do so; for the defendant himself, both upon cross-examination of the people's witnesses and by his own direct testimony, brought out facts strongly indicating that Fa Mar either could not control Josephine or had no desire or disposition to do so in a proper way. On cross-examination Josephine was made repeatedly to say that her father often mistreated her by cursing her and calling her opprobrious names. On one occasion he said to her that she could leave home if she desired to and remain away forever; that he had gotten along well without her before she came into the world, and could get along equally as well without her in the future. Furthermore, on the presentation of his defense, the defendant, through several witnesses introduced by him, brought out testimony which, if true, showed that Fa Mar abused all his children outrageously, frequently calling them "little dirty sons of b——hs." So, assuming that the people failed to make full proof upon the point under consideration, it is manifest that the defendant supplied it, and on the whole evidence the jury were apparently justified in finding that Fa Mar was either incapable of bestowing upon Josephine proper parental care or was unwilling to do so or both incapable and unwilling; for a parent who would deport himself in the manner so described toward his minor children is obivously unfit, and, indeed, justly may we add, if he be a person of ordinary intelligence, unwilling to exercise that care and control over his minor offspring which their tender years and consequent immature judgment imperatively require.

[6] The last contention is that the evidence is insufficient to support the verdict. The defendant was at the trial so confident of his ground upon this point that he moved the court to advise the jury to find a verdict of acquittal, which motion was denied. But, as the record is presented to us, there is as little merit to the point as we found in the other points above considered and disposed of.

A detailed statement of the facts is not necessary. In addition to those above stated, it will suffice, for the purposes of the present consideration, to say that from the testimony the jury could have found, and doubtless did find, these facts to have existed: That the defendant, aged about 33 years, is a man of family, consisting of a wife and five children; that he resided with his family in the town of Cottonwood, and a few blocks from the residence of Fa Mar; that he became acquainted with the Fa Mar family, and on one or two occasions worked for Fa Mar, assisting the latter to prepare some of the equipments of a moving picture show, which business Fa Mar was about to launch; that defendant became attracted to Josephine and held secret meetings with her; that, while Fa Mar was absent from home—at Red Bluff, from which place, on Monday of each week, he usually returned home not before 9 or half past 9 o'clock at night—the defendant would call on Josephine, and on several occasions was with her in her bedroom; that at her home on one occasion he talked to her about sexual intercourse, kissed her, and put his hand under her clothes; that he addressed letters to her, of which some he mailed, one he sent to her by a young man, and others he dropped on the porch of her home as he was passing by; that Josephine on one occasion, pretending to retire, left her room and the house after her father and the younger children had gone to bed, and met the defendant, at between 9 and 10 o'clock, at the public school building in Cottonwood, where they sat together on the ground, he throwing his arms about her body, kissing her, and placing his hands under her clothes; that on said occasion he talked to her about sexual intercourse, and that Josephine returned to her home at about between the hours of 2 and 3 o'clock in the morning; that on other occasions Josephine, without the knowledge or consent of her father, left home and remained away all night.

Thus it is plainly apparent that a case, within the intent of the statute, was made against the accused. A wayward minor female, with a strong inclination toward a wild and indifferent life, obtuse to perceptions of morality, without a parent or guardian capable of properly controlling her or her conduct, holding clandestine meetings at late hours of the night with a married man, almost old enough to be her father, and permitting him to take liberties with her person which, in nine cases out of ten, will lead to immoral practices of the grossest character, what more should be required to establish a case of contributing to the dependency of a minor, within the contemplation of the juvenile court law?

There is, it is true, and as might reasonably be expected, a conflict in the evidence upon the vital points involved in the charge. The defendant himself not only positively de-

nied committing the acts of which he was accused by Josephine and the corroborating witnesses, but declared, in effect, that his attentions to Josephine were inspired solely by a desire to protect her against the abusive treatment to which she was subjected by her father, and to this end permitted her on one occasion to remain over night at his home, and called upon Fa Mar to talk to him about and in behalf of his daughter. And he introduced witnesses whose testimony corroborated to some extent his asseverations of innocence. But all this testimony, when placed side by side with that produced by the people, merely had the effect of creating a conflict, which it was solely the function of the jury to solve. They having decided that conflict against the claims of the accused, and, there being an apparent justification for the result reached by them in the evidence brought to their attention by the people, it is not for this court to say that their judgment, thus evidenced, is erroneous or not sufficiently fortified by the proofs.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

29 Cal. App. 504

PURCELL v. VICTOR POWER & MINING CO. (Civ. 1421.)

(District Court of Appeal, Third District, California. Jan. 31, 1916.)

1. JUDGMENT ⟸584 — CONCLUSIVENESS — FORCE OF.

The force of an estoppel by judgment resides in the judgment itself, and it is not the findings of the court or the verdict which concludes the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063–1065, 1079, 1081, 1083, 1086, 1087, 1096, 1097, 1123, 1125, 1137; Dec. Dig. ⟸584.]

2. JUDGMENT ⟸584—CONCLUSIVENESS—MATTERS CONCLUDED.

To be a bar to a future proceeding, it must appear that the former judgment necessarily involved the determination of the matter to which it was urged as a bar, and it is not enough that the question was one of the issues in the former suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063–1065, 1067, 1079, 1081, 1083, 1086, 1087, 1096, 1097, 1123, 1125, 1137; Dec. Dig. ⟸584.]

3. JUDGMENT ⟸586(1) — CONCLUSIVENESS — MATTERS CONCLUDED.

In a former action of ejectment brought by defendant against plaintiff, judgment was rendered for defendant adjudicating that it owned the property in question. Such property was part of a large mining claim which embraced the property in suit. Code Civ. Proc. § 1911, declares that only is deemed to have been adjudged in a former judgment which appears on its face to have been adjudged or which was necessarily included. The two parcels were not the same. *Held* that, in view of the fact that plaintiff acquired his title to the property in suit after issue was joined in the first action, such judgment was not an adjudication that defendant had title to the entire mining claim, including the property in suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062–1066, 1098; Dec. Dig. ⟸586(1).]

4. JUDGMENT ⟸713(2) — CONCLUSIVENESS — MATTERS CONCLUDED.

A judgment is conclusive not only as to the subject-matter in controversy in the action upon which it is based, but also upon all matters involved in the same which might have been litigated and decided in the same case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1241; Dec. Dig. ⟸713(2).]

5. JUDGMENT ⟸666—CONCLUSIVENESS—EFFECT.

Where a former judgment in ejectment, had it been for plaintiff, would not have entitled plaintiff to an entire mining claim, it did not operate as an adjudication that defendant was entitled to the entire claim against plaintiff; for mutuality of operation is one of the essentials of estoppel by judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1180; Dec. Dig. ⟸666.]

6. VENDOR AND PURCHASER ⟸233—RECORDS —SUBSEQUENT GRANTEE.

Where one holding under an unrecorded deed brings an action involving title to the land against a subsequent grantee under a deed first recorded, the first grantee will prevail unless the second shows, not only the making and recordation of his deed, but that he made his purchase and paid the price in good faith without knowledge of the rights of the previous grantee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 563–566; Dec. Dig. ⟸233.]

7. VENDOR AND PURCHASER ⟸243 — PRIORITIES—BURDEN OF PROOF.

In an action involving title and possession of land, where plaintiff claimed under a subsequent deed which had been first recorded, plaintiff, contrary to the ordinary rule, did not have the burden of showing in the first instance that he received his deed without knowledge of defendant's pre-existing deed, and, defendant having introduced its deed, plaintiff might show such matter on rebuttal.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606–608; Dec. Dig. ⟸243.]

8. VENDOR AND PURCHASER ⟸242 — PRIOR DEEDS—BURDEN OF PROOF.

In a suit involving title to and possession of land, defendant, who claimed under a prior deed which was not recorded, *held* under the evidence, to have the burden of proving that the deed was given in good faith, and that it was not charged with the grantor's fraud.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603–605; Dec. Dig. ⟸242.]

9. EJECTMENT ⟸132—DAMAGES—EVIDENCE.

In an action involving title to land, evidence *held* insufficient to justify an award of $3,000 damages for defendant's withholding possession of a building in which plaintiff would have carried on a saloon, on the theory that plaintiff was compelled to carry on his saloon in a smaller building, and thus lost trade.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 444–447, 449–452; Dec. Dig. ⟸132.]

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by J. H. Purcell against the Victor Power & Mining Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. P. Johnson and P. H. Coffman, both of Red Bluff, for appellant. Bush & Hall, of Redding, for respondent.

HART, J. The action involves the title and right of possession to certain real estate described as lots 1 and 2 of the town of Harrison Gulch, in Shasta county; said lots being a part or portion of the Bonanza lode mining claim, of which the defendant is the owner.

The amended complaint is in two counts, the first of which, after alleging that "for more than five years last past the plaintiff, by and through his grantors and predecessors in interest, has been the owner of and entitled to the possession of the real property" above referred to, charges that the "defendant, wrongfully and without right, claims to be the owner of the said premises above described adversely to the plaintiff, but that defendant's claim is without right, and that it has no right, title, or interest in or to said premises or any part or portion thereof."

By the second count it is charged that "on or about the 15th day of December, 1909, while plaintiff was the owner of and entitled to the possession of the said premises, the defendant, without any right, and without the consent of plaintiff, and against his will, entered into the possession of the said premises and ousted the plaintiff therefrom, and ever since said date has and does now withhold the possession thereof from plaintiff to his damage in the sum of $500."

In a supplemental complaint, the plaintiff alleges that ever since the commencement of this action he has conducted a saloon business in a building known as the "Weyand Building," in Harrison Gulch; that said building was the property of the defendant; that there is no other building in Harrison Gulch suitable for the saloon business but the "Friedman Building," situated on the property in dispute in said town of Harrison Gulch, "and the said saloon business which plaintiff has heretofore been conducting at a profit of at least $480 per month has been totally destroyed"; that by reason of the facts thus stated "the plaintiff has suffered and is further damaged in the sum of $5,000."

The defendant by its answer denies that the plaintiff at any time was the owner or entitled to the possession of the property described in the complaint, and admitted, as the complaint charged, that it claims to be the owner of said property adversely to the rights of the plaintiff, and "denies that its claim is without right, and defendant denies that it has no right, title, or interest in or to said premises or any part thereof, and it alleges that it is the owner in fee of the said property."

The defendant also set up a special defense by way of an estoppel. In this connection the answer alleges that, in an action pending in the superior court of Shasta county at the time of the commencement of the present action, and in which the defendant and the plaintiff herein were, respectively, plaintiff and defendant, the title to the property involved in this action was, as between the plaintiff and the defendant here, litigated, determined, and adjudicated; that on the 25th day of July, 1910 (this action was commenced February 6, 1910), findings were filed and judgment entered in said former action in favor of the plaintiff therein (defendant herein) and against the defendant therein (plaintiff herein); "that the findings of the court in said action were to the effect, and the court thereby decided, that the plaintiff therein was the owner of all the land involved in the present action, and the judgment of the court in said action has now become final; that the subject-matter of the present action was involved in the said action; that the plaintiff herein is estopped by the findings and judgment in the said action from maintaining this action."

The court found that the plaintiff was and is the owner and entitled to the possession of the property described in the complaint; that the defendant wrongfully and without right claims to be the owner of said premises adversely to the plaintiff, but that the defendant has no right, title, or interest in or to said premises or any part or portion thereof; that on the 15th day of December, 1909, while the plaintiff was the owner and entitled to the possession of the said premises, the defendant wrongfully and without the consent and against the will of the plaintiff entered into the possession of the said property and ousted the plaintiff therefrom, and has ever since continued to withhold possession thereof from the plaintiff, to his damage in the sum of $500.

The court found against the defendant on its plea of estoppel, and further found that the plaintiff had been, by the wrongful acts of the defendant, generally and specially damaged in certain specified amounts. These latter findings will receive more particular notice hereinafter.

In accord with the findings, the decree adjudged: (1) That the plaintiff was the owner of the property in dispute, and entitled to the immediate possession thereof; (2) that the defendant has no estate or interest whatever therein; (3) that the defendant and all other persons claiming an interest or estate in said property be forever debarred from asserting any claim thereto or any part thereof or any interest or estate therein or any part thereof adverse to the plaintiff; (4) that the plaintiff is entitled to and that he have and recover from the defendant damages in the sum of $3,500, "together with his costs of suit, taxed at $40.95."

The defendant presents this appeal from the judgment, and supports the same by a transcript of the testimony and proceedings taken and had at the trial, prepared in accordance with the provisions of sections 941a and 941b of the Code of Civil Procedure. The general contention of the defendant is that the findings are without sufficient support from the evidence. We think that, in so far as is concerned the finding of special damages in the sum of $3,000, this contention must be sustained. In view, however, of another trial, we conceive it to be proper to pass upon certain other important propositions involved in the issues.

[1-5] 1. The court was right in finding and deciding that the judgment obtained by the defendant against Purcell, the plaintiff herein, in the action numbered 3839 in the superior court of Shasta county, and entitled "Victor Power & Mining Company, Plaintiff, v. John H. Purcell, Defendant," did not operate as an estoppel against the maintenance of the present action. Action No. 3839, which was in ejectment, to recover from Purcell possession of certain specific property situated within the exterior boundaries of the Bonanza mining claim, was commenced in the superior court in and for the county of Shasta on the 29th day of June, 1909. The complaint in said action, after alleging that the plaintiff "is now, and ever since the 5th day of October, 1907, has been, the owner in fee and entitled to the possession of all those lands and premises * * * known as the Bonanza mining claim, lands, and premises [describing the same]," charged that Purcell, the plaintiff herein, on the 6th day of October, 1907, without right, entered upon and ousted the plaintiff of the possession of a part of said mining claim, lands, and premises, and since said date has wrongfully withheld from the plaintiff in said action the possession of the same, and then follows a specific description of a certain lot upon which there are several buildings (a saloon building, known as the Weyand Building, a barn, and an icehouse), and which constituted a part of or were within the boundaries of the lands or property known as the "Bonanza mining claim" premises. The lot and the buildings so referred to, it is admitted, are not the specific property in dispute in the present action nor any part thereof.

Although the answer filed by Purcell in said action denied that the plaintiff therein (defendant herein) at the times mentioned in the complaint in said action, or at any other time, or at all, was the owner of the lands and premises known and described in said complaint as the "Bonanza mining claim lands and premises," it is clear that the vital, and indeed the only live, issue tendered by said pleading involved, not the question of the title or the right to the possession of the whole of the lands and property known as the "Bonanza mining claim lands and premises," but solely the question of the right to the possession of the particular lot or parcel of land included within the boundaries of the Bonanza claim, and which lot or parcel of land, with its improvements, constituted a part of the town of Harrison Gulch. The judgment does not purport to have adjudicated any other question. The judgment, while describing the property which Purcell was charged by the power company with having wrongful possession of as being a part of the Bonanza claim, does not adjudicate the question of the title to or the right of possession of the whole of said claim. It reads in part:

"Wherefore, by reason of the law and the findings, it is ordered, adjudged, and decreed that plaintiff recover from the defendant, John Purcell, the following real property situate in the county of Shasta, state of California, to wit: That lot and parcel of the Bonanza mining claim, lands, and premises, known as the Weyand Building (saloon, barn, and icehouse) and lot, and situate," etc.

As we have seen, the present action involves the question of the title to or ownership of another and different portion or part of the Bonanza claim. Thus it is to be observed that the two actions not only do not relate to or involve the same subject-matter or the same right, but the issues submitted for decision in the one action were different from those submitted in the other, since in the one the question of the right of possession was the sole issue, while in the other the question of title to or the ownership of the fee was the main issue.

Section 1911 of the Code of Civil Procedure declares:

"That only is deemed to have been adjudged in a former judgment which appears upon its face to have been adjudged, or which was actually and necessarily included therein or necessary thereto."

It is elementary, and indeed necessarily, true that the force of an estoppel by judgment resides in the judgment itself. It is not, in other words, the finding of the court or the verdict of the jury which concludes the parties, but the judgment entered thereon. See 23 Cyc. 1218, and cases named in the footnote.

In Foster v. The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125, the rule of res adjudicata is stated as follows:

"To be a bar to future proceedings it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit. It must appear to have been precisely determined."

See Freman v. Marshall, 137 Cal. 159, 69 Pac. 986; Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436; Freeman on Judgments, §§ 251, 253, 256, 257, 260, 261; Krutsinger v. Brown, 72 Ind. 468; Laguna Drain. Dist. v. Charles Martin Co., 5 Cal. App. 166, 89 Pac. 993.

In this case, while, as seen, the ownership

of the whole of the Bonanza claim premises was made an issue by the pleadings, and the court found that the plaintiff was the owner of all of said claim, yet the single and precise matter submitted for determination and which was adjudicated in the former action was as to the right to the possession of a small part only of the premises included within the boundaries of said claim; and it is obvious that the matter so decided is the only one involved in said action as to which the plea of res adjudicata may properly be held to operate.

The complaint in the former action was filed on the 29th day of June, 1908. The plaintiff in the present action did not, if he ever obtained any at all, acquire title to the property in question in this action until the 27th day of November, 1909, which was over one year after issue had been joined in action No. 3839. None of the predecessors in interest of the defendant herein was made or joined as a party defendant in the former action.

In the very early case of Valentine v. Mahoney, 37 Cal. 389, 396, Mr. Justice Rhodes, speaking for the court, had this to say of a situation strikingly similar to the one here:

"The plaintiff claims that this title accrued after the suit of Mahoney v. Wilson was determined. But it is not necessary to go to that length; for, if he did not hold the title at the time the issue of fact was joined in that action, or if acquired intermediate that time and the rendition of the judgment, it was not set up by the supplemental answer, and it was unaffected by the judgment, for the very sufficient reason that it was not involved in the action. It is enough for the plaintiff to show that the alleged newly acquired title was not in issue in the action, without showing that it was acquired after the judgment."

It is true that the rule is that:

"A judgment is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also * * * upon all matters involved in the issues which might have been litigated and decided in the case." Crew v. Pratt, 119 Cal. 149, 51 Pac. 42.

In different words:

"The plea of res adjudicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

But can it be said that, under the precise issues as tendered by the complaint, and which were vital to the case, the fact of the asserted ownership by Purcell of another and entirely different and distinct parcel of land included within the Bonanza claim constituted "a point which properly belonged to the subject of litigation" in the former action? We think not. The former action, as we have shown, was one in ejectment, in which alone was involved the question of the right to the possession, not of the whole of the premises of the Bonanza claim, but of a fractional part thereof; while the present is a suit to quiet title, in which the question of the ownership of the fee in another and different fractional portion of the lands of said claim is involved. There could obviously be no inconsistency in the wrongful withholding from the power company by Purcell of the possession of a certain portion of its lands and the existence in Purcell of an impregnable title to the fee in another portion of the same lands. Had the judgment in the former action passed in favor of Purcell, most certainly he could not thereafter have claimed that the adjudication had established in him anything more than the right to the possession of the particular premises within the boundaries of the Bonanza claim known as the "Weyand Buildings and lot." He could not have used the judgment as the foundation of a claim to the possession of other portions of the Bonanza lands, and thus, if the defendant's contention here were sound, there would be wanting that mutuality in operation which is one of the essential characteristics of estoppel by judgment. 23 Cyc. 1238.

[6-8] 2. The next point made by the defendant is that Purcell failed to show, as, under ordinary circumstances, it would be incumbent upon him to do, that he was a purchaser of the property involved herein in good faith and without notice, actual or constructive, of the purported conveyance by one A. L. Fletcher, one of the original locators and subsequent patentees of the Bonanza claim, of his interest in said claim and premises to his wife, Gertrude Irene Fletcher, prior to the conveyance by all three of such locators and patentees of the parcel of land in dispute herein to the plaintiff's grantor, Paul Friedman.

The record shows: That the property in question was on the 10th day of January, 1901, by a deed of conveyance quitclaimed by W. J. Thurman and Charles McGraw to Paul Friedman. Said deed recited that the premises thereby conveyed, which included a building in which the saloon business had been carried on, were "the same heretofore acquired by Charles McGraw, one of the parties of the first part herein, from J. F. Shelton by a deed bearing date June 7, 1897," which deed was duly recorded. On the 19th day of November, 1901, Andrew L. Fletcher conveyed by deed the lands and premises known as the Bonanza quartz mine to Gertrude Irene Fletcher; the property so conveyed being all of the lands and premises of the Bonanza mining claim. This deed was recorded on the 9th day of August, 1904. On the 25th day of November, 1901, Thurman and McGraw, above mentioned, executed and delivered to said Paul Friedman a warranty deed to the property in dispute, said deed having been recorded on the 10th day of December, 1901. On the 28th day of February, 1904, E. P. Sherk, Frank T. Large, and Andrew Fletcher by deed conveyed to Paul Friedman the property in controversy, said deed having been recorded on the 3d

day of March, 1904. On the 13th day of February, 1909, the general government issued to E. P. Sherk, Frank T. Large, and Andrew Fletcher (original locators thereof) a patent to the lands and premises of the Bonanza mining claim, which patent included the property here in controversy. This patent was recorded on the 26th day of February, 1909. By deed dated October 4, 1907, Fletcher, Large, and Sherk conveyed all the land and premises described in the said patent to the defendant in this action; the said instrument of conveyance having been recorded on the 18th day of October, 1907. On August 18, 1909, Gertrude Fletcher, wife of Andrew L. Fletcher, conveyed by deed to the defendant herein whatever interest she acquired in the lands and premises of the Bonanza mining claim by virtue of the deed from her husband, Andrew Fletcher, to her, bearing date November 19, 1901. It will be observed that the paramount source of the title to the land in dispute was in the general government, directly from which Sherk, Large, and Fletcher obtained title. The deeds from Thurman and McGraw to Paul Friedman, having been made prior to the issuance of the patent by the government to the parties therein named as patentees, are therefore without any force so far as is concerned the deraignment of title to the property in question to Purcell.

It will further be observed that the deed from Andrew Fletcher to his wife, Gertrude, conveyed the grantor's one-third interest in the properties of the Bonanza mining claim, which, it will be kept in mind, included the parcel of land in dispute. It will also be noted that the last-mentioned deed was executed on the 19th day of November, 1901, or approximately two years and three months prior to the execution by Sherk, Large, and Fletcher (who, as we have shown, subsequently became the patentees of the government of all the lands of the Bonanza claim) of the deed purporting to convey the parcel of land in question to Paul Friedman, the grantor of the plaintiff. The said deed to Friedman, however (it will be observed), was recorded in the office of the county recorder of Shasta county approximately five months prior to like recordation of the deed to Gertrude Fletcher from Andrew Fletcher. Friedman's deed to the plaintiff herein was executed and delivered on the 27th day of November, 1909, at and previous to which time, it will be borne in mind, the deed from Fletcher to his wife was on record in the recorder's office. Neither the deed from Andrew Fletcher to his wife nor the deed from Fletcher, Large, and Sherk to the defendant herein reserved or excepted from its operation any of the lands and premises included within the boundaries of the Bonanza claim or the lands patented to Fletcher, Large, and Sherk by the government.

We are familiar with the rule laid down in the cases, notably the case of Bell v. Pleasant, 145 Cal. 413, 78 Pac. 958, 104 Am. St. Rep. 61, that:

"Where one holding under an unrecorded deed brings an action involving the respective titles to the land against a subsequent grantee under a deed which is first recorded, the first grantee will prevail, unless the second grantee, not only shows the making and recording of his deed, but also that he made his purchase and paid the price in good faith, and without the knowledge of the rights of the previous grantee."

See, also, Colton v. Seavey, 22 Cal. 497, 504; Long v. Dollarhide, 24 Cal. 218; Mahoney v. Middleton, 41 Cal. 41; Eversdon v. Mayhew, 65 Cal. 167, 3 Pac. 641; Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325; Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463.

Under the rule above stated, the burden, under ordinary circumstances, would rest upon the plaintiff to show, if he could, that he received his deed to the disputed parcel of land without knowledge or notice of the pre-existing legal title of Mrs. Fletcher thereto. The deed of the latter, however, was a stranger to the record until after the plaintiff rested his case; it having been introduced in evidence by the defendant as a part, and indeed the mainstay, of its defense against the claim of the plaintiff. It then for the first time became necessary for the plaintiff to attempt to overcome the effect of the prior deed of Mrs. Fletcher, and this obviously could be done, if at all, by way of rebuttal only. In other words, the plaintiff could not know, when he filed his complaint, that the defendant would answer, nor that, if it did, it would claim under the deed from Fletcher to his wife. Baker v. Baker, 9 Cal. App. 737, 740, 100 Pac. 892, and authorities therein referred to. It was therefore the duty of the defendant to prove the deed from Fletcher to his wife, if it intended to rely upon that instrument, and not upon the plaintiff to anticipate it and undertake to overcome its effect in his original case. And meeting this duty, and so putting in its case, the defendant itself brought to light several considerations which give to the transactions concerning the land in dispute, in so far as they involved the dealings of Fletcher and his wife, a decided color of bad faith—so much so, indeed, as to lead to the conclusion that the burden of showing, if it could be done, good faith in said transactions should justly have been cast upon the defendant, to be by it satisfactorily discharged, before the plaintiff should have been required or called upon to make an attempt to show that he took his deed without notice, actual or constructive, of the asserted prior legal right of Mrs. Fletcher to the land in question.

The plain facts of this case are these: That Fletcher is, and was at the time of the trial of this action, the manager, the vice president, and a holder of a large block of the stock of the plaintiff; that the conveyance by him of the land in dispute to his wife, while given for a *good* consideration, was not

supported by a *valuable* consideration; that the conveyance by him to Friedman of said land after having conveyed it to his wife constituted, not only a fraudulent act, but one that is denounced by our law as a crime, punishable as a felony (Pen. Code, § 533); that the neglect of Mrs. Fletcher to record her deed within a reasonable time after she received it enabled him to commit said fraud; that the deed from Mrs. Fletcher to the Victor Power Company according to its face, was supported by a nominal consideration only (the sum of $1), and, moreover, was not made until approximately two years and ten months after Fletcher, Sherk, and Large conveyed by deed to said company all their respective interests in all the lands and premises of the Bonanza claim; that the defendant herein took the conveyance from Fletcher, Large, and Sherk, as likewise they took the deed from Mrs. Fletcher, with at least constructive notice of the prior deed from Friedman to the plaintiff.

Besides the foregoing considerations, Fletcher, while upon the witness stand, admitted the execution and delivery by him and his co-owners of the Bonanza claim lands of the deed conveying to Friedman the parcel of land in dispute, and during the course of his testimony made no claim that said conveyance was not made in good faith and for a valuable consideration. Indeed, his testimony clearly shows that after the deed to Friedman neither he and his associates nor the Victor Power Company ever exercised any acts of ownership over the so-called Friedman property. While he said he thought that the defendant was the owner of the property, he admitted that at no time did the company ever collect rent from the tenants thereof, and, in fact, neither he nor the defendant knew upon whose authority tenants occupied the building. It is true that Fletcher, acting for the defendant after the building became vacant, directed one of the employés of the company to take charge of the building, for no other purpose, however, as declared by Fletcher, than to prevent it from catching fire, the danger of which seemed to be probable from the fact that it was often made a place of refuge by stragglers and men in an intoxicated condition. His principal reason for thus exercising surveillance over the property, he said, was to prevent a conflagration or the destruction by fire of other property in the town of Harrison Gulch (of the bulk of which the company was the owner), a result which would likely follow from the burning of the Friedman Building because of its central location in the town.

Now, as to the deed from Fletcher to his wife and the conveyance from Fletcher, Sherk, and Large to the power company, either one or the other of two conclusions necessarily follows therefrom: (1) That the deed from Fletcher to his wife was not understood or intended by them to operate as a bona fide transfer of Fletcher's interest in the lands; or (2) that Fletcher, when joining Sherk and Large in the deed to defendant, said transfer having been executed subsequently to the making of the deed to Mrs. Fletcher, committed a fraud on the power company, and, as in the case of the deed to Friedman, violated the provisions of section 533 of the Penal Code, supra. The first stated hypothesis is the more reasonable, perhaps, in view of Fletcher's peculiar position with reference to this action. In this connection it is to be observed that, while the action here is against the Victor Power Company, a corporation, it is obvious that a judgment in its favor would inure greatly to the benefit of Fletcher, since he was not only manager of, but a large stockholder in, the defendant at the time of the trial of this action. And it may parenthetically well be observed that Fletcher, as such manager and stockholder, if not strictly in a legal aspect, was nevertheless most certainly in substantial effect, in this action, in the very unenviable position of one who attempts to bolster up his own title to property by and upon his own fraudulent act, or, in other words, attempts to establish that his own deed is void because it was made and delivered in fraud of the rights of his prior grantee.

However, as before stated, all the foregoing facts and considerations were brought out by the defendant itself in attempting to support its claim of ownership of the property in controversy, and were, in our opinion, sufficient to indicate the bad faith of the transaction on which the defendant has planted its resistance to the plaintiff's claim of ownership and to call for a satisfactory explanation thereof, if one may be given. In other words, we believe that, in equity and good conscience, it was a duty incumbent upon the defendant to make such an explanation before the plaintiff should have been called upon to show that he had taken his deed without notice of a prior deed which the facts and circumstances brought out by the defendant itself tend strongly to show was not made and given in good faith and for a valuable consideration.

[9] But, as stated, the judgment must be reversed because of the insufficiency of the evidence to support the finding of special damage. The court found that, by reason of the ouster of and the wrongful detention of the property in controversy from the plaintiff, the latter was damaged in the sum of $500. The court further found that the plaintiff, after having been ejected from the Weyand Building by the defendant, was, by reason of the withholding by the defendant of the possession of the Friedman Building, prevented from engaging in the saloon business in Harrison Gulch, there being no other building in said town suitable for such a business, that the saloon business theretofore conducted by the plaintiff had returned him a profit of $150 per month, and that said business and profits had been totally destroyed by the

said wrongful act of the defendant, and that by reason thereof the plaintiff had been further damaged in the sum of $500.

As to special damage the court found as follows:

"That plaintiff from the 15th day of December, 1909, to the time of the commencement of said action had been continuously engaged in the conducting of the saloon business in that certain building in the town of Harrison Gulch, county of Shasta, state of California, commonly known as and called the 'Weyand Building'; that during all of said times the said Weyand Building was too small for the proper handling of the said saloon business of the plaintiff; that there is situated on the property described in paragraph 1 of these findings, a building known as the 'Friedman Building,' which building was of sufficient size to accommodate the said saloon business of plaintiff; that during said time there was no other building in said town of Harrison Gulch which plaintiff during any of said times was able to secure, or could secure, that was suitable for the transaction of his said saloon business; that by reason of the withholding of the possession of the said Friedman Building from plaintiff plaintiff has been specially damaged in this, that he was during said time greatly restricted in the volume of business which he otherwise would have been able to do, and was and has been deprived of a large revenue which he would have otherwise received if he had been permitted to use and occupy said Friedman Building for saloon purposes during said time, by reason whereof he had been specially damaged in the sum of $3,000."

Although the language of the foregoing finding "that plaintiff from the 15th day of December, 1909, to the time of the commencement of said action," etc., is rather ambiguous, still it seems clear enough that the words "the said action" mean the present action, since no other action is previously mentioned in the findings. There is a further ambiguity in the language of the finding in that this action was commenced on the 1st day of February, 1910, while the amended and supplemental complaints were filed on November 4, 1910. The supplemental complaint set up the claim for the special damages found in the quoted finding. If the finding refers to the time at which the action was actually commenced (February 1, 1910), then the special damages allowed by the court covered only the period from December 15, 1909, to February 1, 1910, or a period of 47 days. If, as perhaps is true, it referred to the period from the 15th day of December, 1909, to the date of the filing of the supplemental complaint, then the damages therein awarded cover a period of a trifle over 11 months.

But in either case the damage claimed to have been suffered by the plaintiff in the particular referred to is entirely too remote and speculative to uphold a finding of special damages on that score in the enormous sum of $3,000. The evidence does not establish a substantial criterion by which special damages by reason of the wrongful withholding of the property from the plaintiff may be approximately estimated. In such cases as this the plaintiff's right to recover for such a loss as is involved in the finding under consideration depends on his proving with sufficient certainty that the advantages he claims would have resulted had the acts of the defendant complained of by him not been committed.

The award of special damages is founded upon the hypothesis, which is presented by the supplemental complaint, that, inasmuch as the Friedman Building was of larger dimensions or more capacious than the Weyand Building, the volume of the plaintiff's business would have been greatly increased, with a corresponding increase in profits therefrom, had the plaintiff not been wrongfully deprived by the defendant of the possession of the former building and he thus enabled to occupy and use said building for the purposes of the saloon business.

There is no necessity for reviewing at length in this opinion the testimony offered and received in support of that proposition, and upon which the trial court predicated the above-quoted finding. Most of whatever proof there is in the record upon this question of special damages came from the testimony of the plaintiff himself. He testified that during the period of time that the possession of the Friedman Building was withheld from him by the defendant and while he was still occupying the Weyand Building, and during the last six months of his occupancy of said building, his receipts for sales of liquor amounted to an average of $48 per day, of which $18 represented profits. He remained in possession of the Weyand Building until the 30th day of October, 1910, or down to four days before his supplemental complaint was filed. Accepting his statement that, his net earnings during the period mentioned amounted to $18 per day, it, of course, follows that his loss, by reason of being deprived of the occupancy and use of the Friedman Building, would be the difference between the amount so earned and any sum in excess of said amount which he might show with sufficient certainty that he would have earned as profits had he, during that time, occupied and used said building for the purposes of the business in which he was engaged. The record does not disclose that this difference has been ascertained or even approximately so. There is testimony by the plaintiff and another witness testifying in his behalf that the plaintiff's saloon in the Weyand Building was generally crowded for room because of the large number of frequenters thereto, and that the saloon was not of sufficient dimensions to hold the number of card tables necessary to accommodate such of the plaintiff's customers as desired to play at cards for drinks. The plaintiff appears to have regarded the lack of room for additional tables as constituting the principal drawback of the Weyand Building to his business; but it was not shown, nor was there any attempt at showing, how much business was

turned in by the card games to the plaintiff, nor is it satisfactorily made to appear that he would have actually sold more liquor had he been able to add to his establishment a sufficient number of card tables to have accommodated all his customers desiring to play at cards. For aught that appears to the contrary from the record, those of his customers having a predilection for card playing who were deprived of the opportunity of indulging in that pastime because of lack of facilities in that respect might have patronized the plaintiff's bar to an extent equal to that which they would have done had they been engaged in card playing. At any rate, as before declared, there is no satisfactory showing that the plaintiff suffered the loss of any business by reason of the comparatively restricted dimensions of the Weyand Building. The most that can be said of all the testimony presented by the plaintiff upon this element of special damage is that he did a profit-producing business while he occupied the Weyand Building. Clearly this is not sufficient warrant for a finding that he would have done a greater amount of business and as a consequence derived larger profits had he been allowed the occupancy and use of the Friedman Building for the purposes of his business.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

29 Cal. App. 496

RIVERA v. CAPPA. (Civ. 1721.)

(District Court of Appeal, First District, California. Jan. 28, 1916. Rehearing Denied Feb. 25, 1916. Denied by Supreme Court March 28, 1916.)

1. BILLS AND NOTES ⟸477—ACTIONS—DEFENSES.

An averment that a note was executed and delivered as the result of duress, coupled with general averments in the answer of want of consideration, is sufficient to present that defense in the absence of a special demurrer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1524, 1525, 1558; Dec. Dig. ⟸477.]

2. APPEAL AND ERROR ⟸499(2)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Though defendant's answer rested the defense of want of consideration for a note upon a conclusion of law, the defect in the pleading will not be considered on appeal, where the record did not show the matter was raised by demurrer or otherwise in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2296; Dec. Dig. ⟸499(2).]

3. APPEAL AND ERROR ⟸907(2)—FINDING—PRESUMPTIONS.

In the absence of a record showing the evidence, there is a presumption on appeal that the finding of the trial court was supported by sufficient evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911–2913, 2915, 2916; Dec. Dig. ⟸907(2).]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Luis Rivera against Joseph Cappa. From a judgment for defendant, plaintiff appeals. Affirmed.

Rehearing denied by Supreme Court, 156 Pac. 1017.

Devoto, Richardson & Devoto, of San Francisco, for appellant. E. M. Rea, of San Jose, for respondent.

PER CURIAM. This is an appeal upon the judgment roll alone from a judgment rendered in favor of the defendant in an action upon a promissory note.

The defendant admitted the execution of the note, but pleaded in his answer:

That "there was no consideration of any kind or nature therefor, * * *" and that at the time of signing said note the defendant was "laboring under great mental excitement, and that the payee therein threatened to blackmail the defendant if he did not sign the same, and that he signed the same through fear of blackmail and by reason of said fear, and not otherwise."

The case was tried and determined upon the issues purporting to have been raised by the pleadings of the respective parties, and upon the issues thus raised the trial court found as a fact:

That the payee of the note "did not at the time of the signing of said note or at any other time part with anything of value for the execution thereof, and that the said note or contract is and was without consideration of any kind or nature."

[1] The defense of want of consideration for the execution of a promissory note or other written instrument is new matter, which must be specially pleaded, and it seems to be the rule in this state that a general averment that the note or contract sued on was executed without any consideration whatever is but an allegation of a conclusion of law. Happe v. Stout, 2 Cal. 460; Gushee v. Leavitt, 5 Cal. 160, 63 Am. Dec. 116; Winters v. Rush, 34 Cal. 136. See, also, 9 Cyc. 738. But, however that may be, it will be noted that the answer of the defendant in the present case averred, in addition to the general allegation of want of consideration, that the note in suit was executed and delivered to the payee as the result of duress. That was an allegation of fact which, when considered in connection with the general averment of want of consideration, and in the absence of a special demurrer, sufficiently pleaded the defense relied upon. Shain v. Belvin, 79 Cal. 262, 21 Pac. 747.

[2] But, even if it be conceded that the defendant's answer rested the defense of want of consideration upon the allegation of a conclusion of law, nevertheless the objection made after trial of the case upon the merits will not be considered upon an appeal supported only by a record which does not show that such objection was interposed by demurrer or otherwise in the court below.

King v. Davis, 34 Cal. 101, 106; Illinois, etc., Bank v. Pac. Ry. Co., 115 Cal. 285, 47 Pac. 60; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497.

[3] In the absence of a record showing the evidence introduced upon the trial, the presumption prevails that there was sufficient evidence to support the finding of the trial court upon the issue of want of consideration. That finding in turn supports the judgment, and therefore the failure of the court to find upon other issues purporting to have been raised by the answer is of no consequence and need not be considered here.

The judgment appealed from is affirmed.

(29 Cal. App. 496)

RIVERA v. CAPPA. (S. F. 7775.)

(Supreme Court of California. March 28, 1916.)

PLEADING ⟸8(4)—CONCLUSIONS—WANT OF CONSIDERATION.

An answer averring that there was no consideration of any kind or nature for a note is a sufficient pleading of want of consideration, not being objectionable as pleading a conclusion of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 14; Dec. Dig. ⟸8(4).]

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Luis Rivera against Joseph Cappa. A judgment for plaintiff was affirmed by the District Court of Appeal (156 Pac. 1016), and plaintiff moves for rehearing. Motion denied.

Devoto, Richardson & Devoto, of San Francisco, for appellant. E. M. Rea, of San Jose, for respondent.

SHAW, J. The petition for a rehearing is denied. The opinion of the District Court of Appeal states that "it seems to be the rule in this state that a general averment that the note or contract sued on was executed without any consideration whatever" does not state a good defense because an averment in that form states a mere conclusion of law.

The only one of the cases cited upon this proposition which appears to support it is Gushee v. Leavitt, 5 Cal. 160, 63 Am. Dec. 116. The court in that case was unfortunate in its mode of expression. In view of the well-established rule that an answer which avers, in so many words, that the note sued on was executed without any consideration whatever, states a good defense (9 Cyc. 738), it is hardly to be supposed that the court there intended to decide the contrary. The context shows, however, that what the court really intended to declare was the equally well-established rule that general allegations that the note was obtained by fraud are not sufficient, but that the facts constituting the fraud must be set forth.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLOR, J.; MELVIN, J.

(172 Cal. 472)

MARTINELLI v. MORROW et al., Board of Directors of Marin Municipal Water Dist. (S. F. 7809.)

(Supreme Court of California. April 6, 1916.)

WATERS AND WATER COURSES ⟸183½—WATER DISTRICTS—ELECTION—STATUTE—CONSTITUTIONALITY.

Const. art. 20, § 13, providing that a plurality of the votes at any given election shall constitute a choice except as otherwise directed in the Constitution, exempting from its operation cities and counties and cities whose charter provisions shall control, and empowering the Legislature to provide by general law the manner in which officers of municipalities organized or incorporated under general laws may be elected, deals only with elections in the state, counties, cities, or other subdivisions exercising governmental functions, and does not invalidate a provision of the law creating municipal water districts that no person shall be declared elected at the first election for directors of such district, unless he received a majority of the votes cast.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⟸183½.]

In Bank. Application for mandamus by E. B. Martinelli against W. G. Morrow and others constituting the Board of Directors of Marin Municipal Water District. Application denied.

E. B. Martinelli, of San Rafael, in pro. per. George H. Harlan, of San Rafael, for defendants.

PER CURIAM. This is an application for mandate, in effect asking this court to declare that certain candidates for the office of members of the board of directors of the Marin municipal water district who received a plurality, but not a majority, of the votes cast at the election held for the purpose of electing the board of directors, were in law duly elected members of the board of directors. The act authorizing the creation of municipal water districts provides that "no person shall be declared elected at such first election unless" he shall have received a majority of the votes cast. Article 20, § 13, of the Constitution provides that: "A plurality of the votes given at any election shall constitute a choice where not otherwise directed in this Constitution." The Constitution then proceeds to exempt from the operation of this provision cities, counties, and cities and counties whose charter provisions shall control in the matter. And next it empowers the Legislature by general law to provide the manner in which "officers of municipalities organized or incorporated under general laws may be elected."

The point in dispute is whether or not this provision of the Constitution providing for

an election by a plurality is controlling. We are of the opinion from a reading and consideration of the whole constitutional section that the Constitution was dealing only with state elections, elections in cities, counties, and cities and counties, and in such other political subdivisions of the state now or hereafter created which exercise governmental functions, and that consequently the provision does not apply to organizations such as this, created for a limited purpose and for the accomplishment of a useful, but not a political or governmental, end.

The application for a writ is therefore denied.

172 Cal. 458

ROBERTS v. BUCKINGHAM et al.

(L. A. 3650.)

(Supreme Court of California. April 5, 1916.)

1. FRAUDULENT CONVEYANCES ⟨⊃259(2) — RIGHT TO VACATE—NECESSITY OF JUDGMENT.

Under Civ. Code, § 3441, providing that a creditor can avoid the act or obligation of his debtor for fraud only when the fraud obstructs the enforcement by legal process of his right to take the property affected by the transfer or obligation, a complaint to set aside a conveyance as fraudulent which shows that the creditor had not yet secured judgment against the grantor is defective.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 764–766; Dec. Dig. ⟨⊃259(2).]

2. FRAUDULENT CONVEYANCES ⟨⊃241(1) — RIGHT TO VACATE—NECESSITY OF JUDGMENT —NONRESIDENTS.

The fact that a debtor who fraudulently conveyed his land is a nonresident of the state does not entitle his creditor to sue to set the conveyance aside without first proceeding against the debtor at least so far as to secure a specific lien, as by attachment, on the property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 694, 696; Dec. Dig. ⟨⊃241(1).]

3. APPEARANCE ⟨⊃25 — CROSS-COMPLAINT — WAIVER OF OBJECTIONS.

Where in a suit to set aside a conveyance as a fraud on creditors the debtor filed a cross-complaint against his grantee alleging that the conveyance was made to enable the grantee to mortgage the property, and that he did so and reconveyed the property to the debtor by an unacknowledged deed which it was agreed should not be recorded, the cross-complaint stated a cause of action within the court's jurisdiction, and the general appearance of the grantee therein waived any objection that it was not a proper cross-complaint, so that on appeal on the judgment roll alone the grantee could not complain of a judgment supported by the findings which decreed the title to be in the debtor.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 144–153; Dec. Dig. ⟨⊃25.]

4. APPEAL AND ERROR ⟨⊃877(2)—HARMLESS ERROR—ERROR NOT AFFECTING APPELLANT.

Where the court properly found that the grantee to whom land had been conveyed in alleged fraud on creditors had reconveyed the land to the debtor, who now had no interest therein, the debtor cannot complain of the money judgment rendered against his grantor, or that it was made a lien on the land, which was merely a declaration of the effect given it by statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3563, 3564; Dec. Dig. ⟨⊃877(2).]

5. COSTS ⟨⊃260(1) — APPEAL FOR DELAY — DAMAGES.

Where an appeal was taken on the judgment roll alone which showed that appellant was causelessly seeking to obstruct justice below and was deprived of no right by the judgment, no reason can be conceived for taking the appeal except to secure delay, and damages will be assessed against him.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983, 986, 996; Dec. Dig. ⟨⊃260(1).]

Department 1. Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Charles A. B. Roberts against Joseph G. Buckingham, C. B. Williams, and others. Judgment for the plaintiff, and defendant Williams appeals. Affirmed.

D. Z. Gardner and Paul W. Schenck, both of Los Angeles, for appellant. Edward L. Payne, of Los Angeles, for respondent Roberts. Trask, Norton & Brown, of Los Angeles, for respondent Buckingham.

SHAW, J. The defendant C. B. Williams has appealed from the judgment upon the judgment roll alone.

[1] The complaint alleges that the defendant Joseph G. Buckingham is indebted to the plaintiff in divers sums amounting to $912; that he is a nonresident of the state of California; that on March 18, 1910, Buckingham, for the purpose of defrauding the plaintiff and others of his creditors, conveyed certain described real estate to the defendant C. B. Williams, who took the same in furtherance of the fraudulent purpose of Buckingham. Judgment is prayed for the amount of the indebtedness and that the deed so made to Williams be declared fraudulent and void as against plaintiff. There was no demurrer to the complaint.

So far as this complaint attempted to state a cause of action to set aside the alleged fraudulent deed, it was defective, for the reason that it did not show that the plaintiff had established his debt against Buckingham by reducing it to the form of a judgment. Civ. Code, § 3441; Aigeltinger v. Einstein, 143 Cal. 609, 77 Pac. 669, 101 Am. St. Rep. 131; McMinn v. Whelan, 27 Cal. 315; First National Bank v. Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; Lyden v. Spohn-Patrick Co., 155 Cal. 183, 100 Pac. 236; Sewell v. Price, 164 Cal. 270, 128 Pac. 407.

[2] The allegation that Buckingham was a nonresident of the state does not cure the defect. The cases cited establish the proposition that even against a nonresident the creditor must first prosecute his suit so far, at least, as to obtain some specific lien, as by attachment, upon the property.

[3] Buckingham filed a cross-complaint against the other parties to the action, alleging that he had executed the conveyance to Williams, being the one referred to in the complaint of Roberts, but that immediately thereafter Williams and his wife had executed a reconveyance of the property to Buckingham, and that it was agreed between them that the reconveyance should not be recorded. Buckingham further alleged that the conveyance to Williams was given in trust to enable Williams to mortgage the property for $3,750, pay a prior mortgage of $2,000 therewith, and pay over the balance of $1,750 to Buckingham. The court made findings, in substance, that the deed from Buckingham to Williams was executed on March 18, 1910, as alleged; that it was made and received with intent to defraud the creditors of Buckingham; that on the same day Williams and his wife reconveyed the property to Buckingham; that said reconveyance was not acknowledged, but that it was duly delivered and was a valid conveyance; and that it was understood between the parties that it should not be recorded. With respect to the amount due from Williams to Buckingham on account of the mortgage, for which Buckingham asked an accounting, the court declared that it was unable to determine how much was unpaid. The judgment does not give Buckingham any relief on that account. Thereupon the court gave judgment for $912, and interest, in favor of the plaintiff against Buckingham, and further adjudged that the deed from Buckingham to Williams was given with fraudulent intent, and was void; that the property was reconveyed by Williams to Buckingham; that said reconveyance was valid; that the title to the real property was then and at all times thereafter vested in the said Buckingham and subject to the claim of the plaintiff; and, further, that the said judgment of plaintiff against Buckingham was a lien on said real property.

The cross-complaint states a cause of action within the jurisdiction of the court. The full appearance thereto by Williams without objection was a waiver by him of all objections, if any there could be, on the ground that it was not a proper cross-complaint to an action to recover money on a contract. The judgment given was an appropriate judgment in response to the cross-complaint of Buckingham, and it is supported by the findings thereon. So far as the controversy between Williams and Buckingham is concerned, the appeal is utterly devoid of merit.

[4] The facts stated also show that Williams is not aggrieved by the personal judgment for money against Buckingham in favor of plaintiff. He had no interest in the controversy, except in virtue of his claim under the deed from Buckingham to him. Since the judgment that the land is now vested in Buckingham, and not in Williams, was properly given, it follows, necessarily, that Williams has now no interest in the case and is not injured by, nor in any manner concerned with, the personal judgment of Roberts against Buckingham. The declaration that said judgment was a lien on the land did not injure Williams, since he had no interest therein. Moreover, the statute makes it a lien on Buckingham's land, and the declaration to that effect was useless.

[5] The appellant has allowed his case to be presented upon a record which shows that he was causelessly endeavoring to obstruct justice in the court below, that the judgment deprives him of no right or claim to which he was lawfully entitled, and that his prosecution of this appeal is nothing other than a continuation of his obstructive efforts. We can conceive of no object he could have had in taking the appeal unless it was to obtain some undue delay. It is a proper case for the imposition of damages.

It is ordered that the judgment be affirmed, that the defendant Joseph G. Buckingham recover of the appellant, C. B. Williams, in addition to his costs, the sum of $100 as damages, and that all the respondents recover their respective costs on this appeal.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 474

In re NIGRO'S ESTATE.

BUTLER et al. v. BUTLER et al.

(S. F. 7549.)

(Supreme Court of California. April 11, 1916. Rehearing Denied May 4, 1916.)

1. DESCENT AND DISTRIBUTION ⟸34—PERSONS ENTITLED—ISSUE OF BROTHER AND SISTER DECEASED.

Civ. Code, § 1386, subd. 3, providing for descent, if there is no issue, spouse, or parent, to decedent's brothers and sisters and to the children or grandchildren of any deceased brother or sister, does not entitle the children or grandchildren of a deceased brother or sister to inherit unless a brother or sister of the ancestor survives him.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 97–101; Dec. Dig. ⟸34.]

2. DESCENT AND DISTRIBUTION ⟸34 — PERSONS ENTITLED—ISSUE OF BROTHER AND SISTER DECEASED.

The rights of issue of deceased brothers or sisters are governed by Civ. Code, § 1386, subd. 5, providing for descent to next of kin where there is no issue, spouse, parent, sister, or brother.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 97–101; Dec. Dig. ⟸34.]

3. DESCENT AND DISTRIBUTION ⟸34—PERSONS ENTITLED—ISSUE OF BROTHER AND SISTER DECEASED—NEXT OF KIN.

Where decedent is survived by no issue, spouse, parent, sister, or brother, but by nephews and nieces and children of dead nieces and nephews, only the nephews and nieces inherit,

under Civ. Code, § 1386, subd. 5, providing that in such case "next of kin in equal degree" inherit.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 97–101; Dec. Dig. ⟸34.]

4. Descent and Distribution ⟸43 — Persons Entitled—Per Stirpes or Per Capita.

Under Civ. Code, § 1386, subd. 5, providing that if there is no issue, spouse, parent, sister, or brother, the estate goes to the next of kin in equal degree, descent is per capita and not per stirpes.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 97–101; Dec. Dig. ⟸13.]

Department 1. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the estate of Ellen Nigro, deceased. From a decree of distribution giving the property to Joseph F. Butler and others, Charles O. Butler and others appeal. Affirmed.

William P. Hubbard, of San Francisco, for appellants Charles O. Butler and others. Knight & Heggerty and William M. Madden, all of San Francisco, for appellant Rose Croghan Johnson. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent Joseph F. Butler individually and as executor, etc. Harry F. Sullivan, of San Francisco, for respondent Madeleine Breiling.

SHAW, J. Two appeals are here presented, each involving the determination of the right of inheritance, under section 1386 of the Civil Code, to ascertain portions of the estate of Ellen Nigro, deceased, not disposed of by her will. The appeals, respectively, are from parts of the decree of distribution of said estate.

Ellen Nigro left surviving at her death neither issue, husband, father, mother, brother, nor sister. She was the survivor of a family of four children, consisting of herself, Ann Butler, Margaret Gordon, and Michael Croghan. At the time of her death, the following descendants of her sisters and brother were living: Joseph F. Butler, a son, and Charles O. Butler, Joseph Butler, and Charlotte Skinner, children of Thomas D. Butler, a deceased son of Ann Butler; eight children of Margaret Gordon, their names being unimportant to our discussion; Rose Croghan Johnson, a daughter of Michael Croghan, and the children of Margaret Croghan Hall, a deceased daughter of Michael Croghan, to wit, Minnie Batinich, Edna Morfield, Madeline Meyer, Ethel Hall, and Benjamin Hall. The court below held that the only persons entitled to inherit were the living children of the deceased sisters and brother, and that the children of deceased children, that is, the grandchildren of said sisters and brother, took nothing. Accordingly, it distributed the property in equal shares, one-tenth each, to Joseph F. Butler, Rose Croghan Johnson, and the eight living children of Margaret Gordon. The persons omitted were Charles O. Butler, Joseph Butler, and Charlotte Skinner, children of Thomas D. Butler, son of Ann Butler, and the aforesaid children of Margaret Croghan Hall, who was a daughter of Michael Croghan. Charles O. Butler and three of the above-named grandchildren of Michael Croghan, deceased, appeal from the decree on the ground that the court erred in excluding the grandchildren of the deceased brother and sister from a share in the estate. Rose Croghan Johnson appeals on the ground that there was error in giving the estate to the surviving nephews and nieces in equal shares, one-tenth to each, and that it should have been distributed by right of representation, one-third to Joseph F. Butler, as the only surviving child of Ann Butler, one-third to the eight children of Margaret Gordon and one-third to herself as the only surviving child of Michael Croghan.

1. The appellants first contend that the right of inheritance is governed by the provisions of subdivision 3 of said section 1386, which reads as follows:

"(3) If there is neither issue, husband, wife, father, nor mother then in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister, by right of representation."

[1] Under the rule established in this state, this section does not entitle the children or grandchildren of a deceased brother or sister to inherit from the ancestor, unless a brother or sister of the ancestor has survived him. Subdivision 3, in this particular, is not to be distinguished from that part of subdivision 2, as it read in 1888 (amd. Codes 1880, p. 14), which declares that:

"If there be no father or mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation," referring to the case of a decedent who leaves a husband or wife, but no father or mother surviving.

This language was under consideration in Estate of Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80. It was there held that the children of a deceased sister of the ancestor could not inherit under that section, because the ancestor left no brother or sister surviving. The court said:

"Paragraph 2 of said section refers to the case where there is a surviving brother or sister, and provides that in such case, if there be also children of the deceased brother or sister, they shall take their parents' share by right of representation. It is vain to argue against the injustice of the rule, or to contend that in a case like the one at bar the children of a deceased sister ought to have a share in the estate when there is not any surviving brother or sister, as well as when there is. Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts."

See, also, Estate of Lynch, 132 Cal. 214, 64 Pac. 284; Estate of Nigro, 149 Cal. 703, 87 Pac. 384.

In the case at bar there was no brother or sister of Ellen Nigro surviving at her death. Consequently, under the rule of interpretation fixed in the Ingram Case, sudivision 3 does not govern the right of inheritance from her or give such right to the children or grandchildren of the deceased brother and sisters.

The descent involved in the Ingram Case occurred prior to the amendment in 1907 of section 1386. The only change in subdivision 2, by the amendment, was the insertion of the words "or grandchildren," so that thereafter the grandchildren, as well as the children, of a deceased brother or sister, would inherit, if the ancestor also left a surviving brother or sister. By the same amendment an identical change was made in subdivision 3, apparently for the same purpose. These amendments obviously have no bearing whatever on the rule of interpretation here involved. They do not change the effect of the section as applied to the facts of this case.

[2] The rights of the parties here are governed by subdivision 5 of said section. That subdivision is as follows:

"(5) If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote."

[3] This subdivision applies, as its language shows, to cases where the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister surviving. This is the condition here presented. The question for determination is what is the meaning of the words "the estate must go to the next of kin in equal degree," as used in this section. "The degree of kindred is established by the number of generations, and each generation is called a degree." Civ. Code, § 1389. The series of degrees form the line, and the series between persons who do not descend from one another, but spring from a common ancestor, as in case of brothers and sisters, constitute collateral kindred. Civ. Code, § 1390.

"In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. * * * Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins germane in the fourth, and so on." (Civ. Code, § 1393.)

These definitions control the meaning of the words "in equal degree," in subdivision 5. Under its terms, therefore, the only persons in equal degree of kindred to Ellen Nigro who could inherit from her were the surviving children of the deceased brother and sisters. The grandchildren of such deceased brother and sisters were not in equal degree with such surviving children. It necessarily follows that the grandnephews and grandnieces of Ellen Nigro took no part of her estate. The observations quoted from the Estate of Ingram, supra, apply with equal force to any claim that subdivision 5 is unjust in this respect. The Legislature has determined the question.

[4] 2. On behalf of the appellant Rose Croghan Johnson, it is contended that the descent to the next of kin in equal degree is by right of representation and not per capita, and, consequently, that the decree is erroneous in giving her, as the only living child of the brother, Michael Croghan, one-tenth of the estate instead of one-third thereof, and in giving one-tenth to each of the eight children of Margaret Gordon, instead of one-third to them all. It will be observed that subdivision 5 is silent on the question whether the descent there provided is to be per capita, or by right of representation. We are of the opinion that, when the language of the entire section is considered, the conclusion is inevitable that the Legislature intended that the descent in such cases should be per capita, and not by right of representation. In the other subdivisions of the section, in cases where the Legislature deemed it proper, it carefully provided that descent should be according to representation and not per capita. Thus, in subdivision 1, the statement is made repeatedly that grandchildren take by right of representation and not per capita, and that only where the descendants are all in the same degree do they share equally. By subdivision 2 the children or grandchildren of deceased brothers or sisters are to take by right of representation. In subdivision 3 the same provision is made. In subdivision 6, like provision is made with regard to the inheritance from a surviving child, who dies under age, by the issue of other children of the ancestor. In subdivision 7 again provision is made that, if issue are in the same degree, they share equally, but if not, by right of representation. So, also, in subdivision 8. The only reasonable conclusion from this omission of any similar provision or declaration on the subject in subdivision 5 is that the Legislature intended that the inheritance should go to the next of kin in equal degree, per capita and not by right of representation.

The said appellant relies on the common-law rule that collateral kindred of the degree of nephews and nieces take by representation, and only those of remoter degree, as grandnephews and grandnieces, if they take at all, take per capita. Woerner on Descendants' Estates, § 69; Carter v. Crawley, T. Raym. 496. She argues that as the common law is made the rule of decision in this state, so far as it is consistent with our statutes (Pol. Code, § 4468), it determines the right of the next of kin in equal degree, under subdivision 5, to take by representation, since that subdivision does not declare that they shall take per capita. Subdivision 5 applies to all

next of kin of equal degree, however remote, and without distinction, in respect of this question. It is not probable that the Legislature would designedly have left this matter to be governed by the common-law rule limiting descent by right of representation to nephews and nieces and denying it to remoter kin, without saying anything on the subject, when it was so careful to cover the subject in each of the other subdivisions. As no distinction is declared, it is to be inferred that all next of kin were to be governed by the same rule. If we are right in our conclusion that this subdivision, in connection with the others, must be understood to provide that the descent thereunder is per capita, then the common-law rule cannot prevail. It must yield to the implied meanings of the statute, as well as to its express declarations.

The decree of distribution is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 456

PORTER v. JOHNSON. (L. A. 3637.)

(Supreme Court of California. April 5, 1916.)

1. APPEAL AND ERROR ⟸1011(1)½—CONFLICTING EVIDENCE—FINDING—CONCLUSIVENESS.

A determination on conflicting evidence was in the province of the lower court, and the Supreme Court cannot interfere with its findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸ 1011(1).]

2. ESTOPPEL ⟸94(1)—ACQUIESCENCE.

Defendant, who had owned the lot in suit and who, being unable to pay the installments due upon her contract with plaintiff's grantor, requested it to take the property off her hands and authorized it to sell and convey it and to apply the proceeds on her indebtedness and pay the surplus, if any, to her, and who acquiesced in its sale to plaintiff, was estopped to deny plaintiff's title to the property.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 245–247, 276–278; Dec. Dig. ⟸ 94(1).]

3. VENDOR AND PURCHASER ⟸232(3)—BONA FIDE PURCHASER—NOTICE—POSSESSION.

The possession of the defendant, which was fully explained and was not inconsistent with the view that plaintiff's grantor owned the legal title and was selling with the consent and for the benefit of the defendant, was not notice of her claim sufficient to put the plaintiff on inquiry at the time of his purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 544; Dec. Dig. ⟸ 232(3).]

4. HUSBAND AND WIFE ⟸221 — ACTION AGAINST WIFE—PARTIES—STATUTE.

In an action against a married woman to recover possession of a lot, begun when she was living separate and apart from her husband because of his desertion of her, the husband, under the express provision of Code Civ. Proc. § 370, was not a necessary party.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 463, 464; Dec. Dig. ⟸ 221.]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by George W. Porter against Anna Johnson. Judgment for plaintiff, and from the judgment and an order denying her motion for a new trial defendant appeals. Judgment and order affirmed.

Constan Jensen, of Los Angeles, for appellant. Parker & Moote, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying her motion for new trial.

[1, 2] The complaint states a cause of action to recover possession of a lot in Los Angeles. The defendant was formerly the owner of the lot. The plaintiff derives title under a deed executed by the defendant, conveying the lot to the Maine Building & Investment Company, dated July 19, 1911, and a subsequent deed from the investment company to the plaintiff. The defendant's claim is that the deed executed by her to the investment company was made to secure the company in the repayment of money expended by it on her behalf in the erection of a house on the premises, and that the legal effect of the transaction was to create only a mortgage in favor of said investment company. After the execution of the deed to the investment company, that company executed to the defendant a contract for the sale of the property from the company to the defendant for the price of $7,150, payable in installments of $50 a month until $3,500 should be paid, whereupon the company was to reconvey the property to the defendant and take back a mortgage for the remainder of the price. In reply to this the plaintiff's contention was that the defendant was wholly unable to pay the installments due upon the contract to the investment company, or otherwise to comply with the terms thereof, and that she requested the investment company to take the property off her hands and relieve her of the burden thereof, and authorized and empowered it to sell and convey the same, apply the proceeds on the indebtedness for the erection of the house, and pay the surplus, if any, to the defendant; that in pursuance of said request and authority, and with the acquiescence and consent of the defendant, the investment company, on March 19, 1912, sold and conveyed the said property to the plaintiff, that the plaintiff was informed by defendant that she consented to said sale, and was not informed of any claim or interest in said real estate on the part of the defendant other than that shown by the deed and contract, but believed that the investment company was the owner of the title in fee, and was authorized to sell the same free from defendant's claims under the contract, and that he purchased the property and paid the price therefor in good faith and without knowledge of any right or claim of plaintiff. The facts above

stated are found by the court, and they are fully supported by the evidence in the case. The defendant's testimony contradicted the evidence of the plaintiff on the subject, but this merely raised a conflict which it was the province of the lower court to determine, and we cannot interfere with its solution of the question. Under the facts stated, the defendant was clearly estopped to deny the title of the plaintiff to the property.

[3] The defendant relies on decisions to the effect that possession by her was notice of her claim sufficient to put the plaintiff upon inquiry at the time of his purchase. This proposition is not disputed. The answer is that, under the circumstances as appearing to the plaintiff, and under the statements made by the defendant herself, there was no occasion for inquiry. The possession of the defendant was fully explained, and it was in no manner inconsistent with the proposition that the investment company owned the legal title and was selling it with the consent and for the benefit of the defendant. The principle contended for is well established, but it has no application to the present case.

[4] The defendant in her answer also alleged that her husband was not made a party to the action. It appeared, and the court found, that at the time the action was begun, and ever since, the defendant was living separate and apart from her husband because of his desertion of her. He was therefore not a necessary party to the action. Code Civ. Proc. § 370.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 448

KOYER v. MINER et al. (L. A. 3568.)

(Supreme Court of California. April 4, 1916.)

1. NAVIGABLE WATERS ⟸37(6)—TIDELANDS —CONSTITUTIONAL PROVISIONS—LEASE.

Under Const. art. 15, § 3, declaring that all tidelands within two miles of any incorporated city or town in the state and fronting on the waters of any harbor, bay, etc., used for navigation shall be withheld from grant or sale to private persons, corporations, etc., the state, through its legislative authority, may lease tide and submerged lands within the two-mile limit with proper restrictions of time and proper regard to public and quasi public uses, so that private enterprise may build up the commerce of seaport cities; and hence the city's lease of tidelands within such limits, confirmed by act approved March 23, 1907 (St. 1907, p. 987), requiring the lessee to build a sea wall and to improve and reclaim it, was valid.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 224; Dec. Dig. ⟸37(6).]

2. NAVIGABLE WATERS ⟸39(3)—TIDELANDS —LITTORAL RIGHTS.

Plaintiff, owning one parcel and one-half of an adjoining parcel, the boundary of which was the line of ordinary high tide, from which line the bottom descended gradually, who had never constructed any wharves out into the bay or made any improvements to facilitate access to the bay from his land, could not enjoin the defendants, claiming under a lease from the city; confirmed by the state, from maintaining structures or otherwise interfering with his right of access from his land to the navigable waters of the bay, or complain of any disposition by the state of such tide and submerged lands; as the state had the right to confirm a lease by the city, which provided that the lessee should erect a sea wall on the harbor front line when located, and should improve it for navigation and reserve a part to the city as a public harbor front, and should reclaim the land between the front and the shore and dedicate parts thereof to public use for streets, etc., and should have the remainder in fee or a lease thereof for 50 years.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 243, 244; Dec. Dig. ⟸39(3).]

3. NAVIGABLE WATERS ⟸37(6) — TIDELANDS —LEASE—CONFIRMATORY ACT.

The city's lease of tidelands to an individual, executed February 14, 1906, requiring the lessee to erect a sea wall on the harbor front line as soon as it was located by the federal government, to improve it for the purposes of navigation, and to fill in and reclaim part of it, notwithstanding a lease on July 23, 1907, from the city to the first lessee's successor, reciting the former lease and a change made in the harbor line and re-executing the former lease to make the line of the sea wall correspond to the new harbor line, was within the confirmatory act approved March 23, 1907 (St. 1907, p. 987), expressly confirming the lease of February 14, 1906, since the later lease was a mere correction of the previous lease.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 224; Dec. Dig. ⟸37(6).]

4. NAVIGABLE WATERS ⟸37(3) — TIDELANDS —POWER OF STATE.

The state had the power to permit a railroad company to build and operate a railroad over tide and submerged lands to a connection with deep-water navigation, as such a disposition of the public land held in trust for purposes of navigation and commerce would be in furtherance of the trust and valid.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 205; Dec. Dig. ⟸37(3).]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Actions by A. S. Koyer to quiet title and for injunctions against Randolph H. Miner and others. Judgments for defendants, motion for new trial denied, and plaintiff appeals. Judgments and orders affirmed.

Robert Young, of Los Angeles, for appellant. Lewis W. Andrews, Thos. O. Toland, Cedric E. Johnson, Gibson, Dunn & Crutcher, J. W. McKinley, Frank Karr, and H. H. Trowbridge, all of Los Angeles, for respondents.

SHAW, J. The transcript in this case embraces the record of two actions involving the same questions relating to the rights pertaining to two adjoining parcels of upland fronting upon the bay of San Pedro. One parcel belongs wholly to the plaintiff. In the other he has a one-half undivided interest. The southerly boundary of the two par-

cels is the line of ordinary high tide. The parcels are a part of a grant of land made by the government of Mexico prior to the treaty of Guadalupe Hidalgo and afterwards confirmed by the United States and known as Rancho Los Palos Verdes. From said high-tide line into the bay the surface of the soil, prior to any artificial changes therein, descended gradually and on even grade to a depth of 24 feet below high tide at the distance of 6,000 feet from said high-tide line. Plaintiff had never wharfed out into the bay from these parcels or otherwise made any improvements or erected any structures for navigation to facilitate access to the bay from his land.

The complaint in each case alleges that the defendants, without right, claim interests in said lands, and that they have erected and maintained structures on the adjoining tideland between plaintiff's land and the navigable waters of the harbor of San Pedro which prevent access thereto from plaintiff's land, and asks that plaintiff's title in said parcels be quieted, and that defendants be enjoined from maintaining said structures or otherwise interfering with plaintiff's right of free access from his land to the navigable waters of the bay.

The defendant Pacific Electric Railway Company answered, claiming the right to maintain and operate an electric railroad over the adjoining tideland under a franchise granted by the city of San Pedro. The Southern Pacific Railroad Company answered, claiming a right to maintain and operate its road over said tidelands to navigable water under a franchise or permit from the state of California in pursuance of section 478 of the Civil Code, and also rights in the tideland and land below tide line, under a lease from the city of San Pedro to Randolph H. Miner, made on February 14, 1906, and an agreement made between them on February 7, 1906, which lease and agreement were confirmed by the Legislature by the act approved March 23, 1907. Stats. 1907, p. 987.

Miner and the Outer Harbor Dock & Wharf Company, with other defendants claiming under them, answered alleging that the lease and agreement of Miner above mentioned and his interests thereunder had been by him assigned and transferred to the Outer Harbor Dock & Wharf Company, and claiming the rights given thereby from the state in the tide and submerged lands between plaintiff's land and deep water. This lease and agreement were given by the city as a means for improving the harbor of San Pedro and facilitating navigation and commerce therefrom. The agreement provided that Miner and his successors should erect a sea wall on the harbor front line as soon as same was located by the federal government, should improve the same for purposes of navigation, should reserve a certain portion thereof to the city for a public harbor front, should fill in and reclaim the land between said front and the shore and dedicate appropriate parts thereof to public use for streets, and that he and his successors should thereupon have the remainder of such reclaimed land in fee, or if the grant of a fee was not valid, that they should have a lease thereof for the term of 50 years. This lease was executed accordingly. Its validity is the principal question in the case.

The court found for the defendants and particularly that the Wharf Company had erected the sea wall and made the improvements contemplated by the Miner lease and agreement for purposes of navigation and was devoting the same to public use for that purpose. As conclusions of law it declared that the state, through its authorized agencies, the city of San Pedro, and the city of Los Angeles, which succeeded to San Pedro by annexing the latter, and said Wharf Company, have and had the right to use and improve the tide and submerged lands in front of plaintiff's parcels to fit the harbor for navigation, to the exclusion of plaintiff as an upland owner, and in doing so to cut off plaintiff's access to navigable water except, of course, over and along the public streets opened for that purpose in pursuance of the plan adopted for said improvements; that the defendants who claimed interests under the Miner lease and agreements or rights from the state in the tide and submerged lands were entitled to judgment enjoining plaintiff from asserting any interest therein and that plaintiff take nothing. Judgment was given accordingly. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

None of the defendants claims rights in the tide and submerged lands in front of plaintiff's property under or by virtue of any grant or disposal thereof by the state as tideland in pursuance of the Political Code (sections 3440 to 3493t) for the sale of swamp and overflowed, salt marsh, and tideland. All of them, as will be seen from the facts above stated, claim rights and interests derived from the state and granted in pursuance of the plan adopted by the state for the improvement of the harbor of San Pedro and in furtherance of navigation by adapting said lands to the purposes of navigation.

Practically every question presented in this case is settled by decisions of this court made after the filing of the transcript on appeal herein and after the filing of the opening brief. People v. California Fish Co., 166 Cal. 576, 138 Pac. 79; People v. Southern P. Co., 166 Cal. 614, 138 Pac. 94; People v. Southern P. Co., 166 Cal. 627, 138 Pac. 103; People v. Banning Co., 166 Cal. 630, 138 Pac. 100; People v. Banning Co., 166 Cal. 635, 138 Pac. 101; People v. Banning Co., 167 Cal. 643, 140 Pac. 587; Wheatley v. Consolidated Lumber Co., 167 Cal. 447, 139 Pac. 1057; Henry Dalton, etc., Co. v. Oakland, 168 Cal. 463, 143 Pac. 721; Patton v. Los Angeles, 169 Cal. 521, 147 Pac. 141; People v. Southern

P. R. Co., 169 Cal. 537, 147 Pac. 274; Knudson v. Kearney, 152 Pac. 541.

[1] Section 3 of article 15 of the Constitution declares that:

"All tidelands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet, used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations."

The land here in controversy lies either within the limits of the city of San Pedro, now Los Angeles, or within two miles thereof. Under the definition of "tidelands," as given in San Pedro, etc., Co. v. Hamilton, 161 Cal. 614, 119 Pac. 1074, 37 L. R. A. (N. S.) 686, the land embraced within the lease of Miner comes within the terms of this section of the Constitution. In the case just cited it was held that under this section the state, through its legislative authority, may lease the tide and submerged lands within the two mile limit, "with proper restrictions of time and proper regard to public and quasi public use, * * * so that private enterprise and capital may build up the commerce of our seaport cities." The lease was therefore within the legislative power, and the confirmatory act of 1907 establishes it as a valid lease made under legislative authority. That the act had that effect was expressly decided in the case just cited. See, also, Wheatley v. Consolidated Lumber Co., supra; People v. Banning Co., 166 Cal. 630, 138 Pac. 100. The judgment in this case in favor of the defendants was limited to the leasehold interest and did not declare that they have an interest in fee. The question whether the state can alienate in fee lands included in the constitutional reservation which are found to be unnecessary and useless for purposes of navigation and commerce is therefore not involved.

[2] With regard to the claim of littoral rights the case of Henry Dalton, etc., Co. v. Oakland, supra, is decisive. There the plaintiffs owned a tract of upland bordering upon navigable water in the harbor of Oakland, but as in the case of the plaintiff here, had no ownership in the tidelands fronting thereon. Its claim was that as a littoral or riparian owner of property fronting on the bay, and notwithstanding the fact that it did not own the tidelands, the plaintiff had the right to free and unobstructed access over the tidelands to navigable water, and the right to construct suitable landings thereon, and to enjoy exclusive use of such landings, subject only to the paramount public right of navigation. The court, following the decision in People v. Southern P. R. Co., 166 Cal. 627, 138 Pac. 103, said that:

"When the public authorities see fit to make improvements on the land below high-water mark for purposes of navigation, the riparian owner must yield thereto. * * * The littoral rights of the defendants" (the plaintiff here) "cannot impinge upon the control by the state of tidelands for the public purposes of navigation and fishery, or affect the public easement for those purposes."

In conclusion the court said:

"If such improvements have the effect of cutting off access over said tidelands from the upland lot of the plaintiff, it is no ground of complaint, because, as has been pointed out, it had no right as an upland owner to the free and unobstructed access to navigable waters over said tidelands as against the right of the state to at any time devote them to the improvement of the harbor of Oakland in aid of the public easement of navigation and commerce."

See, also, Patton v. Los Angeles, 169 Cal. on page 526, 147 Pac. 141, and People v. S. P. R. R. Co., 169 Cal. 541, 147 Pac. 274.

These cases settle this case so far as the riparian or littoral rights of the plaintiff are concerned. The state had the undoubted right to make the lease in question in order to procure the erection of a sea wall with docks and slips and the improvements to be made to obtain public access to deep water, the better to fit the harbor for navigation. As an incident to this right it cannot be denied that it has the right to grant to the person making the improvements and as a consideration therefor, a lease for 50 years of the reclaimed land lying between the shore and the harbor front, including the land below the line of ordinary high tide and all the land not necessary for use in furtherance of navigation. As the harbor front improvements rightfully cut off access from the plaintiff's land to the waters of the bay and as plaintiff had no other littoral right by virtue of this ownership of the upland, nor any other right whatever in the tide and submerged lands, it follows that he cannot be heard to complain of any disposition made by the state of such tide and submerged lands. The only interest he had therein was rightfully terminated by the harbor improvements, and as a private citizen he had no right to question the use to which the state was devoting such tidelands. If the use thereof for private purposes had inflicted damage on his upland, other than that of cutting off his littoral right of access, perhaps he might have had a cause of action on that account, but nothing of this kind is averred and no such question is presented.

[3] The plaintiff claims that the lease under which the defendants hold was made after the confirmatory act of March 23, 1907, and that, therefore, under the decision in People v. Banning Co., 166 Cal. 630, 634, 138 Pac. 100, said act did not apply to or confirm the same. It may be doubted whether, even if this were so, the plaintiff has shown any right to maintain the action on account of the ensuing purpresture. It is not necessary to consider this question for we are satisfied that the lease was within the confirmatory act. It was executed on February 14, 1906, more than a year before the passage of the confirmatory act. The claim that it is not within the terms of the act is based on the fact that subsequently, on July 23, 1907, the city of San Pedro and the Wharf Company, as successor of Miner, entered into another indenture of lease. This instrument recites

the agreement of February 7, 1906, the lease of February 14, 1906, and the fact that after the execution of said instruments the United States government laid out the harbor line in the bay of San Pedro, on courses differing slightly from the harbor lines as described in said agreement. Thereupon, the instrument declares that the lease of 1906 is re-executed, and that the description of the harbor line is rewritten to make the line of the sea wall correspond with the line as afterwards established by the United States. The contention is that this was substantially a new lease which, having been made after the confirmatory act, was not within its terms and, consequently, utterly void. While it did in fact contain other provisions and terms not included in the former lease, it did not change it, nor purport to change it, with respect to the boundaries of the land leased. The original lease referred to the agreement and made it a part thereof. The agreement provided that if the United States required the sea wall to be built upon other lines than those therein described the lessee should thereupon have the right to have said lease rewritten and re-executed so as to correctly describe the line in accordance with the change in the sea wall line. It was, in effect, a lease of the lands between the shore and the harbor line as thereafter fixed by the United States. The subsequent lease was therefore a mere correction of the previous lease and was entirely within the rights which were secured by the lessee under the terms of the previous lease. The new stipulations may possibly be void so far as they purport to be adverse to the public use. But if so they do not destroy the old lease, and that instrument remains in force and covers the land up to the harbor line as finally located.

Even if it were supposed that a third person could attack a lease given by the state, of land in which he has no interest, on the ground that it was made without consideration, or that this fact would affect the validity of a lease, in any case, there is no foundation for the assertion of the fact. The evidence and the findings show that the Wharf Company expended nearly $1,500,000 in making the sea wall, docks, and channels to deep water for the public use, as it had agreed to do, as a consideration for the lease.

[4] That the state had power to permit the Southern Pacific Railroad Company to build and operate a railroad over tide and submerged lands to a connection with deep-water navigation, is not seriously disputed. Such a disposition of the public land held in trust for purposes of navigation and commerce would be in furtherance of the trust, and not in violation of it, and is undoubtedly valid. San Pedro v. Southern P. R. Co., 101 Cal. 336, 35 Pac. 993; Santa Cruz v. Southern P. Co., 163 Cal. 549, 126 Pac. 362; Arcata v. Arcata, etc., Co., 92 Cal. 645, 28 Pac. 676.

With regard to the Pacific Electric Railway Company we need say nothing more than that the plaintiff's interest in the upland gives him no right to attack the use made of the reclaimed tideland, whether such use is under lawful authority from the state, or merely by its sufferance. There are no other points that deserve consideration.

In each case the judgments and orders are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLOR, J.; HENSHAW, J.; MELVIN, J.

172 Cal. 441

In re STRONG'S ESTATE. (L. A. 3973.)

(Supreme Court of California. April 4, 1916. Rehearing Denied May 4, 1916.)

WITNESSES ⇐275(2)—EXAMINATION—CROSS-EXAMINATION—SCOPE.

Where the administrator of the estate of deceased had been deceased's confidential agent, and the objector claimed that, as agent, the administrator had appropriated moneys belonging to deceased and filed objections to his annual account, liberal cross-examination of the administrator as to such transaction should be permitted; the administrator occupying a position of hostility to the estate, and it is improper where the administrator merely declared that certain moneys were his own to refuse further cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 968, 974; Dec. Dig. ⇐275(2).]

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

In the matter of the estate of A. F. M. Strong, deceased. W. A. Strong, administrator, filed his first annual account, to which Hattie Strong interposed objections. From an order and decree settling and allowing the account, the objector appeals. Reversed.

Gibson, Dunn & Crutcher and Davis & Rush, all of Los Angeles, for appellant. Bradner W. Lee and Bordwell & Mathews, all of Los Angeles (Bradner W. Lee, Jr., and Kenyon F. Lee, both of Los Angeles, of counsel), for respondent.

HENSHAW, J. A. F. M. Strong died intestate in the city of Los Angeles, leaving as his heirs at law his son, W. A. Strong, and two daughters, Alice B. and Hattie Strong. The son was appointed administrator of his father's estate, which estate was appraised at over $380,000. To the allowance of the administrator's first annual account Hattie Strong, his sister, duly interposed objections. Upon these objections issue was joined. After trial the court entered its order and decree settling and allowing the account and report as full, true, and correct. This appeal is taken from the decree so doing.

No objections are urged to the disbursements of the administrator. The gist of the controversy between the parties is found in the contention of the appellant that the administrator's account is not, as it purports to be, a full, true, and correct account of all the property which has come into the administrator's hands belonging to the estate.

What contestant in the court below undertook to show was that relations of the closest intimacy and confidence existed between the father and his only son; that after the admission of the son to practice law in 1898 he became the legal advisor and business manager of his father's affairs; that no small part of this business was the loaning of money upon securities; that the son transacted this business, collected the moneys of the father, in some instances appropriating these moneys to his own use, and that thus at the time of his father's death in February, 1913, the son was the actual custodian of moneys and properties really belonging to his father's estate to the amount of about $40,000; that he refused to enter these moneys and properties in his inventory or in his report and account as the properties of the estate, insisting that they were his own; that his father during all of the latter years of his life had made his son's office his own, having no other, and confided his business affairs wholly to the son's management; that the son at the time he was admitted to the practice of the law had no property whatsoever of his own; that his earnings in the practice of his profession during the years thereafter and up to the time of his father's death were no more than sufficient to provide for his support; that the father and son had joint access to the safe deposit boxes in which their papers and securities were deposited; that during the years of their business intercourse the son had collected nearly $200,000 of his father's moneys; that these moneys, at his will, he placed in bank, sometimes to his father's account, and sometimes to his own personal account; that some of the notes and mortgages which the son contended were his property were notes and mortgages running directly to the father, and, where assignments of these notes and mortgages appeared to the son, they were made to the son by the father for purposes of collection only, and were upon the death of the father falsely claimed by the son to be his own property.

In the effort to establish these matters the son was placed upon the witness stand, and an attempt was made to cross-examine him after he had testified that his account and report were full, true, and correct and embraced all the properties of the estate known to him or which had come into his possession. The cross-examination was rigidly limited by the court. No better success attended the efforts of the contestant to secure answers to similar questions when she made the administrator her own witness. Endeavor was also made by the contestant to compel the production of the administrator's bank books and books of account, under the contention that these books would show that the moneys and properties asserted by the administrator to be his own in fact belonged to the estate. The single complaint made upon this appeal is that the court unduly and illegally restricted these inquiries of the contestant. An examination of the record impels the declaration that this complaint is well founded.

The case presented is that of one occupying relations of highest confidence with his principal, and being at the same time practically in complete control of the principal's large business affairs. Upon the death of the principal he becomes administrator of his estate. Under such a relationship and under such business management, involving, as it did, the admitted deposit of the principal's funds to the trusted agent's account, involving, as also it did, the assignment to the agent of the negotiable instruments and securities taken in the name of the principal, every reason was presented dictating that the court should have allowed, as the administrator should have desired, a broad and complete inquiry into the history and fairness of any of these questioned transactions. This, of course, is not the case of an endeavor to establish as property of the estate the property of an administrator in no wise connected with the estate. It is in no sense an inquiry into the purely personal and exclusive business affairs of the administrator. But it is an inquiry into the history of the dealings of the administrator with property which upon the face of each transaction originally stood as property of the estate, and a legitimate inquiry into the dealings of a confidential agent with that property. After a perusal of the record, we confess to a difficulty in understanding the grounds of the court's rulings curtailing and forbidding this cross-examination. The court seems to have had in mind the correct rule and principle of evidence governing the inquiry, as when it says:

"The inherent right lies in the court as an equitable proposition to be satisfied that he accounted, by accounting to the estate for everything that had come into his hands prior to the death of his decedent."

And again:

"In the absence of a more specific way to proceed and get the benefit of what this man [administrator] does know of the estate, the property that might have belonged to the estate, I shall make the latitude quite wide."

But, notwithstanding these declarations, when it came to the examination of the administrator, the rulings of the court were in such marked contrariety to its declarations as to the latitude to be allowed on examination and cross-examination as seriously and injuriously to curtail contestant's rights. It would appear that the trial court believed

that the contestant was bound by the statements of the administrator, and was thus precluded from pursuing her inquiries further.

Let us illustrate: A note and mortgage had been executed by C. G. Smith to the deceased for $6,500. That mortgage was paid and released by the deceased shortly before his death. The funds arising from this payment were not by the administrator credited to the estate of the deceased. The administrator admitted receiving and retaining this money and said that it was his own. The question is then asked:

"Can you explain, then, how it was that the mortgage was made by Smith in favor of your father if the money was yours? Go ahead and explain it."

An objection to this question was sustained by the court, and all further inquiry along these lines refused.

Again, there was a note for $6,000, secured by mortgage, made to the deceased by Cecelia Levitt. These papers bore indorsements in the following words:

"Pay Will A. Strong or order without recourse on me. A. F. M. Strong."

The handwriting was that of deceased. The note and mortgage were paid to the administrator, and the moneys retained by him as his own. It was contended that the indorsement was for purposes of collection only. The following are a few of the questions asked by contestant touching the history of this matter, to which questions objections were sustained by the court:

"I wish you would tell the court the facts and circumstances of making that note and mortgage to your father.

"To whom did the money belong for which the note and mortgage were given?

"Did you make the loan to Cecelia Levitt of your own money, or was it your father's money?

"Why did your father make that assignment?

"What consideration did you give him for that? Answer: Because it was my money that went into that note.

"Question: Then why was the mortgage taken in your father's name?

"I ask you to make full explanation of the transaction wherein $6,000 of your money was loaned to Cecelia Levitt and the note and mortgage taken in your father's name.

"Where did you get the $6,000 that you loaned to Cecelia Levitt?

"Was this $6,000 money that you had collected for your father?

"How did you pay this $6,000 to Cecelia Levitt; in check drawn upon your account or in cash?

"Did you draw this $6,000 out of any bank account standing in your name wherein were commingled funds belonging to you and your father?

"Why did not your father make the assignment of this note and mortgage to you immediately upon the execution of the mortgage to him?

"Was the money that you say you loaned to the Levitts given to you by your father?

"Have you any check that you drew for the payment of that money to the Levitts?

"Did you pay your father anything for the assignment of the note and mortgage?

"Why did you not have this assignment recorded?"

To all of these questions, and to a multitude of others, seeking to learn from this administrator and confidential agent the history of the transactions resulting in his assertion of ownership of properties such as this, ownership of which, as appears on the face of the instruments, was in the deceased, or, as contended by the contestant, were assigned to the administrator for purposes of collection only, objections were sustained and the inquiry forbidden.

There was also a note for $10,000 in favor of the deceased secured by trust deed to the Title Insurance & Trust Company. The back of the note bore the indorsement:

"December 11, 1912. Without recourse pay to W. A. Strong or order together with all rights accrued or to accrue under the deed of trust securing this note. A. F. M. Strong."

The name "A. F. M. Strong" was in the handwriting of the deceased. The rest was in the handwriting of the administrator. The administrator insisted that he was justified in not entering this note and mortgage as one of the assets of the estate upon the ground that they were his own. The contention again was that the assignment was made to him for purposes of collection.

"Q. What did you pay or give to your father for this note?

"Did you give him anything for the note and trust deed?

"Did you pay him anything for making this assignment to you?

"Who collected the interest on this note after it was made, down to the time of your father's death?

"What were you worth at the time you were married?"

To all these and like questions objections were sustained. The administrator had testified that while he had made many collections on account of his father, depositing some of these collections to his own personal credit and others to his father's, that he had monthly settlements with his father of their affairs.

"Q. Have you a bank book that you kept or other book showing the money that you collected for your father belonging to him and that you deposited in any bank or banks in this city in your name?

"Did you collect any money for your father during that time belonging to him which you deposited in the bank or banks in your own name and to your own credit?

"Will your account show, if produced here, what money you collected and deposited in your name belonging to your father's estate?"

No answers were permitted to these and other similar questions.

We have thus outlined a few of the transactions concerning which contestant made inquiry. The others were of the same general character, and the rulings as to each were the same. In addition, the court refused to permit contestant to bring into court and examine the bank books of the administrator. As has been said, no justification can be found for the rigidity of these rulings. They seem to have been, in the court's mind, based upon its conviction that all further inquiry

was foreclosed by the answer of the administrator that the property in controversy was his, and this proposition we find to a great extent advanced in the brief of respondent. Thus as to the Smith mortgage it is said, as being a complete answer to appellant's complaint:

"The money was paid to W. A. Strong as it was his, and always was his, and he continued to use it."

As to the Cecelia Levitt mortgage it is said:

"It was assigned to witness because it was the witness' money which was loaned on the note and mortgage."

Such indeed is the administrator's testimony. But this was the precise subject-matter of controversy.

There is no occasion here for any disquisition as to the value of cross-examination nor as to the right to a liberal exercise of it under the indicated circumstances. The administrator's position was one of hostility to the interests of the estate which he represented. It was not only the duty of the court to have permitted a liberal examination of a confidential agent and administrator under the conditions shown, but the administrator himself should have welcomed the opportunity for full disclosure establishing the integrity of all his transactions.

The decree appealed from is therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

172 Cal. 462

ROCK v. TRAVELERS' INS. CO. OF HARTFORD, CONN. (S. F. 6818.)

(Supreme Court of California. April 5, 1916.)

1. INSURANCE ⊂⊃646(6) — ACCIDENT INSURANCE — ACTION ON POLICY — BURDEN OF PROOF.

The burden of proving that the death of the insured was the result of "bodily injury effected through external, violent, and accidental means," within the terms of a policy, was upon the beneficiary, suing thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1659–1662; Dec. Dig. ⊂⊃646(6).]

2. INSURANCE ⊂⊃455 — ACCIDENT INSURANCE —RECOVERY—"ACCIDENTAL MEANS."

Insured, holding an accident policy payable upon death "resulting from bodily injuries effected, directly and independently of all other causes, through external, violent, and accidental means," acted as pallbearer and attempted to carry one end of a heavy casket down a flight of stairs, and did so without slipping or stumbling, in precisely the manner intended and designed by him, but the exertion was beyond his strength, and resulted in a dilation of the heart and death. *Held*, that the policy differentiated between accidental injury or death, and injury or death from accidental means; that it was not enough that injury or death should be unexpected or unforeseen, but there must be some element of unexpectedness in the act or occurrence resulting in death; and that his death was not due to "accidental means," so that there could be no recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166–1169; Dec. Dig. ⊂⊃455.

For other definitions, see Words and Phrases, First and Second Series, Accidental Means.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Mary Rose Rock against the Travelers' Insurance Company of Hartford, Conn. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order reversed.

Coogan & O'Connor, of San Francisco, for appellant. Lewis F. Byington, of San Francisco, for respondent.

PER CURIAM. This case was originally assigned to Department 1 of this court, and the judgment of the lower court was reversed. Upon petition for a rehearing we granted petitioner's prayer, because we believed that the importance of the matters involved in the appeal merited a consideration by the court in bank. After a careful study of the case, in which we have been assisted by the able arguments and briefs of counsel on both sides, we have adopted the opinion of Department 1, prepared by Mr. Justice Sloss, which is as follows:

The plaintiff, as beneficiary under a policy of accident insurance, issued by the defendant to Joseph Francis Rock, brought this action to recover $7,000, payable to her under the terms of said policy in the event of the death of said insured "resulting from bodily injuries effected directly and independently of all other causes, through external, violent, and accidental means." The complaint alleged, and the answer denied, that Joseph Francis Rock had sustained bodily injuries and met his death within the above-quoted terms of the policy. The action was tried before a jury, which returned a verdict in favor of the plaintiff for the amount claimed. The defendant appeals from the judgment and from an order denying its motion for a new trial.

The principal question, and the only one that need here be considered, is whether the evidence justified the finding (implied in the verdict of the jury) that the deceased died as the result of bodily injuries effected through external, violent and accidental means.

On June 30, 1911, Joseph Francis Rock was attending the funeral of one James Murphy. The casket containing Murphy's remains was on the second floor of the Murphy home. The stairway leading from the second to the first floor was so narrow that only two men could handle the casket while on the stairs. Rock took up one end of the casket and M. C. Cleveland the other. These two then carried the casket down the stairs, Cleveland leading, and Rock holding the upper or rear end. When they got to the bottom of the stairs, other pallbearers took hold, and immediately thereafter Rock collapsed. He was promptly removed to a hospital, but died before medical aid could reach him. The cause of his death, as shown by the testimony, was acute dilatation of the heart. An autopsy was held. There was some conflict of testimony regarding the exact condition of Rock's heart, as disclosed by this post mortem examination. There can be no reasonable room for doubt, however, that the condition of the heart

had not been entirely normal. Indeed, the circumstances above related, together with some other matters to which we shall refer, make it perfectly clear that Rock's heart was not able to withstand the strain put upon it by the exertion which he underwent, and that the strain thus caused produced the dilatation and the consequent death.

The record does not disclose that anything of an unusual or unexpected nature occurred in the course of carrying the casket down the stairs. The testimony, so far as it went, was to the contrary. Cleveland, who was carrying the forward end of the coffin, was walking backward and facing Rock. He testified that: "Coming down the stairs, nothing to my knowledge happened in the way of slipping, or anything of that sort. * * * I don't know of anything of an exceptional character that happened as I went down the stairs; just walked down the stairs." Three other witnesses gave similar testimony, and there is nothing conflicting with this view. The respondent points to the testimony of McGinn, the undertaker in charge of the funeral, as supporting the view that in some accidental way Rock was forced into an unnatural position. But McGinn testified merely that Rock "was in a stooping position, kind of stooping over; bent over. I told him to straighten himself up, and that would push the casket back to him so as to ease it up for him, which he did; and then he fell back into that position again as he got about halfway coming downstairs; that is, got into that bent-over position." There is nothing in this to indicate that the stooping position was anything more than the natural and ordinary effect of carrying a heavy object down a flight of stairs. Apparently Rock attempted to assume another position on the suggestion of McGinn, but soon resumed his original attitude. McGinn's expression that "he fell back into that position" cannot, in view of all the facts in evidence, be taken to mean anything more than this. The witness himself explained and qualified this expression by adding, "that is, Rock got into that bent-over position."

[1, 2] The burden of proving that the death of the insured was the result of "bodily injury effected through external, violent, and accidental means" was upon the plaintiff. 1 Cyc. 289; Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175. In the case at bar the court so instructed the jury. The appellant's attack upon the verdict rests upon the contention that the injury here claimed to have been sustained by Rock was not shown to have been effected through "accidental" means. The meaning of the term "accident" has frequently been discussed by the courts, and we have had occasion to define it in several of our own decisions. In Richards v. Travelers' Insurance Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455, "accident" was defined as "a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly and without any design of the person injured." See, also, Price v. Occidental Ins. Co., supra; Western Indemnity Co. v. Pillsbury, 151 Pac. 398. The policy, it will be observed, does not insure against accidental death or injuries, but against injuries effected by accidental means. A differentiation is made, therefore, between the result to the insured and the means which is the operative cause in producing this result. It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death. Policies like the one before us have been before the courts in many cases, and the great weight of authority, we think, sustains the view which we have just expressed. Thus in Clidero v. Scottish Accident Ins. Co., 29 Scot. L. R. 303, Lord Adam said: "The question, in the sense of this policy, is not whether death was the result of accident in the sense that it was a death which was not foreseen or anticipated. That is not the question. The question is, in the words of this policy, whether the means by which the injury was caused were accidental means. The death being accidental in the sense in which I have mentioned, and the means which led to the death as accidental, are, to my mind, two quite different things. A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental." In re Scarr, L. R. 1 K. B. Div. [1905] 387; Feder v. Iowa S. R. M. Ass'n, 107 Iowa, 538, 78 N. W. 252, 43 L. R. A. 693, 70 Am. St. Rep. 212; Southard v. Ry. D. A. Co., 34 Conn. 574, Fed. Cas. No. 13,182; Smouse v. Ass'n, 118 Iowa, 436, 92 N. W. 53; Lehman v. Western Ass'n, 155 Iowa, 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562; Appel v. Ætna Life Ins. Co., 86 App. Div. 83, 83 N. Y. Supp. 238; Niskern v. United Bro'd, etc., 93 App. Div. 364, 87 N. Y. Supp. 640; Schmid v. Indiana, etc., Ass'n, 42 Ind. App. 483, 85 N. E. 1032; Bryant v. Cont. Gas Co. (Tex. Civ. App.) 145 S. W. 636; Cobb v. Pref. Ass'ns, 96 Ga. 818, 22 S. E. 976; Fid. & Cas. Co. v. Stacey's Ex'rs, 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955; Shanberg v. Fidelity & C. Co. (C. C.) 143 Fed. 651, s. c., on appeal, 158 Fed. 1, 85 C. C. A. 343, 19 L. R. A. (N. S.) 1206; Hastings v. Travelers' Ins. Co. (C. C.) 190 Fed. 258.

The same doctrine is recognized in United States Mutual Accident Association v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60. In that case, the Supreme Court upheld the propriety of an instruction to the jury "that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means."

We shall not take the time to review in detail the facts of the cases which we have cited. It will suffice to say, by way of illustration, that among them are decisions holding that death was not the result of bodily injury sustained through accidental means, where an insured who was afflicted with tuberculosis died from a hemorrhage occasioned by a ruptured artery, the rupture of the artery being due to the act of the insured in standing on a chair and reaching out to close the shutter of a window (Feder v. Iowa St. Ass'n, supra), or where the insured, convalescing from an attack of pneumonia, arose and, in attempting to remove his nightshirt, made a more or less violent effort, which caused the rupture of a blood vessel, resulting in his death (Smouse v. Ass'n, supra), or where the insured died of appendicitis, caused, as the evidence tended to show, by his riding a bicycle over a rough road (Appel v. Ætna Life, etc., 86 App. Div. 83, 83 N. Y. Supp. 238), or where the insured went to Colorado Springs and ascended the stairs of a hotel, carrying in each hand a traveling bag, his death resulting from paralysis of the heart caused by the high altitude and the strain of his exertions. Schmid v. Indiana, etc., Ass'n, supra.

There are decisions which declare a different rule. Horsfall v. Pacific Mutual L. Ins. Co., 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846; Young v. Railway Mail Ass'n, 126 Mo. App. 325, 103 S. W. 557; Beile v. Travelers' Protective Ass'n, 155 Mo. App. 629, 135 S. W. 497. In the first two of these cases the death of the insured occurred through the strain of some exertion voluntarily undertak-

en by him, there being, so far as the evidence showed, nothing unexpected or out of the ordinary in the manner of performing the act which led to the fatal result. In the Beile Case death was the result of chloroform administered to the insured, with his consent, in preparation for a surgical operation. The evidence did not disclose that there was anything unusual or unexpected in the circumstances, except for the fact that death resulted. In each case it was held that a judgment in favor of the beneficiary should be sustained. Of these cases, Young v. Railway Mail Ass'n, supra, is the one in which the question was most exhaustively considered. The theory of the court appears to have been that a death or injury by accidental means is shown where the death or injury is unforeseen or unexpected, even though there be nothing of an unusual or unexpected character in the act leading to the result. "Any unusual and unexpected event attending the performance of a usual and necessary act" is said to be covered by such a policy as the one before us. We are unable to agree with this view. To our minds it fails to give effect to the plain language of the policy, in that it does not distinguish between the result to the insured and the means by which that result was brought about. As we have already pointed out, the insurance is not against accidental injury or death, but is against death resulting from injuries effected by accidental means. In nearly all, if not all, of the other cases relied on by the respondent, there was some evidence which justified the inference that the means through which the injury was sustained contained something of an unexpected or unforeseen character. In United States Mutual Ass'n v. Barry, supra, relied on by both parties to this appeal, the Supreme Court of the United States took this view of the facts.

It may also be said that the interpretation which we have given to this policy was adopted by the court below in its instructions to the jury. Under the facts as above recited, we find ourselves unable to escape the conclusion that the verdict was in conflict with these instructions. Briefly stated, the case is simply this: Rock undertook to carry a heavy casket down a flight of stairs. In carrying it down he did not slip or stumble, nor did the casket fall against him. The entire operation was carried out in precisely the manner intended and designed by Rock. The exertion which he thus assumed was, however, beyond his strength, and imposed upon his vital organs a burden which, as it turned out, they could not bear. The result of this exertion was a dilatation of the heart and death. On these facts, which appear in the record without substantial conflict, it cannot be said that the plaintiff sustained the burden which was on her of proving that the death of the insured was caused by bodily injuries effected through accidental means.

The judgment and the order denying a new trial are reversed.

172 Cal. 468

PERRY v. GROSS, County Clerk.

(S. F. 7805.)

(Supreme Court of California. April 6, 1916.)

1. CONSTITUTIONAL LAW ⇐13—CONSTRUCTION—INTENTION.

In the construction of a Constitution the court must endeavor to reach an understanding of the purpose and object, and to give that purpose and object the fullest effect compatible with the meaning of the language through which it is expressed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 9, 10; Dec. Dig. ⇐13.]

2. CONSTITUTIONAL LAW ⇐14—CONSTRUCTION—MEANING OF LANGUAGE.

Words, phrases, and sentences are to be construed in contemplation of the purposes and objects of the instrument, and, when any doubt of their precise meaning exists, aid in arriving at that meaning is to be drawn from the general rules governing the construction of doubtful language.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 11; Dec. Dig. ⇐14.]

3. STATUTES ⇐35½—FILING OF REFERENDUM PETITION—CONSTITUTIONAL PROVISION—"AT THE SAME TIME."

Under Const. art. 4, § 1, providing that each section of the referendum petition shall be filed with the clerk, etc., of the county, etc., in which it was circulated, but that all sections circulated in any county shall be filed at the same time, the term "at the same time" does not regard fractions of a day; and hence mandamus would lie to compel the county clerk, after the filing of one section of a referendum petition, to file another section thereof presented on the same day.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. ⇐35½.

For other definitions, see Words and Phrases, First Series, Same Time.]

In Bank. Mandamus by H. D. Perry against George E. Gross, as County Clerk of Alameda County. Mandate to issue.

H. H. McPike and Clinton G. Dodge, both of San Francisco, for petitioner. Edward J. Tyrrell, of Oakland, for respondent.

HENSHAW, J. Petitioner, having filed with the county clerk of the county of Alameda a referendum petition, thereafter and on the same day presented for filing another section of this petition, which section the county clerk refused to file. Mandate before this court was sought compelling the county clerk so to do.

The question thus presented involves a construction of the language of the Constitution which is as follows:

"Each section of the petition shall be filed with the clerk or registrar of voters of the county or city and county in which it was circulated, but all said sections circulated in any county or city and county shall be filed at the same time." Const. art. 4, § 1.

Respondent contends that under this language his duty was plain; that the constitutional requirement that "all said sections * * * shall be filed at the same time" compels him to refuse to file a section presented after a petition had been filed, even though presented upon the same day.

[1, 2] In the construction of any written instrument, whether it be a Constitution, a statute, or a contract, the most important duty of the court is directed to discovering the true meaning of the instrument. Its endeavor is directed first to attaining an understanding of the purpose and object of the writing, and next to the giving to that purpose and object the fullest effect compatible with the meaning of the language through which that purpose and object find expression. Words, phrases, and sentences

therefore are construed in contemplation of these fundamental purposes and objects, and, when any doubt of their precise meaning is found to exist, aid in arriving at that meaning is drawn from the general rules and principles governing the construction of such doubtful language. The phrase here demanding construction is that which declares that all sections of the petition shall be filed at the same time, and the question before this court is not how lexicographers define the phrase, but rather is it what is the true meaning of this phrase as thus employed in the Constitution?

The foregoing statement involves no novel rule of construction. It is a universal one, and it will be found that phrases such as the one under consideration employed in statutes or contracts (and the same rule of construction of course applies to a constitutional provision)—phrases such as "at the time," "at the same time," and "at the same time and place"—are one and all subject to and given a reasonable construction in furtherance of what is determined from a consideration of the whole enactment to be its true purpose and object. Thus, where a contract provided that no claim should be allowed unless the shipper "made it in writing before or at the time the stock was unloaded," it was held that a written notice three days after the unloading of the stock was within the reasonable meaning of the contract. Rice v. Kansas Pac. R. R. Co., 63 Mo. 314. In Jenks v. State, 39 Ind. 1, the statute provided that bills of exception in criminal cases must be made out and presented at the time of the trial, and it was held that such a bill made out at any time during the course of the trial was within the spirit and meaning of the statute. Construing an English statute limiting the liability of a shipowner for damages done by the collision of his ship to the value of the ship at the time of collision, it was held that this language meant before the collision, as necessarily the value would be much depreciated by the fact of the collision. Brown v. Wilkinson, 15 M. & W. 391. In Gulf, etc., R. R. Co. v. Warner, 89 Tex. 475, 35 S. W. 364, there was under construction a statute declaring that to constitute two or more employés fellow servants they must be "working together at the same time and place." The court held this not to mean identity of time and place, saying:

"While 'at' indicates nearness in time and place, it does not demand an exact coincidence as to either."

In Dryburg v. Mining & Milling Co., 18 Utah, 410, 55 Pac. 367, where the Utah statute contained the same language, it is declared by the court that:

"The meaning of the phrases 'at the same time' and 'at the same place' often vary in view of their application."

[3] It would seem that all such questions as this could have been avoided and the public welfare better conserved by language providing for the filing of such petitions at any time up to a day fixed and certain. Such a provision would prevent the possibility of fraud and the possibility of a defeat of the public will, which under the present condition of the law may possibly take place by premature filings made through ignorance or design.

The construction of the law contended for by respondent, which construction necessitates the filing of all sections of the petition at the same instant of time, it is apparent, lends itself to the defeat of the public will in many obvious ways. Thus to illustrate: At 10 o'clock a citizen presents for filing (as he has a perfect right to do) a petition containing 10 names. It is filed. At 11 o'clock a petition containing a necessary and sufficient 5,000 names is offered, and is refused filing because not presented at the same instant of time with the petition containing 10 names, and the expression of the desire of 5,000 citizens to have a given measure submitted to the electors by the initiative or under the referendum is defeated by the act of one man. It is not to be supposed that the Constitution, in placing this power in the hands of the people, designed that the exercise of their rights under the initiative and referendum could thus easily be thwarted and destroyed, and a construction which would avoid this result is manifestly to be preferred, if it be reasonably possible within the language of the instrument, to one which accomplishes it.

It is certainly a permissible construction to hold that "at the same time," as used in the Constitution, does not regard fractions of a day, and that filings of these petitions are good if made upon the same day. Not only is this construction permissible, but it is manifestly desirable, as it tends at least to that extent to further the will of the public, and at the same time imposes no added duty or labor upon county clerks.

It may be said that this construction would not avail in case some ignorant or designing person should file such a petition bearing but a few names some days in advance of the filing of a principal petition. With that question we are not here concerned. The declaration may be a sound one, and it may be that in the present condition of the law there is no way to avoid such a result. But the fact that this result—which is manifestly in hostility to the great purpose of the initiative and referendum—can be accomplished in one case, can furnish no reason to support a construction of the Constitution which would make it possible in another case.

Let mandate issue as prayed for.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

172 Cal. 473

MILLER v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA.

In re SHIELDS.

(L. A. 4659.)

(Supreme Court of California. April 10, 1916.)

MASTER AND SERVANT ⊂=414 — WORKMEN'S COMPENSATION ACT—TIME FOR INSTITUTING PROCEEDINGS—STATUTE.

Industrial Compensation Act (St. 1913, p. 287) § 16, providing that the payment of a disability indemnity or death benefit, or any part thereof, shall extend the period within which proceedings its collection may be commenced six months from the date of the agreement or last payment, means the date on which the money is actually paid, and the proceedings before the commission must be commenced within six months thereafter, unless there is some agreement as to payment of compensation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊂=414.]

In Bank. Petition by J. H. Miller against the Industrial Accident Commission of the State of California. Oscar Shields applies for writ of review. Award of the Commission annulled.

Karl L. Ratzer, of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondent. F. M. Shepard, of Los Angeles, for applicant.

ANGELLOTTI, C. J. The court is unanimously of the view that, when the statute speaks of the date of the last payment, it means the date on which the money is actually paid. The proceeding before the commission must be commenced within six months thereafter, unless there is some agreement for payment of compensation. Section 16, Industrial Compensation Act (St. 1913, p. 287).

The award of the commission is annulled.

172 Cal. 481

STOFF v. ERKEN. (S. F. 6919.)

(Supreme Court of California. April 11, 1916.)

1. MORTGAGES ⊂=467(1) — APPOINTMENT OF RECEIVER—UNDERTAKING.

Where a receiver is appointed by ex parte order in an action for foreclosure of a mortgage, the applicant must, under Code Civ. Proc. § 566, give an undertaking in an amount to be fixed by the court to pay defendant's damages sustained if the applicant shall have wrongfully procured the order, and, where the only undertaking required by the order was the bond to be filed by the receiver as required by section 567, the order is erroneous.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1371; Dec. Dig. ⊂=467(1).]

2. MORTGAGES ⊂=467(1) — APPOINTMENT OF RECEIVER—UNDERTAKING.

An ex parte appointment of a receiver in an action to foreclose a mortgage is erroneous, though the applicant furnished an undertaking in form as required by Code Civ. Proc. § 566; it appearing that the court did not require the undertaking or fix the amount as provided by statute.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1371; Dec. Dig. ⊂=467(1).]

3. APPEAL AND ERROR ⊂=714(6)—RECORD—MATTERS CONTAINED IN.

Where the bill of exceptions declared that the proceedings contained therein constituted all the proceedings had on the ex parte appointment of a receiver in an action to foreclose a mortgage, and it did not contain an undertaking by the applicant as required by Code Civ. Proc. § 566, a certified copy of an undertaking furnished by the clerk of court cannot be considered on appeal as showing the filing of the undertaking.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2963; Dec. Dig. ⊂=714(6).]

Department 1. Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Louis D. Stoff against Irma M. Erken, in which a receiver was appointed on ex parte order, and defendant appeals. Order reversed.

James L. Nagle and P. B. Nagle, both of San Francisco, for appellant. Louis H. Brownstone, of San Francisco, for respondent.

SHAW, J. The defendant in this case appeals from an order appointing a receiver.

[1] The receiver was appointed by an ex parte order in an action for the foreclosure of a mortgage. Section 566 of the Code of Civil Procedure provides that, where a receiver is appointed ex parte "the court, before making the order, must require from the applicant an undertaking" in an amount to be fixed by the court, "to the effect that the applicant will pay to the defendant all damages" sustained by defendant if the applicant shall have wrongfully procured the order. The record shows that this undertaking was not required as provided by that section. The only undertaking required by the order pending the receiver was a bond to be filed by the receiver, as required by section 567 of the Code of Civil Procedure. The order was erroneous because of the failure to exact any undertaking from the applicant before making it.

[2, 3] The applicant, after the filing of the transcript, procured from the District Court of Appeal, to which court the appeal was erroneously taken, an order directing the clerk of the superior court to file a certified copy of an undertaking on file in the superior court, which the appellant claims was filed in compliance with section 566 aforesaid. The copy was accordingly filed in this court. It appears to be in the form required by section 566. This does not cure the defect, even if we could consider it. The record still fails to show that the undertaking was required by the court below or that the amount thereof was fixed by the court as the section provides. But we cannot consider this bond at all. The bill of exceptions declares that the proceedings therein contained constitute all of the proceedings had on the appointment of the receiver. It does not contain this undertaking, nor any order referring to or pro-

viding for it or fixing its amount. No proceeding was had to correct the bill of exceptions and the copy of the undertaking cannot be considered a part of the record on appeal.

The order is reversed.

We concur: SLOSS, J.; LAWLOR, J.

MEMORANDUM DECISIONS

29 Cal. App. 471

BRIZZOLARA v. SBRANA. (Civ. 1679.) (District Court of Appeal, First District, California. Jan. 28, 1916.) Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge. Action by L. G. Brizzolara against Carlo O. Sbrana. From a judgment for the plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed. Frank Sawyer, of San Francisco, for appellant. Bacigalupi & Elkus, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of the plaintiff and from an order denying the defendant's motion for a new trial. The action is for unlawful detainer. The complaint sets forth specifically the alleged transaction out of which the relation of lessor and lessee arose between the parties, and makes the lease, as an exhibit attached thereto, a part of the complaint. The answer of the defendant denies specifically the averments of the complaint. The cause was tried before a jury upon the issues thus framed, and a verdict was rendered in the plaintiff's favor. A statement of the case was prepared and used on motion for a new trial, which is, however, brief, and which does not purport to contain all of the evidence in the case. Upon this appeal from the judgment and order denying a new trial the appellant has filed a brief in propria persona, which, although quite voluminous, does not present a single question of law or ground of alleged legal error upon which to base a reversal of the case, but which is wholly devoted to the assertion and discussion of matters not embraced in the record and not before this court, and which does not present any showing of service upon the adverse party. To this brief the respondent—probably for the latter reason—has presented no reply. The court, thus unaided by either party, has examined the record before it, and from such examination has satisfied itself that no reversible error was committed by the trial court. Judgment and order affirmed.

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172 Cal. 205

MILES v. RYAN, City Clerk. (S. F. 6765.)

(Supreme Court of California. Feb. 28, 1916. On Rehearing March 27, 1916.)

1. MECHANICS' LIENS ⇐198—PRIORITY OF LIEN—GARNISHMENT.

Under Code Civ. Proc. § 1184, providing that any person within the classes entitled to a lien under the mechanic's lien law, except a contractor, may give the owner notice that he has furnished labor or materials to the contractor, or has agreed to do so, and that on such notice being given, in the case of property which, for reasons of public policy or otherwise, is not subject to the liens provided in the chapter, the owner shall withhold from the contractor sufficient money due him to answer the claim and any lien that may be filed therefor, the claim of a person who garnishes a debt due his judgment debtor in the manner provided by section 710 has precedence over claims of laborers and materialmen subsequently filed.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 348–355; Dec. Dig. ⇐198.]

2. MECHANICS' LIENS ⇐13—PROPERTY SUBJECT—PUBLIC BUILDING.

Neither the Constitution nor the statute gives laborers or materialmen any lien against public buildings.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 14, 15; Dec. Dig. ⇐13.]

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. O. Miles against W. H. Ryan, City Clerk of the City of Fresno. From the judgment for plaintiff, defendant appeals. Affirmed.

L. L. Cory, of Fresno, for appellant. Milton M. Dearing, of Fresno, for respondent.

SHAW, J. The defendant appeals from a judgment in favor of the plaintiff. The object of the action was to obtain a writ of mandate directing the defendant as city clerk to draw his warrant in favor of the plaintiff for the sum of $750.50, being the amount due and remaining unpaid by the city of Fresno to one J. G. Simpson. The clerk refused to issue the warrant, basing his refusal on the ground that the plaintiff's claim was founded solely on a garnishee process under section 710, Code of Civil Procedure, upon a judgment against Simpson in favor of plaintiff, that the money was due to Simpson as the final payment upon a contract by him with said city for the erection of a public building, and that after said garnishee notice was served certain other persons who had furnished material and performed labor for Simpson in the erection of the said building had served notices upon said clerk to withhold payment from Simpson of said sum of money due him and to apply the same in satisfaction of their claims for said labor and material furnished to Simpson. They claimed this right under section 1184, Code of Civil Procedure. These claims amounted to more than the amount due Simpson from the city. On May 2, 1910, the sum of $750.50 had been duly allowed by

the city authorities as a claim due Simpson for the performance of his contract to erect the building. The transcript of the plaintiff's judgment was served on the city clerk on May 5, 1913. On May 10, 1913, the aforesaid laborers and materialmen served their notices upon the clerk demanding payment of their claims out of the money due Simpson. The sole question presented is whether or not the claim of a person who garnishees a debt due to his judgment debtor, in the manner provided in section 710, is subordinate to the claims of laborers and materialmen who, under section 1184, afterwards give notice to intercept the money due to the contractor from the owner.

[1, 2] We are of the opinion that, upon the facts above stated and under the provisions of the law relating to claims of such materialmen and laborers, the giving of a notice by the judgment creditor, prior to their notice and after the maturity of the claim, gives the judgment creditor precedence over said laborers and materialmen in the payment of money due the contractor. Neither the Constitution nor the statute gives laborers or materialmen any lien against public buildings. This was expressly decided in Mayrhofer v. Board, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451. The doctrine on which it rests, namely, that the state is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it, and that such general expressions will not be applied to public property, has been repeatedly affirmed since that decision. As there could be no lien in this case, we are not concerned with the priorities that may exist in favor of lien claimants. The respective rights of laborers and materialmen on the one hand, and of judgment creditors on the other, must therefore be determined by the statutory provisions relating thereto.

Section 1184, as amended in 1911 (St. 1911, p. 1315), provides that any person within the classes entitled to a lien under the mechanic's lien law, except the contractor, may at any time give to the owner a notice that he has performed labor or furnished materials, or both, to the contractor, or that he has agreed to do so, describing generally the labor or material furnished or to be furnished and the value thereof. It then provides that:

"Upon such notice being given it shall be lawful for the owner to withhold, and in the case of property which for reasons of public policy, or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor shall withhold from his contractor sufficient money due, or that may become due, to such contractor to answer such claim and any lien that may be filed therefor."

The provision in the last quotation referring to property not subject to the liens was added by the amendment of 1911. It merely put in statutory form the previous decisions of this court. In other respects the section is substantially the same as it was prior to said amendment. It has been held that the proceeding authorized by this section is substantially an equitable garnishment by the claimant of the fund due to the contractor from the owner (Bates v. Santa Barbara, 90 Cal. 543, 27 Pac. 438), and that it secures to the person giving the notice a claim on the funds due which is paramount to that of the contractor, or any person claiming under him by assignment or attachment made after the service of such notice (First National Bank v. Perris, 107 Cal. 55, 40 Pac. 45; Newport, etc., v. Drew, 125 Cal. 585, 58 Pac. 187; Long Beach School Dist. v. Lutge, 129 Cal. 409, 62 Pac. 36). The two cases last cited establish the additional proposition that if, before the service of such notice by the claimant, the claim being then due to the contractor, the contractor has assigned his claim, or other parties have obtained rights therein by attachment or otherwise, such assignment or rights are paramount to those of the persons giving notice under section 1184.

These principles control the decision in the present case. Before the claimants under section 1184 gave their notice to the city clerk, the plaintiff, as judgment creditor, had served upon the city clerk the transcript of his judgment and in all respects duly complied with the provisions of section 710 necessary to entitle him to have said fund paid and applied upon his judgment. The judgment creditor was therefore entitled to precedence in payment over the persons subsequently giving notice under section 1184. The money was due and payable to Simpson on May 2d. He had at that time the right to assign the same and his creditors had the right to reach the same by attachment, execution, or creditors' bill. Under these circumstances, the one first in time is first in right. The claimants under section 1184 must yield to the prior claim of the judgment creditor.

Section 1184 gives laborers and materialmen a right to give their notice at any time after they contract to furnish the labor or materials. By doing so they may anticipate any subsequent attachment or execution. But by no process of construction can the statute be held to mean that the fund due to the contractor upon a public building, upon which no lien is given, is set apart for an indefinite period after the completion of the building and maturity of the payment therefor, as a fund for the payment of persons furnishing labor and material, free from all demands of other creditors of the contractor and beyond his power to transfer or assign. Section 1184 fixes no limit upon the time in which the notice therein provided for may be given. Under the decisions cited and upon sound principles of construction, if they await the maturity of the pay-

ment to the contractor before giving the notice, it must be given before any assignment is made, or attachment or other claim has accrued against the contractor on account thereof, or their claims will be postponed to those of attaching creditors whose attachments are prior in point of time.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

On Rehearing.

SHAW, J. In a petition for rehearing the defendant contends that of the $750.50 which the city of Fresno, on May 2, 1913, ordered paid to Simpson on his building contract, only $363 was due and that the remainder, $387.50, did not become due until 35 days after May 1, 1913, the date of the completion of the building. From this he argues that under the mechanic's lien law the claimants under the building contract were entitled to preference over the judgment creditor as to the $387.50 not due on May 10, 1913, when they served their notices to withhold payment for their benefit.

The record does not establish the facts as claimed. The complaint alleges that the city allowed the Simpson claim for $750.50 on May 2, 1913, and ordered that a warrant be drawn for its immediate payment. The answer does not aver that this allowance anticipated the final payment on the building contract and included the installment of $387.50 that was not due until June 4, 1913. It cannot be presumed that the city would pay a debt before its maturity and the only inference remaining is that the $750.50 was made up of the installments which fell due at and before completion. The answer alleges that the $750.50 is the full amount due under the building contract, but as the action was begun on May 16, 1913, which was before the final payment became due, this would be true only if the allowance covered the installments which were then due. The demurrer to the answer included a specification that the answer was uncertain in this respect and defendant was, therefore, duly advised that if the facts were as now claimed, the pleading was defective.

We concur: SLOSS, J.; LAWLOR, J.

30 Cal. App. 135

PEOPLE v. FISHER. (Cr. 331.)

(District Court of Appeal, Third District, California. March 11, 1916. Rehearing Denied May 4, 1916.)

1. KIDNAPPING ⟸5 — SUFFICIENCY OF EVIDENCE—INTENT.

Evidence in a prosecution under Pen. Code, § 209, for kidnapping upon an information charging that defendant unlawfully, feloniously, and forcibly enticed and carried away a certain named person, with the intention to restrain such person, and thereby to commit extortion and robbery, and to exact from his relatives money and valuable things, *held* sufficient to show the alleged intent.

[Ed. Note.—For other cases, see Kidnapping, Cent. Dig. § 11; Dec. Dig. ⟸5.]

2. KIDNAPPING ⟸1—ELEMENTS OF OFFENSE —ACCOMPLISHMENT.

Under such information, it was not necessary that the purpose charged should be accomplished to make it effectual as an element of the crime, but all that was required was that some overt act be done toward the execution of the purpose and the fulfillment of the intent, and the forcible removal of one from his buggy and the preparations indicated by the handcuffs, chloral, blank notes, etc., found in defendant's automobile, satisfied the requirement of the law in that respect.

[Ed. Note.—For other cases, see Kidnapping, Cent. Dig. §§ 1–7; Dec. Dig. ⟸1.]

3. CRIMINAL LAW ⟸823(16)—INSTRUCTIONS— PARTIES TO OFFENSE.

Any error in a charge that all persons concerned in the commission of a crime, whether directly committing the act constituting the offense, or aiding or abetting in its commission, or, not being present, advising and encouraging its commission, are principals in any crime so committed because implying that one who did not commit the offense may be guilty from mere aiding of the commission without guilty knowledge, is cured where the court forcibly charged that the jury should acquit unless they were convinced of his guilty intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1994, 3158; Dec. Dig. ⟸823(16).]

Appeal from Superior Court, Merced County; J. J. Trabucco, Judge.

Albert E. Fisher was convicted of kidnapping, his motion for a new trial was denied, and he appeals. Judgment and order affirmed.

Ben Berry, of Stockton, and L. J. Schino, of Merced, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. This case, as set forth in the transcript, reveals a strange story. It reads as though it were a tale of medieval brigandage. Defendant and one F. W. Kirkman, riding in an automobile on the morning of May 26, 1915, near the city of Merced, saw approaching in a buggy F. W. Henderson, a prominent attorney of said city, who was on his way from his home in the country to his office in Merced. Appellant and Kirkman, alighting from the machine, approached the head of the horse that he was driving and, both pointing pistols at Henderson's head, demanded that he get out or they would kill him. He was then compelled to get into the automobile, which contained two seats and had side curtains. He was then required to write a note to his stenographer, giving an account of his absence. Kirkman and Fisher then handcuffed him to an iron rail attached to the seat of the automobile. Fisher then drove Henderson's horse and buggy into Merced, and delivered said note to the stenographer and thereafter he walked

to the outskirts of the city and rejoined the occupants of the automobile. From this point the machine was driven along the public highway until the city of Stockton was reached and, while making a turn from one street to another, Henderson managed to get the door open and he jumped headlong out, Fisher ineffectually attempting to grab him. Kirkman was driving, and temporarily lost control of the car, with the result that it collided with an iron lighting post, and was brought to a standstill. Kirkman and Fisher took flight, and the former has not been apprehended. Fisher was arrested in Los Angeles and convicted in the superior court of Merced county upon an information charging that he "did wilfully, unlawfully, feloniously, maliciously, forcibly, and fraudulently take, entice, and carry away one F. W. Henderson, with the intent then and there to restrain said F. W. Henderson, and thereby to commit extortion and robbery from said F. W. Henderson, and to exact from the relatives of said F. W. Henderson, money, lands, promissory notes, deeds, real property, personal property, and other valuable things."

[1] It is not disputed that therein is properly set forth the offense contemplated by section 209 of the Penal Code, nor is it claimed that the evidence is insufficient to support the offense of kidnapping, but the main contention of appellant is that there is a failure of proof as to the intent charged in said information. With this contention we do not agree. Manifestly, the intent with which such an unlawful act is performed or the ultimate object which the actor has in view must ordinarily be shown by circumstances. It is not to be supposed that the perpetrators would openly declare the full purport of their nefarious design, although it does appear that they threatened to kill Mr. Henderson if he made an outcry or attempted to escape.

Mr. Henderson does not say that the conspirators, or either of them, declared an intention to resort to extortion or robbery, but certain facts related by him and by other witnesses furnish mute but persuasive testimony that such was the intention. At least, from the many circumstances appearing in the record, it cannot be said that the inference drawn by the jury was or is unreasonable. As a striking example of these significant circumstances we may refer to some of the articles that were found in said automobile. There was a telephone apparatus by which telephone connection could be had through the wire running at the side of many of the public roads, also a complete telephone directory of the city of Merced. There were also many promissory notes in favor of Kirkman for large sums of money, needing only the signature of some promissor to make them complete. There was also a complete map of the land owned by Henderson and a deed, containing an exact description of land owned by the mother-in-law of Henderson, without any signature thereto. To the foregoing we may add the fact that, while Henderson was being taken along the highway as before described, defendant Fisher attempted to induce him to drink some wine which was afterwards found to contain chloral, a drug producing sleep. When they passed other machines Henderson was also compelled to hide his handcuffs and himself as much as possible. Considering these things in connection with the forcible abduction of the prosecuting witness, it is not strange that the jury found a verdict of guilty as charged. Indeed, any other verdict would have been surprising.

It is true that while being spirited away Henderson was told that he was being taken to some indefinite place in order that his affidavit to certain facts might be obtained. We need not go into the details of that, however, as it has never yet been held that the jury is bound to accept at its face value such self-serving declarations of one charged with a crime. Besides, it may be added, the story was so whimsical and improbable that it could justly be disregarded and repudiated.

[2] Of course, it is not necessary for the purpose charged in the information to be accomplished in order to make it effectual as an element of the crime. All that is required is that some overt act be done toward the execution of the purpose and the fulfillment of the intent. The forcible removal of Mr. Henderson and the other preparations indicated by what was found in the automobile satisfy the requirement of the law in that respect. It may be illustrated by the proof of intent in burglary. Therein if the defendant is charged with the entry of a building with intent to commit larceny there must be the overt act of entering the building before a conviction can be had, but from this entry under suspicious circumstances the jury may infer the intent to commit larceny, although no larceny was actually accomplished.

[3] There is no more merit in the other contention as to a declared instruction of the court. It seems that the instructions of the court by stipulation were taken down in shorthand and afterward transcribed by the official reporter and filed with the clerk. Among these appears the following:

"I charge you, gentlemen, that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid or abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed."

This is the contention of appellant:

"In this instruction, the jurors were told that an accessory was one who aided or abetted in the commission of a crime, and we submit that the learned judge thereby transgressed the plain letter of the statute. He read to the jury section 31 of the Penal Code, and in doing so changed its language and perverted its meaning. We will admit for the sake of argument that the defendant did aid in the commission of a crime.

He aided and assisted Kirkman, no doubt, in enticing or carrying away Henderson. If while this carrying away was being accomplished he knew of the existence on the part of Kirkman of the specific intent to extort money or property from Henderson or his relatives, as charged in the information, he not only aided but also abetted in the commission of the crime for which he was convicted. But from this instruction the jury were led to believe that by the mere aiding in carrying away of Henderson, without abetting the crime which Kirkman intended to commit, to wit, the crime of extortion, the defendant could be found guilty, as charged in the information."

It is further urged that there is no evidence that Fisher had knowledge of any such intention of Kirkman, and that said instruction was not rendered harmless by other instructions. The rule is stated in People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50, that such instruction "is erroneous, as implying that a person who did not commit the offense may be found guilty for mere aiding of the offense without guilty knowledge and without 'aiding and abetting' the offense, but such error is cured by an instruction from which the jury could not fail to understand that aiding or assisting in the crime without guilty knowledge is not criminal." The qualification therein stated is strikingly applicable here, for the court clearly and forcibly instructed the jury that they must acquit the defendant unless they believed beyond a reasonable doubt and to a moral certainty that he had the intent and purpose "to extort from, or rob, the said F. W. Henderson, or to exact from the relatives of the said F. W. Henderson money or lands," etc. In fact, in several instructions he was treated as a principal, and the jury was admonished over and over again that they must believe every element of the crime charged had been proven against the defendant to a moral certainty and beyond a reasonable doubt or else he must be acquitted. It is not possible that appellant was prejudiced by said instruction, if it was given. The doubt manifested in the last clause is expressed for the reason that through the proceeding known as "diminution of the record" a copy of said instruction as filed in the lower court has been presented here, duly certified by the clerk of said court, and this copy corresponds exactly with the language of said section 31 of the Penal Code, containing the words "aid and abet," instead of "aid or abet." However, this is probably not conclusive, as the trial judge did not certify that he read the instruction as it was written, whereas he certified to the transcript as containing a correct record. But the matter is of no importance as no prejudicial error was committed.

Appellant was justly convicted of a villainous and dastardly crime, and it requires no small degree of patience and forbearance to treat with serious consideration the technical reasons urged for a new trial. The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(29 Cal. App. 521)

PEOPLE v. LOVE. (Cr. 439.)

(District Court of Appeal, Second District, California. Feb. 1, 1916.)

1. INFANTS ⊂⊃20 — LEWDNESS — OFFENSE — STATUTE.

In a prosecution under Pen. Code, § 288, for lewd and lascivious conduct with a child, evidence that defendant was discovered in the bedroom lying upon the bed in company with the boy, his body being in contact with that of the boy, that witness was not able to see what act the two were committing, as defendant immediately arose from the bed, and the boy left, and that upon being questioned by the witness, his father, the boy told what he and defendant had been doing, did not bring the offense within Pen. Code, § 288a, relating to fellatio and cunnilingus felonies, in effect August 8, 1915, where the information and proof fixed the date of the alleged crime prior thereto.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. ⊂⊃20.]

2. INFANTS ⊂⊃20—ANY "PERSON"—STATUTE.

In a prosecution for lewd and lascivious conduct with a child, under Pen. Code, § 288, providing that the offense may be committed by "any person," a child under the age of 14 years is such a person.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. ⊂⊃20.

For other definitions, see Words and Phrases, First and Second Series, Person.]

3. CRIMINAL LAW ⊂⊃1036(2)—EXCLUSION OF EVIDENCE—FAILURE TO OBJECT—WAIVER.

In such prosecution, where defendant on cross-examination asked the boy whether, when the acts were done, he knew that they were wrong, the sustaining of an objection thereto on the ground of its immateriality, in view of defendant's failure to call attention to his purpose in asking the question or to propose any instruction dealing with the necessity of accomplice corroboration, or as to whether the boy had sufficient understanding under Pen. Code, § 26, of the nature of the acts committed so as to become an accomplice, was not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2640; Dec. Dig. ⊂⊃1036(2).]

4. CRIMINAL LAW ⊂⊃742(1)—QUESTION FOR JURY—UNDERSTANDING OF WRONG.

In such prosecution, the jury, having the boy before it, with an opportunity of observing the state of his mental development and his ability to understand, were authorized to conclude from the evidence whether he understood the wrongfulness of such acts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1719; Dec. Dig. ⊂⊃742(1).]

5. CRIMINAL LAW ⊂⊃1170(1)—APPEAL—ADMISSION OF EVIDENCE.

In a prosecution under Pen. Code, § 288, for lewd and lascivious conduct with a child, the defendant could not complain of the court's exclusion of evidence tending to show that he committed acts of sodomy with the prosecuting witness, since the ruling was favorable to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145, 3149–3152; Dec. Dig. ⊂⊃1170(1).]

6. CRIMINAL LAW ⊂⊃1036(1)—OBJECTION TO EVIDENCE—WAIVER.

In such prosecution, where such testimony was brought out by direct questions to the

prosecuting witness, to which defendant made no objection, any objection thereto was waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631–1640, 2639; Dec. Dig. ⟸1036(1).]

7. Criminal Law ⟸371(9) — Evidence — Other Offenses.

In a prosecution under Pen. Code, § 288, for lewd and lascivious conduct with a child, proof of prior lascivious acts, even though tending to show the commission of the distinct crime of sodomy, was relevant to illustrate the defendant's lascivious disposition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. ⟸371(9).]

8. Criminal Law ⟸681(1), 1153(6)—Discretion of Trial Court—Foundation for Impeachment of Witness.

The question as to whether a sufficient foundation had been laid to warrant a witness in expressing an opinion that the general reputation of another witness for truth was bad is especially committed to the trial court, and, unless shown to have been clearly abused, cannot be held prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1611, 3066; Dec. Dig. ⟸681(1), 1153(6).]

9. Criminal Law ⟸1170(1) — Appeal — Harmless Error — Impeaching Evidence.

In a prosecution under Pen. Code, § 288, for lewd and lascivious conduct with a child, where the defendant was permitted to prove his own reputation and the alleged bad reputation of the boy's father, who appeared as a witness against him, the refusal to allow a witness to testify as to the general reputation of the father of the boy for truth was not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145, 3149–3152; Dec. Dig. ⟸1170(1).]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

E. D. Love was convicted of lewd and lascivious conduct with a child, his motion for a new trial was denied, and he appeals. Judgment and order affirmed.

E. L. Johnson, of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of having accomplished the crime described in section 288 of the Penal Code, by committing certain lascivious acts with a boy with intent as specified in the section referred to. As punishment for the offense the trial judge ordered that he be imprisoned in the state prison for a long term of years. The appeal is from that judgment and from an order denying the motion for a new trial.

[1] The evidence offered in support of the allegations of the information was in the main given by the boy in question, who described in detail very shocking acts alleged to have been committed with him by appellant. Appellant was the keeper of a merchandise store in the city of San Diego, and the father of the Mexican boy named in the information was a patron of his store. In the rear of the store appellant had a bedroom for his own use; he appearing to be an unmarried man. It was in this room that the alleged criminal acts are said to have been committed. The father of the boy testified that upon going into the front of the store to make some purchase he failed to find the appellant there, and discovered him in the bedroom lying upon the bed in company with the boy, his body being in contact with that of the boy. He was not able to see what act the two were committing; for appellant immediately arose from the bed, and the boy went through a rear door. Upon being questioned by the father, the son told the latter what he and appellant had been doing in the room, and the arrest followed. While on the witness stand the boy, in addition to describing the acts committed with him, stated that the same kind of acts had been upon prior occasions practiced between the two. There was testimony given by other witnesses that the boy had been seen in and about the store and rooms of the appellant.

It is first claimed that the evidence established a different charge from that alleged in the information, in that the acts described by the boy constituted an offense under section 288a of the Penal Code, and therefore could not be proved under a charge framed agreeable to the provisions of section 288 of the same Code. The section under which appellant was prosecuted makes punishable acts of a lascivious nature "other than the acts constituting other crimes provided for in part two of this Code." It is a sufficient answer to this contention, as is properly stated by the Attorney General, that section 288a, referred to by counsel for appellant, was not a law at the time of the commission of the offense alleged. The information and proof made fixed the date of the alleged crime as of the 15th of April, 1915. Section 288a was a new section enacted by the Legislature of 1915, and that section did not become effective until August of that year.

[2] We think there is no merit in the added contention that, because section 288 provides that the offense may be committed by "any person," a child under the age of 14 is not such a person. The evidence was ample to show the lascivious motives of appellant in causing or persuading the boy to contribute to the commission of the offense.

[3, 4] Counsel here suggests another question which refers to an alleged error committed by the court in ruling upon certain offered testimony. On cross-examination the boy was asked this question:

"Q. At the time that you say that these acts were done, did you know that they were wrong?"

This was objected to as "immaterial," and the objection was sustained. Counsel went no further with questions in that direction, and did not outline to the court what theory he was pursuing in calling for testimony as

to the fact indicated. He now argues that, as the boy was under the age of 14 years, he was presumptively incapable of committing a crime unless he knew and appreciated the wrongfulness of the acts. Section 26 of the Penal Code does provide that all persons are capable of committing crimes except:

"1. Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness."

It is argued that the testimony was immaterial because, if the boy understood the nature of the act and that it was wrong, he became an accomplice with the appellant, and therefore his testimony would require corroboration. The independent testimony introduced, as we have suggested the general substance of it, was corroborative, and probably in this view we would be compelled to say that the error, if any, did not result in a miscarriage of justice. However, we conceive that, in order to make the ruling of the court amount to prejudicial error, counsel should have called attention to his purpose in asking the question which was ruled out. Furthermore, the jury had before it the boy, and had the opportunity of observing the state of his mental development, his ability to understand, and altogether under the facts and circumstances it would seem that they were authorized to draw a conclusion from the testimony before the court upon the very matter adverted to. But appellant did not propose a single instruction to the court dealing with the question of the necessity made by the law which requires an accomplice to be corroborated, or any instruction pointing the attention of the jury to the matter as to whether the boy had sufficient understanding of the nature of the act committed as to become an accomplice. Under such a state of the record, we think the contention for error as to that proposition is not well founded.

[5, 6] It is contended next that evidence was introduced tending to show that appellant committed acts of sodomy with the prosecuting witness, which would not be included within the acts described by section 288. The testimony of the boy does very strongly hint that, in addition to other lascivious acts, the crime of sodomy was committed, although it cannot clearly be told that such was the case. This testimony, which was given in response to direct questions, was all answered without objection being made. But at the conclusion of it appellant's counsel said:

"We object to that and move to strike out all the prior testimony along that line. I think that is absolutely incompetent under the charge in this case, a separate and distinct matter."

The court responded that the objection was sustained. Not only was the ruling in its whole purport favorable to appellant, but the objection to the testimony, in view of the fact that it was brought out by direct questions of the prosecution, was waived.

[7] This court has held in People v. Harrison, 14 Cal. App. 545, 112 Pac. 733, that, under a charge there considered which was like the one here, proof of prior lascivious acts, even though that proof tends to show the commission of the distinct crime of sodomy, is relevant for the purpose of illustrating the lascivious disposition of the person charged.

[8, 9] We think that the court did not abuse its discretion in refusing to allow the witness Maud Hill to testify as to the general reputation of the father of the boy for truth, honesty, and integrity. The question as to whether a sufficient foundation has been laid to warrant a witness in expressing such an opinion is a matter especially committed to the judgment of the trial court, and unless that discretion is shown to have been clearly abused there can be no prejudicial error. Two witnesses were asked by appellant's counsel as to whether they would believe statements of the father of the boy if given under oath, to which questions objections were sustained. This court in the case of People v. Corey, 8 Cal. App. 726, 97 Pac. 907, has held that such a question may properly be asked, but we need not here determine, assuming that there might be among the justices of this court a difference of opinion as to that matter, the correctness of that holding; as subsequent to the date of that decision an amendment to the Constitution has been made which requires that no reversal shall be ordered unless it appears that by reason of the error alleged a miscarriage of justice has resulted. The appellant was permitted to make proof of his own reputation, and also of the alleged bad reputation of the boy's father, who appeared as a witness against him. It can only be in cases where there has been an undue restriction of this privilege to make proof as to personal character that error of a sufficiently prejudicial character to warrant a new trial can be said to have been committed.

A careful examination of the record makes it clear to us that there was sufficient competent evidence heard to support the verdict of the jury.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

30 Cal. App. 66

SWANTON v. JACKS. (Civ. 1725.)

(District Court of Appeal, First District, California. March 4, 1916. Rehearing Denied by Supreme Court May 1, 1916.)

1. PARTNERSHIP ⇐81 — TRUSTS — ADMINISTRATION.

Where one member of a firm acted as a trustee for his associate, he is bound to exercise the highest degree of diligence and good faith, and to render a full and exact account of his

transactions, and of all moneys transmitted to him, and of their proper investment.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 129; Dec. Dig. ⊂⊃81.]

2. PARTNERSHIP ⊂⊃336(3)—ACCOUNTING—ACTIONS.

In a suit by one partner for an accounting, who acted as trustee of partnership funds, evidence by the trustee partner *held* to warrant a finding that he had not properly carried out the partnership purposes.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. ⊂⊃336(3).]

3. PARTNERSHIP ⊂⊃342—ACCOUNTING—VERDICT—FINDINGS.

In an action by one partner for an accounting, where affirmative averments of defendant's answer merely put in issue the same matters which were raised by the general denial, a general finding against defendant was equivalent to a general finding against his affirmative defenses.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 810, 812; Dec. Dig. ⊂⊃342.]

4. PARTNERSHIP ⊂⊃344—ACCOUNTING—JUDGMENT.

In an action by a partner for an accounting, where there was only one transaction, and the court found defendant was indebted in a given amount, the judgment was not objectionable on the ground that the partnership accounts were not stated.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 813–818; Dec. Dig. ⊂⊃344; Account, Cent. Dig. § 28.]

5. PARTNERSHIP ⊂⊃342 — ACCOUNTING — ACTIONS—FINDING.

In an action for a partnership accounting, where the court found that plaintiff had delivered moneys to defendant to be devoted to the partnership business, and that defendant had converted said moneys to a given sum, the finding entitled plaintiff to recover the whole sum, and not merely one-half.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 810, 812; Dec. Dig. ⊂⊃342.]

6. APPEAL AND ERROR ⊂⊃1050(1)—REVIEW—HARMLESS ERROR.

The erroneous admission of testimony is harmless where unimportant, and there was other testimony as to the same facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⊂⊃1050(1).]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by F. W. Swanton against Romie C. Jacks. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Affirmed.

N. A. Dorn and C. D. Dorn, both of San Francisco, for appellant. C. H. Sooy, Walter Shelton, and David L. Levy, all of San Francisco, for respondent.

RICHARDS, J. This is an action brought for the dissolution of a partnership and for an accounting between the parties to it, and for the recovery by the plaintiff of such sum as should be found due him thereon. The complaint sets up in full the articles of copartnership, from which it appears in substance that the parties were to engage in the business of giving aeroplane exhibitions in various parts of the country, and that as a preliminary thereto the defendant was to proceed to France, taking with him a man who was to be instructed there in the art of aviation; that the defendant was while there to inspect and purchase one or two aeroplanes for use in said exhibitions; that in order to meet the expenses of the trip each of the parties was to put up the sum of $500 and which the defendant was to receive at the time of his departure for France; that each of the parties was to contribute the additional sum of $4,500, which was to be placed in the hands of a trustee named in the agreement as soon as the defendant should have selected for purchase said machines; that thereupon the said trustee was to forward to said defendant such sum up to $8,000 as would cover the purchase price of said machines; that the balance of the fund in the hands of the trustee was to be dispensed in arranging for and advertising the exhibitions.

The complaint then proceeds to aver:

"That from the commencement of said partnership said defendant has willfully neglected the business of said partnership and to carry out the purposes for which it was formed, and has from time to time applied to and converted unto his own use and benefit from moneys belonging to said partnership and constituting the capital thereof, large sums of money, to the detriment of said partnership and the injury of said plaintiff."

In the answer of the defendant the making of the partnership agreement is admitted, but the above-quoted averment of the complaint is denied, and the defendant further affirmatively sets forth the several acts and expenditures on his part in furtherance of the objects and execution of said agreement.

Upon the trial of the cause the court found the agreement to have been made, and that under its terms the plaintiff had intrusted to the defendant the sum of $3,300. It then found in the terms of the above-quoted allegation of the complaint that the defendant had willfully neglected the business of said partnership, and willfully neglected to carry out the purposes for which it was formed, and had converted to his own use and benefit $2,800 of the said moneys so intrusted to him by plaintiff; and the court further found that upon an accounting between the parties there was due, owing, and unpaid to the plaintiff from the defendant the sum of $2,800. The court then entered judgment for a dissolution of the partnership and for the recovery by plaintiff of the said sum.

The defendant appeals from the judgment and from an order denying a new trial.

[1, 2] The first contention which the appellant urges upon this appeal is that the evidence is insufficient to sustain the finding of the court to the effect that the defendant either neglected the business or failed to carry out the purposes of the partnership,

or that he converted any of its money to his own use. In support of this contention the appellant calls the attention of the court to his own testimony relative to his trip to France and to the purchase of an aeroplane or aeroplanes there. If the trial court believed the testimony of the defendant in regard to these matters it would follow necessarily that the findings were contrary to such evidence. But it must be remembered that the defendant was acting throughout as the trustee of his associate in said firm, and that as such he was bound not only to an exercise of the highest degree of diligence and good faith in the administration of his trust, but that he was also bound to keep and render a full and exact account of his transactions and of all moneys transmitted to him and of their proper investment, in accordance with the terms of his agreement, and that his testimony in regard to all such matters should be clear and explicit. Foster v. Davis, 46 Mo. 268; Baker v. Williamson, 4 Pa. 456.

Without undertaking to review the evidence in detail it may be stated that a mere cursory inspection of the record will show that the testimony of the defendant falls far short of measuring up to these requirements, and that it was of such a doubtful, vacillating, and altogether unsatisfactory character as to have amply justified the court in rejecting the whole thereof, and in finding in the language of the plaintiff's complaint that the defendant had willfully failed and neglected to attend to the business of the partnership or to carry into effect the purposes for which it was formed. Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Roberts v. Roberts, 168 Cal. 307, 142 Pac. 1080, Ann. Cas. 1916A, 886; Treat v. Treat (Sup.) 150 Pac. 53; Guerrero v. Ballerino, 48 Cal. 118.

[3] The appellant's next contention is that the court has failed to find upon the issues raised by the affirmative statements of his answer relative to his trip to France and his doings there.

It is true that the court has not specifically referred to these matters in its findings; but, as is above shown, the court has made a general finding which, if true, carries with it the necessary implication that the affirmative asseverations of the defendant in his answer and his evidence are untrue. This being so, no detailed finding was required to respond to the issues raised by the defendant's answer, for the added reason, if for none other, that the answer of the defendant raised no new issue in the case, but only amounted to the affirmative averment of matter already put in issue by his denials of the allegations of the complaint as to his neglect of the business and conversion of the funds of the firm.

[4] The appellant further urges that the findings and judgment of the court are insufficient, for the reason that this being an action for the dissolution of the firm and for an accounting, the court should in its findings have found and given the items of such account, or else in its judgment have ordered that such accounting be thereafter had.

It is to be noted, however, that this partnership had during its brief period but one transaction, involving the deposit with a trustee of a certain fund and its outlay for but two objects, viz., the trip of the defendant to France, and the purchase by him of an aeroplane or two while there. The evidence shows that an accounting was had as to both these items during the trial, and the court finds that upon such accounting there is a balance in plaintiff's favor of $2,800. It cannot therefore be justly said that the court has not made an accounting and found and fixed the balance due the plaintiff thereon.

[5] As to this finding, however, the appellant urges that since the court found that the defendant had only diverted $2,800 of the money of the firm, the defendant could only be held liable to the plaintiff for half of that sum, and hence that the amount of the judgment is double what it should have been.

This argument is, however, based upon a misconception of the finding of the trial court; for the finding is that the money of the firm which the defendant converted to his own use was that portion thereof which the plaintiff himself had paid, and which had been intrusted by him to the defendant. Thus construed the findings and judgment properly provide for the repayment to the plaintiff of the sum which he had paid into the firm.

[6] The appellant's further contention is that the court erred in permitting a certain witness to testify to a conversation held with the trustee of the parties but in the absence of the defendant. An examination of the record in this regard shows that the error, if any, was harmless, for the reason that the testimony educed was unimportant and related to matters already in evidence from the lips of other witnesses.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

30 Cal. App. 58

COOLEY v. BRUNSWIG DRUG CO.

(Civ. 1644.)

(District Court of Appeal, Second District, California. March 3, 1916. Rehearing Denied by Supreme Court May 1, 1916.)

1. NEGLIGENCE ⇐142 — FINDINGS — SUFFICIENCY.

Findings of the trial court should receive such a construction as will uphold, rather than defeat, the judgment, and whenever from the facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. Therefore, in a personal injury action, an ex-

press finding of negligence is unnecessary where it can be implied from the facts found.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 400–403; Dec. Dig. ⟸142.]

2. NEGLIGENCE ⟸108(2)—COMPLAINT.

Where the circumstances alleged warrant an inference of negligence, a complaint is sufficient, though not specifically averring negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 175; Dec. Dig. ⟸108(2).]

3. NEGLIGENCE ⟸136(9) — WHAT CONSTITUTES—JURY QUESTION.

"Negligence" is a relative term, depending upon inferences to be drawn from many facts and circumstances which it is the province of the jury to draw in every case, unless the facts are such that reasonable minds cannot differ.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 293–297; Dec. Dig. ⟸136(9).

For other definitions, see Words and Phrases, First and Second Series, Negligence.]

4. MASTER AND SERVANT ⟸278(3), 281(6) — INJURIES TO SERVANT — NEGLIGENCE — ACTIONS.

In an action for injuries to a servant who struck his head on a trapdoor, which he had no reason to believe was closed, evidence *held* to warrant a finding that the master was negligent in closing the door without warning, and that the servant was not negligent in failing to look.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 958, 990; Dec. Dig. ⟸278(3), 281(6).]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by L. B. Cooley against the Brunswig Drug Company, a corporation. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Affirmed.

Flint, Gray & Barker and Henry S. Van Dyke, all of Los Angeles, for appellant. Anderson & Anderson and Trent G. Anderson, all of Los Angeles, for respondent.

SHAW, J. Action to recover damages for personal injuries alleged to have been sustained as a result of defendant's negligence. Judgment in the sum of $1,000 went for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals.

The sole ground upon which appellant insists upon a reversal is that the findings do not support the judgment, in that the court not only failed to find, either directly or indirectly, that defendant was guilty of negligence, but the findings affirmatively show that the injury complained of was due solely to the gross negligence of plaintiff. Upon the question of negligence the court found:

"II. That on the 6th day of November, 1911, the plaintiff was, and for about five years theretofore had been, employed in the capacity of receiving clerk by the defendant.

"III. That the defendant, on the 6th day of November, 1911, and for more than five years previous thereto, had been carrying on a part of its business of wholesale drug dealer in a concrete building in the city of Los Angeles, county of Los Angeles, state of California, situate on New High street, in said city; that among various other sets of stairways and elevators the several floors upon said building were connected by a set of concrete stairways, and that as a protection against fire there was placed over the opening of the stairway leading from the first to the second story a fire door sheathed with iron; that said door was ordinarily kept open, except on infrequent occasions when necessary to close the same on account of prevention of fire or for other special purposes; that said doorway had not been closed during the employment of plaintiff by said company to plaintiff's knowledge during business hours, but that it had been closed on such infrequent occasions or for such special purposes, and when so closed, no warning of its having been closed had been given.

"IV. That the duty of plaintiff, as receiving clerk in the employment of said defendant, required him, many times a day, to ascend and descend to the floor above, and that upon the 6th day of November, 1911, while plaintiff was engaged in his duties as receiving clerk of the said defendant below the second floor of said building, the defendant's agents and officers, acting within the scope of their employment, closed said fire door within an hour or two before 2 o'clock p. m. of said day, and did not give any warning to plaintiff that said door had been so closed, and that plaintiff had no notice or knowledge that said door had been closed; but said door was clearly visible from the bottom of said stairway to any one looking up; that on said date, and about the hour of 2 o'clock p. m., plaintiff, while in the discharge of his said duties, was required, in the discharge thereof, to ascend to the second floor of said building, and, assuming that said fire door was open, and without looking up or towards said doorway, and without knowledge that the same was shut, plaintiff ascended the stairway leading to said second floor, and in so doing, came suddenly and violently in contact with the said fire door, and struck the top of his head against same with great violence, and thereby was stunned and thrown backward into a sitting position on the stairway and against the iron railing of the stairway."

"VIII. That it is true that the said stairway or staircase referred to in plaintiff's complaint leading from the first to the second floors, and in ascending which the plaintiff was injured, is composed of 24 steps; that the width of said staircase is 4 feet, and that the size of the said fire door when closed, exposed to view of one approaching from the first floor and attempting to ascend the said staircase, is 4 feet in width by 11½ feet in length; that all of the surface of said fire door, 4 feet in breadth and 11½ feet in length, is in full view from the first floor, and by any person approaching the foot of such staircase, or any one attempting to ascend the said staircase from the first to the second floor if such person looks up; that the various floors in said building, in the rear part of said building in which plaintiff was stationed ordinarily have three series or sets of communication with each other, each and all being practically equidistant from the place of plaintiff's ordinary position of employment, to wit, said set of stairways ordinarily referred to, a freight elevator, which was frequently used by plaintiff, and another complete set of stairways; that to pass from the top of the stairway, which was used by plaintiff on the occasion referred to, to the front of the second floor, plaintiff would have to walk past said freight elevator, as well as by the head of the stairway which he did not use; that it is not true that the plaintiff, on November 6, 1911, at the time of the collision referred to in plaintiff's complaint, ascended said staircase without observing ordinary care, or any care at all, but, on the contrary, the plaintiff at said time and place did, in ascending said staircase, observe ordinary care in so doing, notwithstanding the specific

facts hereinbefore found; and it is not true that any injury received by plaintiff was due solely, or at all, to the wanton and reckless manner of the said plaintiff in ascending said staircase, or to the failure of said plaintiff to exercise ordinary care in the premises, or that the plaintiff did ascend said staircase in a wanton or reckless manner."

[1, 2] It is an established rule of law that the findings of the trial court are to receive such a construction as will uphold, rather than defeat, its judgment thereon; and whenever from the facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. Warren v. Hopkins, 110 Cal. 512, 42 Pac. 986; Gould v. Eaton, 111 Cal. 645, 44 Pac. 319, 52 Am. St. Rep. 201; Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257. Nor is it necessary, in order to sustain the judgment, that the court should, in express terms, have found that defendant was guilty of negligence. The omission to allege negligence in a complaint does not render the pleading defective, provided the circumstances alleged are such as to justify the inference of negligence. Geneva v. Burnett, 65 Neb. 464, 91 N. W. 275, 58 L. R. A. 287, 101 Am. St. Rep. 628; Silveira v. Iverson, 125 Cal. 266, 57 Pac. 996; Quinn v. Electric Laundry Co., 155 Cal. 500, 101 Pac. 794, 17 Ann. Cas. 1100. So in findings of fact, the omission to find in express terms that defendant was negligent will not defeat the judgment, if the facts found show an omission of duty with a resultant injury.

[3, 4] The question therefore presented is whether or not the facts found, together with inferences deducible therefrom and which the trial court was justified in making, support the judgment. Judge Cooley, in his work on Torts, defines negligence as:

"The failure to observe, for the protection of the interest of another person, that degree of care, protection and vigilance which the circumstances justly demand, whereby such other person suffers injury."

It is a relative term, depending upon inferences to be drawn from many facts and circumstances which it is the province of the jury to draw in each particular case.

"It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff." Schierhold v. N. B. & M. R. R. Co., 40 Cal. 447; Bowers v. U. P. R. R. Co., 4 Utah, 224, 7 Pac. 251; Jamison v. S. J. & S. C. R. R. Co., 55 Cal. 593; Franklin v. Motor Road Co., 85 Cal. 70, 24 Pac. 723.

And when they do so find upon facts as to which reasonable minds might differ in the conclusion reached, their decision is not subject to review on appeal. So if negligence on the part of the defendant may be reasonably implied from the facts found by the court, it is the duty of this court to construe the findings as upholding the judgment.

Appellant insists that in the case at bar there can be but one inference drawn from the plaintiff's actions as found by the court, and that is one of gross negligence on his part. We cannot assent to this contention. In effect, the court found that defendant was guilty of negligence in closing the trapdoor without doing anything to indicate or give notice of such changed condition, thus rendering it dangerous for plaintiff to ascend the stairway as he was accustomed to do. In other words, it failed to do what a reasonably prudent man, having due regard for the safety of his employé, would have done under the circumstances shown to exist. And likewise as to plaintiff. As a reasonably prudent man, accustomed as he was in the course of his employment covering a period of five years, to run up and down this stairway 5 to 20 times a day, and never knowing of the door being closed, he was justified, in the absence of notice or warning of its being closed, in assuming that it was open as he had always found it, and hence he was not negligent when in ascending the stairway he failed to look up for the purpose of discovering whether or not it was open. The determination of both questions was for the trial court sitting as a jury, and as to both it has made findings of fact from which inferences of negligence on the part of defendant and exonerating plaintiff therefrom may fairly be implied. As a matter of law, we cannot say the facts as found do not support the judgment, and it and the order denying defendant's motion for a new trial are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 76

GORDON v. ROBERTS et al. (Civ. 1607.)

(District Court of Appeal, Second District, California. March 6, 1916. Rehearing Denied by Supreme Court May 4, 1916.)

1. MASTER AND SERVANT ⊂⊃318(1)—EXISTENCE OF RELATION—GENERAL CONTRACTOR—LIABILITY FOR NEGLIGENCE.

If the general contractor for construction of a building was under the direction of the owner as to the manner and means by and with which the work should be prosecuted, he would occupy the ordinary relation of a servant towards the owner, as regards the owner's liability for injury to a third person from negligence of the contractor and his servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1257; Dec. Dig. ⊂⊃318(1).]

2. NEGLIGENCE ⊂⊃54—LIABILITY—CONTRACTOR.

Whether or not B., who contracted to paint a building, was an independent contractor, he is not liable for injury to a third person from negligence in the moving of the trestle from which the painting was done; the sole cause of the injury being the negligence of the men designated by the owner to do the moving, pursuant to his contract with B. that the scaffolding and the moving thereof should be attended to by him, the owner.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 66, 67; Dec. Dig. ⊂⊃54.]

3. MASTER AND SERVANT ⟸330(1)—LIABILITY FOR NEGLIGENCE—INDEPENDENT CONTRACTOR—BURDEN OF PROOF.

A showing that the men, whose negligence, in moving a trestle for the painting of a building, caused injury to a traveler on the sidewalk, were furnished by the owner of the building, pursuant to his contract with the painters, that he would attend thereto, establishes his liability, in the absence of a showing, of which he had the burden, that such men were as to him independent contractors.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1270; Dec. Dig. ⟸330(1).]

4. NEGLIGENCE ⟸121(3)—PRESUMPTION FROM ACCIDENT.

A prima facie case of negligence is made out by the fact of a trestle for painting a building falling on a person on the sidewalk, without any showing of the particular thing causing it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 218; Dec. Dig. ⟸121(3).]

5. WITNESSES ⟸275(2)—CROSS-EXAMINATION OF PARTY.

There was no error in not allowing a question on cross-examination of plaintiff, calling for a statement whether he felt able to pursue the same work that he did before his injury, he having, immediately before and afterwards, stated that his health was then about the same, excepting such natural disability as might accrue from his increased age, and that, beyond the fact that he had frequently felt pain about his shoulder, there was no injury from which he could then complain; as from this testimony the jury could well draw a deduction as to his ability to pursue his customary work.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 968, 974; Dec. Dig. ⟸275(2).]

6. TRIAL ⟸90—RECEPTION OF EVIDENCE—OBJECTION AND MOTION TO STRIKE.

Where objection is not made till after witness has answered a question, motion to strike out the answer is necessary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 235, 236, 238-240, 252; Dec. Dig. ⟸90.]

7. NEGLIGENCE ⟸124(2) — EVIDENCE—NONCOMPLIANCE WITH ORDINANCE.

Admitting in evidence an ordinance requiring a barricade and canopy over the sidewalk where building work is in progress, and leaving to the jury the question whether absence of such a barrier contributed to the injury of a person on the sidewalk from the falling of a trestle used in work on the building, is proper, it being admitted that no such barrier was in existence, and seeming quite plain that had there been one the probability of injury from the falling of the trestle would have been greatly diminished or entirely obviated.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 237; Dec. Dig. ⟸124(2).]

8. APPEAL AND ERROR ⟸176 — ADMISSIONS BY COUNSEL AT TRIAL.

Absence of proof of defendant's ownership of the building from which a trestle fell, injuring plaintiff, standing on the sidewalk, cannot be complained of, where to the remark of plaintiff's counsel, while defendant was on the witness stand, that he believed it was admitted in the pleadings that defendant was such owner, defendant's counsel answered, "Yes."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1066; Dec. Dig. ⟸176.]

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by James A. Gordon against William B. Roberts and another, partners as Roberts Construction Company, and others. From a judgment for plaintiff, and an order denying a motion for new trial, defendants James B. Lankershim and Achille Biorci appeal. Affirmed in part, and reversed in part.

See, also, 162 Cal. 506, 123 Pac. 288.

Frank P. Deering, of San Francisco, and Harry A. Hollzer, of Los Angeles, for appellants. Kemper B. Campbell, Frank P. Doherty, Charles S. Burnell, and Wheeler & Sweet, all of Los Angeles, for respondent.

JAMES, J. Judgment was entered herein in favor of the plaintiff and against the defendants in the sum of $1,237 as damages, which the jury fixed as the amount of compensation awarded to the plaintiff for personal injuries suffered by reason of the alleged negligence of the defendants. There was a motion for a new trial made on behalf of the defendants Lankershim and Biorci, which motion was denied. This appeal was then taken by said defendants from the judgment as entered and from the order denying them a new trial.

The record of the trial is presented by bill of exceptions. The facts as they appear to have been established by competent evidence introduced on behalf of the plaintiff are as follows: At the date when the alleged injuries were suffered by the plaintiff, a business building was being erected at the corner of Main and Fourth streets in the city of Los Angeles for the appellant Lankershim. The building had been in the main completed. Appellant Biorci was employed by Lankershim or his authorized agent to decorate the corridor on the ground floor, which was entered from the Main street side. The sidewalk was already laid in front of the building. Plaintiff, on the day in question, was standing on the sidewalk several feet distant from the line of the building, waiting to take a trolley car to Pasadena. A painter in the employ of Biorci was at work on a tall trestle near the entrance by which the plaintiff was standing. It became necessary to move the trestle, and several men who were delegated for that purpose by a contractor doing the general work of the building came to move the trestle. While engaged in this operation the trestle was tipped toward the street and either the end of it or a plank therefrom fell and struck the plaintiff on the shoulder, throwing him to the sidewalk and inflicting the injuries on account of which he afterwards sued. Biorci at that time was working at a point in the corridor about 100 feet from the trestle toward the interior of the building. The one man who had been at work upon the trestle remained there during the operation of moving and was himself thrown down. It was agreed in the contract made by Biorci with the owner of the build-

ing that the scaffolding and the moving thereof should be attended to by the owner: or, in other words, that the owner should furnish men from the staff of the contractor to move it. The defendants all claimed that there was an absence of negligence on their part, and it was further claimed by the appellant Lankershim in defense that the negligence, if any, which was committed producing injury to the plaintiff, was the negligence of persons who were with respect to their relation to the owner of the building, independent contractors.

[1-3] No evidence appears from which it can be determined as to what the conditions of the contract were respecting the erection of the building by the Roberts Construction Company. It may have been, and there was an entire absence of proof to the contrary, that the general contractor was under the direction of the owner as to the manner and means by and with which the work should be prosecuted. In such a case the contractor, of course, would occupy the ordinary relation of a servant toward the owner. As we view the testimony, there was no evidence at all before the jury which would warrant any finding excusing appellant Lankershim from liability on the ground that the persons whose negligence caused plaintiff's injuries were as to him independent contractors. Lankershim's agreement with Biorci, undisputedly shown in evidence, was that he would provide not only the trestles themselves, but would take care of the shifting of the trestles as they were required to be moved in order to enable Biorci to perform his contract. We can find no evidence which justifies the verdict of the jury as against Biorci. It matters not at all whether he was an independent contractor as to the doing of the painting or decorating; no negligent act of his was committed while in the performance of that work which resulted in any damage to the plaintiff. The sole cause of injury was the act of the men designated by the owner of the building to move the trestle. This moving was done, so far as the evidence shows, without the assistance of Biorci or either of his men and without any right in Biorci to give any direction as to how the work should be performed. As to the defendant Biorci, we think the evidence is insufficient to sustain the verdict. As to defendant Lankershim, we are in no doubt at all of the propriety of the verdict against him under the evidence disclosed by the bill of exceptions. It very plainly appeared that the trestle was caused to fall through the act of some of the men who were delegated by the contractor in charge of the general work. These were the men whom the owner had arranged should do that work.

[4] It was not necessary under these circumstances that the particular act, thing, or motion which caused the trestle to fall should be illustrated by direct evidence. On an appeal to the Supreme Court, taken in this same cause heretofore, it was said in the opinion of the court:

"The decisive issue relates to the position of the plaintiff at the time of the injury. That he was injured by the fall of a wooden trestle used in the building is not open to doubt. If, as he claimed, he was standing on the sidewalk, the mere fact that the trestle fell upon him from within is sufficient to make out a prima facie case of negligence on the part of the person or persons responsible for the management of the trestle." Gordon v. Roberts et al., 162 Cal. 506, 123 Pac. 288.

What has been said in the foregoing answers several of the contentions advanced by the appellant Lankershim in the opening pages of his brief.

[5, 6] There are alleged errors occurring during the trial which furnish the subject of some further argument made by this appellant. It is claimed that the court erred in not allowing a question to be asked of the plaintiff which called for a statement as to whether he felt able to pursue the same work that he did prior to receiving the injuries complained of. Both immediately before this question was asked and afterwards, the witness had stated that his health was at that time about the same, excepting such natural disability as might accrue by reason of the increase of his age. Also that, beyond the fact that he had felt pain frequently in the region of his left shoulder, there was no injury of which he could then complain. The jury could well draw a deduction from this testimony as to the ability of the plaintiff to pursue his customary work. The other errors assigned in the matter of rulings on the introduction of evidence have not more merit than that just discussed. In two instances objection was made after the witness had answered a question, but there was no motion to strike out the answer. Several instructions were offered to be given to the jury on behalf of the defendant and refused by the court. The court, on the question of the defense made as to the independent character of the contractors performing the work, under the state of the evidence as we have summarized it, gave instructions more favorable to the appellant than, we think, he was entitled to have submitted. After proof of the facts that the owner of the building agreed to have men furnished to move the trestles, and that such men did perform the work which resulted in injury being suffered by the plaintiff, the burden rested with the appellant Lankershim to show such facts as would warrant the conclusion to be drawn that the men so employed were acting in the capacity of independent contractors. This burden was not sustained in the least degree. The instructions as given generally, we think, stated the law applicable to the case in hand.

[7] It is complained that there was error in allowing to be introduced an ordinance of the city of Los Angeles which required that

a barricade be erected with a canopy over the sidewalk where building work was in progress. It was admitted that no such barrier was in existence at the time of the accident. It seems quite plain that had such a barrier been there constructed the probability of injury being suffered by plaintiff by reason of the falling of the trestle would have been greatly diminished or entirely obviated. The court very properly left it to the jury to determine as to whether the absence of such a barrier did contribute to produce the injury suffered.

[8] At the oral argument it was suggested by counsel recently brought into the case that there was an absence of proof that appellant Lankershim was the owner of the building being constructed. In making this statement counsel, no doubt unintentionally, overlooked that part of the record wherein the testimony of appellant Lankershim is set out. At page 128 of the transcript counsel for plaintiff, while appellant Lankershim was on the witness stand, remarked: "I believe it is admitted in the pleadings that Col. Lankershim is the owner of the building." Mr. Morton (counsel for Lankershim) answered, "Oh, yes."

From the conclusions we have arrived at after a careful examination of the record presented, we are of opinion that the judgment should be sustained as to Lankershim.

The judgment and order as to appellant James B. Lankershim are affirmed. The judgment against Achille Biorci and the order denying said appellant's motion for a new trial are reversed.

We concur: CONREY, P. J.; SHAW, J.

30 Cal. App. 101

INNES v. GOLDWATER. (Civ. 1763.)

(District Court of Appeal, First District, California. March 8, 1916. Rehearing Denied April 7, 1916. Denied by Supreme Court May 4, 1916.)

1. Evidence ⇐385—Parol—Varying Writing—Memorandum of Transaction.

Where plaintiff signed a statement in defendant pawnbroker's register, reciting that interest on a loan was to be at the rate of 2 per cent. per month, and that he had received a copy of the register and returned it, did not constitute an agreement in writing as to the rate of interest to be charged, which could not be varied by parol evidence even if the copy of the register had actually been delivered as provided by Pen. Code, § 339.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1757, 1758; Dec. Dig. ⇐385.]

2. Usury ⇐76 — Effect on Contract — Pawnbrokers.

Under Pen. Code, § 340, making pawnbrokers who charge or receive more than 2 per cent. interest per month guilty of a misdemeanor, where plaintiff agreed to pay pawnbrokers 4 per cent. interest on loans, the loans and pledges were legal as to principal sum and security, and only illegal to the interest to be charged; hence plaintiff was not entitled to recover property pledged without tendering the amount of the loans.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 149–152; Dec. Dig. ⇐76.]

3. Pawnbrokers ⇐5 — Loans — Memorandum of Transactions—Statutes.

Under Pen. Code, § 339, requiring pawnbrokers to keep a register with details of transactions including rates of interest on loans and to deliver to the pledgor a written copy of such entry, an agreement between the plaintiff and defendant pawnbroker was not invalid for failure to actually deliver to the plaintiff copies of the register entries, as the requirement was not by the statutes made essential to the validity of the transaction, but is collateral to the contract between the parties.

[Ed. Note.—For other cases, see Pawnbrokers, Cent. Dig. § 4; Dec. Dig. ⇐5.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by James E. Mitchell Innes against Mandel H. Goldwater. Judgment for plaintiff, and defendant appeals. Reversed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant. Donald Horne and D. C. Dutton, both of Oakland, for respondent.

RICHARDS, J. This is in form an action brought to recover certain personal property pledged to the defendant as security for several loans made to plaintiff by the defendant, doing business under the name of California Loan Office. The answer of the defendant consisted in denials of the plaintiff's ownership and right to the possession of the said property.

Upon the trial the following practically undisputed facts appeared in evidence: The defendant was a pawnbroker regularly licensed and qualified under the statute, engaged in that business. The plaintiff came to him from time to time to borrow money, pledging different articles of the property in question as security for these several loans, until they aggregated the sum of $396.50. The plaintiff made several payments on account of these loans in small sums, which aggregated in all $34.50. He finally failed or refused to make further payments, and the defendant undertook to sell out said property for the balance remaining due upon the debt, whereupon this action was brought. It further appeared in evidence that on the occasion of these several loans defendant made an entry in his register, which he required the plaintiff to sign, and which was in the following form:

"No. 36,193. Date Feb. 28, 1914.

"Copy of Register from California Loan Office, Oakland, Cal.

"Description of property pledged and estimated valve of property sold. Jewelry. Amt. loaned $250.00, interest at the rate of 2 per cent. per month. This is to certify that I have received this copy of register and returned same to California Loan Office, to be its custodian till called for by me within the date of its duration, which is seven months from date.

"Name, J. E. M. Innes.

"Residence, 474 Jean St., Oakland."

It does not appear that the defendant ever actually delivered to the plaintiff a copy of this register entry as the law (Pen. Code, § 339) requires, but that he did deliver to the plaintiff a pawn ticket in which the rate of interest to be charged was not specified.

The plaintiff at the trial undertook to show by his oral testimony that at the time of these several loans the interest actually agreed upon and charged was more than 2 per cent. per month, that the agreement was that he was to pay 4 per cent. per month, and that he actually made payments at said rate of interest for several months. To this evidence the defendant objected upon the ground that the above register entry, which the plaintiff signed, constituted an agreement in writing as to the rate of interest to be charged, which the plaintiff could not be permitted to vary by parole.

[1] We cannot agree with this contention. The matters contained in the foregoing register entry which the defendant was required to make under the above section of the Penal Code, while a memorandum of the loan made by the defendant, could not be binding upon the plaintiff in the first instance, even though a copy of the register had actually been delivered to him as the statute requires. The added portion of such entry beyond the requirement of the Code was an attempted evasion of its terms, and amounted only to an acknowledgment on the part of the plaintiff that he had received from and redelivered to the defendant a copy of the register entry. In signing this admission of what was not the fact, the plaintiff could in no just sense be held to have estopped himself by his signature from proving that the rate of interest was other than that specified in the register entry. The court therefore properly overruled the defendant's objection to the plaintiff's oral proof that he was charged a rate of interest upon these several loans in excess of 2 per cent.

Having made this proof the plaintiff contended, and the court found, that the several contracts between the plaintiff and the defendant for these loans, and for the pledge of the property in question as security therefor, were wholly void because in contravention of section 340 of the Penal Code, which reads as follows:

"Every pawnbroker who charges or receives interest at the rate of more than two per cent. per month, or who by charging commissions, discount, storage, or other charge, or by compounding, increases or attempts to increase, such interest, is guilty of a misdemeanor."

The court therefore held that said contracts being wholly void, the plaintiff was entitled to recover the pledged property without paying or offering to pay his loans, and rendered its judgment accordingly in plaintiff's favor.

The question which is thus presented is as to whether the violation by the defendant as a pawnbroker of the terms of section 340 of the Penal Code renders the transactions, whereby the defendant charged and received a rate of interest in excess of 2 per cent. per month in violation of the said section, so wholly void as to entitle the pledgor to recover his property without paying or offering to pay the amount of his several loans.

In the early case of Jackson v. Shawl, 29 Cal. 267, the Supreme Court, in construing the statute of 1861, which regulated the rate of interest to be charged by pawnbrokers, and made it a misdemeanor to make interest agreements and charges in excess of such rate, held that the contract between the parties for the loan and pledge being legal as to the principal sum loaned, and only illegal as to the rate of interest to be charged, the entire contract was not void, but that the illegal portion thereof was so separable that the borrower could only recover the pledged property by tendering the pawnbroker the amount of the original loan with such interest thereon as was lawfully permitted to be charged. With this construction of said statute its terms were practically embodied in section 340 of the Penal Code, the only substantial difference between the statute and the Code being that the chargeable rate of interest was reduced in the Code section from 4 to 2 per cent. The respondent herein contends, however, that the rule laid down in Jackson v. Shawl, supra, has been changed and that case practically overruled by the Supreme Court in Levinson v. Boas, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661, wherein the court held that the contract between the pledgor and a pawnbroker, when such pawnbroker was acting in violation of law in doing business as such, and in making such contract without having taken out a license as required by section 338 of the Penal Code, was wholly void; and that the receiver in bankruptcy of the borrower was entitled to recover the property pledged for such loan without tendering or offering to pay the amount of the loan. It is to be noted, however, that the court in the last above-cited case, far from overruling the case of Jackson v. Shawl, made this comment upon it:

"It is to be noticed that the illegality of the contract in Jackson v. Shawl went only to the excess of interest charged, and this court applied the general and liberal principle fully recognized by the law, that when any matter, void even by statute, be joined with good matter which is entirely independent of it, the good part shall stand and the rest be held void. But in the case at bar the illegality and the prohibition go to the whole substance of the contract. It is a prohibition of the law from entering into such a contract at all, and the illegality affects the whole transaction from its inception." Levinson v. Boas, supra, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661.

[2] In the light of this express approval of the principle declared in the case of Jackson v. Shawl we are constrained to give application to that principle in the case at bar

to the extent of holding that the agreements of the plaintiff with the defendant for these several loans and pledges were legal in so far as the principal sum of such loans and the security therefor were concerned, and only illegal as to the interest to be charged, and hence that the plaintiff was not entitled to recover the personal property so pledged and made the subject of this action without first tendering and offering to repay to the defendant the amount of his original loans.

Whether the plaintiff was also required to make an additional tender of any sum as interest up to or less than the sum of 2 per cent., the statutory limit of a pawnbroker's legal exaction, we are not required in this case to determine, for the reason that it differs from the case of Jackson v. Shawl, supra, in the respect that thus far in the instant case no tender of either principal or interest in any sum is shown to have been made.

[3] It is necessary to notice but one other contention of the respondent. It is that the agreements for the several loans between the plaintiff and the defendant were invalid, for the reason that the defendant did not actually deliver to the plaintiff a copy of his register entries as required by section 339 of the Penal Code. There is some language in Levinson v. Boas, supra, which might seem to support this contention; but the question has been put at rest by the more recent case of Wood v. Krepps, 168 Cal. 382, 143 Pac. 691, L. R. A. 1915B, 851, wherein the court, in passing upon the precise point in issue, says:

"The theory of the defendants in alleging that the plaintiff had failed to give them the memorandum or notice of the contents of the note and mortgage and other matters provided for by section 5 of the said act of 1909 at the time the note and mortgage were executed, is, that such failure precluded any recovery by plaintiff. But this theory is erroneous. While the section relied on provides that when a loan such as here is made a memorandum or notice of the contents of the note and mortgage and other matters shall be given the mortgagees, it is not made by the statute essential to the validity of the transaction that this shall be done. It is a statutory duty imposed upon the personal property broker to be performed by him when the loan is made, but after the instrument taken as security is executed. It is a matter which does not at all enter into the contract between the parties, but is collateral to it. The statute itself provides that as a penalty for failure to give the memorandum or notice the broker shall be subjected to a fine not exceeding the specified amount. This is the only penalty which the statute imposes. No further penalty is declared and the contract itself is not in any manner affected by the failure to comply with this provision of the section."

It follows from the foregoing views that the judgment must be reversed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

30 Cal. App. 87

BRADFORD v. SUNSET LAND & WATER CO. (Civ. 1672.)

(District Court of Appeal, Second District, California. March 7, 1916. Rehearing Denied by Supreme Court May 4, 1916.)

1. VENDOR AND PURCHASER ⇐18(4)—VALIDITY OF CONTRACT—OPTION—RESCISSION.

Under a written option to buy land, all bills and accounts receivable, and other personal property then owned by the defendant, calling for a deposit and balance payable in installments on completion of which the seller was to execute a conveyance, and providing that a default of plaintiff should terminate the option and release the seller, who should retain payments made as the consideration of the option, plaintiff not having tendered or offered to pay the final and largest installment, by virtue of the provisions of the contract, defendant was not only released from his obligation to convey, but is entitled to retain the payments made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. ⇐18(4).]

2. CORPORATIONS ⇐442—SALES OF PROPERTY—VALIDITY—CONSENT OF STOCKHOLDERS.

Civ. Code, § 361a, providing that no sale, lease, assignment, transfer, or conveyance of the business, franchise, and property as a whole, of any corporation, shall be valid without the consent of the stockholders holding of record at least two-thirds of the issue of capital stock, does not apply to an option for the sale of land.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1782; Dec. Dig. ⇐442.]

3. VENDOR AND PURCHASER ⇐339—OPTIONS—OPERATION.

Until plaintiff performed or offered to perform the covenants imposed upon him by a written option as a condition precedent to the conveyance of the property by the defendant corporation, he could not complain of want of action on the part of the stockholders in giving assent to a sale and conveyance as to which under the terms of the contract he had lost all right.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 994–1002; Dec. Dig. ⇐339; Contracts, Cent. Dig. § 233.]

4. CORPORATIONS ⇐442—SALE OF PROPERTY—OPTION—VALIDITY—CONSENT OF STOCKHOLDERS.

Civ. Code, § 361a, aforesaid, does not apply to an option for the sale of land with bills and accounts receivable and other personal property of the defendant corporation which was engaged in a general real estate business, no mention of which or its franchise is made in the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1782; Dec. Dig. ⇐442.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by S. P. Bradford against the Sunset Land & Water Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Milton K. Young, of Los Angeles, for appellant. Roger S. Page, of Los Angeles, for respondent.

SHAW, J. Action to recover money paid pursuant to the terms of an option contract for the purchase of real estate. Judgment went against plaintiff, whose motion for a new trial was by an order of court denied,

and from which order he prosecutes this appeal.

On January 24, 1912, defendant, a corporation, executed a written document giving to plaintiff an option to purchase the property therein described. The portion of the agreement material to this inquiry is the following:

"Received of S. P. Bradford the sum of five hundred dollars ($500), same being a deposit and part payment on account of purchase price for all those certain parcels of land situate in the county of Orange, state of California, described in deed from Sunset Beach Company, a corporation, to Sunset Land & Water Company, a corporation, recorded July 6, 1904, in Book 108 of Deeds, at page 48, records of said county, excepting therefrom those certain lots or parcels of land designated sold on the plat of Sunset Beach hereto annexed and made a part hereof, together with all fixtures and improvements thereon, also all bills and accounts receivable and other personal property now owned by said Sunset Land & Water Company. Said property having this day been sold to said S. P. Bradford for the sum of forty-five thousand seven hundred and fifty dollars ($45,750); the balance thereof being payable in the amounts and at the times following, to wit, $500 on or before May 1, 1912; $500 on or before June 1, 1912; $44,250 on or before August 1, 1912. Upon completion of the payments aforesaid and the faithful performance of the covenants herein imposed, the seller will execute and deliver good and sufficient conveyance conveying said property to the purchaser, clear of incumbrance, excepting * * *. If the purchaser shall fail to make any of the payments as and when specified above, or shall fail to perform any or all of the covenants herein imposed upon him, this option shall thereupon cease and determine and the seller shall be released from all further obligations hereunder, time being of the essence of this agreement, and the seller may retain all sums theretofore paid hereon, the same being fixed as the consideration and in full compensation for the option hereby granted. * * *"

[1] In accordance with the terms of the option, plaintiff paid to defendant $500 on or before May 1, 1912, and $500 on or before June 1, 1912, which, together with the first payment, made $1,500, for the recovery of which this suit was instituted; but he neither paid, nor did he ever at any time tender or offer to pay, the sum of $44,250 required by said instrument to be paid on or before August 1, 1912. By reason of this default respondent, by virtue of the provisions of the contract, was not only released from all obligations to sell, convey, or transfer the property described in the contract, but, as provided therein, entitled to retain the $1,500 so paid by plaintiff, which by the terms of the agreement was "fixed as the consideration and in full compensation for the option * * * granted." Townsend v. Tufts, 95 Cal. 257, 30 Pac. 528, 29 Am. St. Rep. 107; Scott v. Glenn, 98 Cal. 170, 32 Pac. 983.

[2-4] Appellant, however, insists that the contract was made in violation of the provisions of section 361a of the Civil Code, and therefore void, and, being void, defendant obtained no rights by virtue of its terms. The section is as follows:

"No sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of stockholders thereof, holding of record at least two-thirds of the issued capital stock of such corporation; such consent to be either expressed in writing, executed and acknowledged by such stockholders, and attached to such sale, lease, assignment, transfer or conveyance, or by a vote at a stockholders' meeting of such corporation called for that purpose; but with such assent, so expressed, such sale, lease, assignment, transfer or conveyance shall be valid: Provided, however, that nothing herein contained shall be construed to limit the power of the directors of such corporation to make sales, leases, assignments, transfers or conveyances of corporate property other than those hereinabove set forth."

It will be seen that the section makes no reference to contracts of the character here involved; the inhibition being as to the "sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole," unless the prescribed conditions are complied with. Until plaintiff performed or offered to perform the covenants imposed upon him as a precedent condition to the conveyance of the property by defendant, he was in no position to complain of the want of action on the part of stockholders in giving assent to a sale and conveyance as to which, under the terms of the contract, he had lost all right. Laffey v. Kaufman, 134 Cal. 391, 66 Pac. 471, 86 Am. St. Rep. 283; Leach v. Rowley, 138 Cal. 709, 72 Pac. 403. Conceding the option covered the entire "business, franchise and property, as a whole," nevertheless there is no ground for plaintiff's contention for the reason that the contract did not purport to constitute a sale, transfer or conveyance of the property, but was a mere option to purchase, the exercise of which on the part of plaintiff and paying or offering to pay the purchase price in the manner therein specified was necessary in order to place him in a position where he could in any event complain of the failure of stockholders to signify assent. The option, however, does not purport to cover and include the entire business and franchise of the corporation. It appears from the evidence, without contradiction, that defendant was engaged in a general real estate business, no mention of which or its franchise is made in the contract. Construing the contract as a sale of the property described therein, there is nothing to prevent the corporation from continuing its business. Shaw v. Hollister, 166 Cal. 257, 135 Pac. 965. As thus viewed, section 361a is not applicable to the transaction.

The order denying plaintiff's motion for a new trial is affirmed.

I concur: JAMES, J.

I concur in the judgment: CONREY, P. J.

29 Cal. App. 566

SNYDER v. MILLER et al. (Civ. 1376.)

(District Court of Appeal, Third District, California. Feb. 5, 1916.)

1. APPEAL AND ERROR ⟸347(2)—TIME FOR APPEAL.

Where judgment was entered on the default of defendants, duly entered on their failure to answer the complaint, six months prior to taking appeal, such appeal was ineffectual.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⟸347(2).]

2. BILLS AND NOTES ⟸487 — PLEADING — AMENDMENT—ALLOWANCE.

In an action on a promissory note, amendment of the complaint alleging that after execution and delivery of note, and on or about the ——— day of June, 1913, the payee duly assigned to plaintiff, to allege that the date of the assignment was the 15th day of February, 1913, the date of execution of the note, was properly allowed, though necessitating amendment of the answer, where defendant and his counsel were present when the amendment was prepared, had no trouble in amending their answer to meet by denial the complaint as altered, and asked for no continuance; the main defense being a release by the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1575–1583; Dec. Dig. ⟸487; Pleading, Cent. Dig. § 703.]

3. PLEADING ⟸236(1)—AMENDMENT—DISCRETION OF TRIAL COURT.

The allowance of amendments to pleadings is a matter resting in the sound legal discretion of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. ⟸236(1).]

4. APPEAL AND ERROR ⟸1010(1)—REVIEW—FINDINGS OF TRIAL COURT.

Findings of fact of the trial court having support in evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981; Dec. Dig. ⟸1010(1).]

5. PLEADING ⟸252(2)—AMENDMENT—EFFECT.

Where the complaint is amended, it supersedes the original complaint for all purposes of the trial, and plaintiff's testimony must be viewed and considered by its allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 737½; Dec. Dig. ⟸252(2).]

6. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDING ON CONFLICTING EVIDENCE.

Where there is a substantial conflict in the evidence, a court of review cannot substitute its judgment for that of the trial court upon the effect of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸1011(1).]

7. CHATTEL MORTGAGES ⟸243—RELEASE—VOID CHARACTER.

Where the payee of a note given for the price of a clothing store and having payment secured by chattel mortgage on the stock, subsequently to his assignment of the note to his creditor, and without the authority of the assignee, executed a release of the chattel mortgage, his act was void.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 508; Dec. Dig. ⟸243.]

8. APPEAL AND ERROR ⟸987(2)—REVIEW—EVIDENCE—CONSTITUTIONAL PROVISION.

Under Const. art. 6, § 4½, providing that no judgment shall be set aside, etc., on the ground of misdirection of the jury, etc., unless, after an examination of the entire cause, including the evidence, the court shall be of opinion that the error complained of has resulted in a miscarriage of justice, the appellate courts may review or examine the evidence, not to determine the evidentiary value of the testimony, or where its preponderance lies, but merely to determine whether the court may be required to hold that from any error in misdirecting the jury the admission or exclusion of evidence, or as to any matter of pleading or of procedure, a miscarriage of justice has resulted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3893; Dec. Dig. ⟸987(2).]

9. APPEAL AND ERROR ⟸1010(1)—REVIEW—LAW OR FACT—INSUFFICIENCY OF EVIDENCE.

Where the testimony upon which a verdict or finding is based is characterized by such inherent weakness as to justify the conclusion that it is insufficient to uphold the verdict or finding, a question of law arises, reviewable by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981; Dec. Dig. ⟸1010(1).]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by William Snyder against Ben Miller and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Light & Crane and A. V. Scanlan, all of Stockton, for appellants. A. H. Carpenter, of Stockton, for respondent.

HART, J. This is an action on a promissory note. Judgment passed for the plaintiff, and from said judgment the defendants take this appeal.

[1] The record shows, and, indeed, counsel for the appellants concede, that the judgment against the defendants Rottenberg and Case was entered upon their default, duly entered, on failure to answer the complaint, on the 11th day of May, 1914, which was six months prior to the date of the taking this appeal. The appeal as to those defendants is therefore abortive, as counsel concede, and they have expressly abandoned the same.

The complaint sets out the note declared upon in hæc verba. It was executed in favor of Roy Snyder, son of the plaintiff, for the sum of $2,472.45, with interest at the rate of 7 per cent. per annum, payable monthly, and provided for the payment of the principal sum in monthly installments of $500, to be paid, beginning with the 15th day of July, 1913, on the 15th day of each succeeding month, until the total amount was paid in full, the last installment, however, which was payable on the 15th day of October, 1915, involving the sum only of $472.45.

The complaint as originally filed alleged that after the execution and delivery of said note, "and on or about the ——— day of June, 1913, and before said note became due or payable, the said Roy Snyder duly indorsed, assigned, and delivered said promissory note, for a valuable consideration, to the plaintiff herein, who ever since has been, and now is, the lawful owner and holder of said promissory note."

The answer of the defendant Miller admits the execution and delivery of said note as alleged in the complaint, but denies that the same was assigned by the payee named therein, Roy Snyder, at any time or at all, to the plaintiff for a valuable or any consideration. By way of avoidance the defendant alleges that on the 22d day of May, 1913, Roy Snyder, in consideration of the execution of a promissory note in his favor by the defendants Rottenberg and Case, and which note was delivered to him, the said Roy Snyder, executed and delivered to the defendant Miller a covenant of release and satisfaction and acknowledgment of full payment, so far as Miller was concerned, of the note in suit; "that at the time of the execution and delivery of said release and said last-mentioned note herein the plaintiff was present with plaintiff's assignor and had full knowledge of said release and satisfaction of said promissory note in plaintiff's complaint set forth."

When the trial of the cause was called, the counsel for the plaintiff asked, and the court granted, leave to amend the complaint so that the date of the assignment of the note by Roy to the plaintiff would appear as the "15th day of February, 1913," the date of the execution of the obligation, instead of the "——— day of June, 1913," as originally alleged in the complaint. The court found that the note had been executed and delivered and assigned as alleged in the amended complaint, that the sum of $1,500, and no more, had been paid thereon, and that the sum of $1,159.61, and accrued interest, was still due thereon. As to the special defense the court found:

"That the release set forth in the defendant Ben Miller's answer was made and executed on the 22d day of May, 1913, by the original payee, Roy Snyder, and that at that time the said Roy Snyder was a minor, under the age of 21 years, and had no right, power, or authority to make or execute such release, as he had theretofore, on the 15th day of February, 1913, sold, assigned, and transferred unto the plaintiff all his right, title, and interest therein, and that plaintiff was not bound by such release and had no knowledge that such release had been executed."

The general contention of the appellant Miller is that certain vital findings are not sustained by the evidence. There is a further objection that the court failed to find upon the special defense set up by the defendant Miller, involving, as we have seen, the statement of new matter. Complaint is also made that, in allowing the plaintiff to amend his complaint in the particular above explained, the court abused its discretion.

[2] Taking up first the last-stated contention, we are, upon a consideration thereof, required to say that we are not justified in holding that the court abused its discretion in allowing the amendment. The object of the amendment was obvious from the face thereof. Precisely why the date of the assignment was not in the first instance alleged as of the 15th day of February, 1913, we are, of course, unable to say, but we may and must assume, from the amendment, that from the plaintiff's understanding of the fact a mistake in that respect was made in the complaint as it was originally drafted and filed. Of course, a party is entitled to state his case in his pleading as he understands the facts thereof and as he believes he can prove them. The defendant and his counsel were present when the amendment was prepared and made, and had no trouble in amending their answer so as to meet by denial the complaint as so altered. They asked for no continuance of the trial on account of the allowance of the amendment, and from this we may assume that they were as well prepared then to go on with a trial of the issues as at some future time. The only objection which appears to have been made by the attorney for the defendant to the proposed amendment was that, if allowed, it would necessitate an amendment of the answer. This was, of course, no valid objection to the allowance of the amendment. Very naturally, an amendment of a complaint in a material respect would call for an amendment of the answer.

[3] The allowance of amendments to pleadings is a matter resting in the sound legal discretion of the trial court, and the appellate courts of this state have repeatedly declared that:

"Great liberality should be shown by a trial court in permitting, where it can be done without working great delay, such amendments to pleadings as will facilitate the production of all the facts bearing upon the questions involved in the action." Spelling on New Trial and Appellate Practice, § 107, and cases therein cited; S. F., etc., Soc. v. Leonard, 17 Cal. App. 254, 267, 119 Pac. 405.

Of course, as was said in Baxter v. Riverside Portland C. Co., 22 Cal. App. 199, 133 Pac. 1150, and in Hayden v. Hayden, 46 Cal. 333, some good reason should ordinarily be affirmatively disclosed justifying the amendment before the court acts favorably upon the proposition.

In this case, while the reason for the mistake was not shown, we think that where as here, the defendant is put to no trouble or inconvenience or placed at no disadvantage by the amendment, and where his principal defense did not rest upon the question whether the note was duly executed, or wholly upon the proposition whether it was assigned by the payee at a particular time or assigned at all, but upon a release of the defendant from the obligations thereof, it cannot well be said that the trial court abused its discretion by allowing the amendment. The object of judicial proceedings is to discover all the facts of the case as they actually occur and exist and apply the law thereto; and the theory of the Code is that the parties should each have reasonable opportunity to present his side of the case upon the facts as he understands they actually

transpired. Lower Kings River, etc., Canal Co. v. Kings River, etc., Canal Co., 67 Cal. 577, 8 Pac. 91.

The facts as to which there is no controversy are as follows: That at some time prior to the year 1913 the plaintiff bought and paid for a clothing store in the city of Stockton for his son, Roy Snyder, who was at that time, as well as at the time of the particular transactions involved herein, a minor being somewhat near but less than 21 years of age. Prior to the 7th day of February, 1913, the defendants Rottenberg and Miller began negotiations looking to the purchase of said clothing store from young Snyder, and on the said 7th day of February, 1913, an agreement of purchase and sale, including the total price and terms, was finally reached by the parties, and the same reduced to writing. Among the terms so agreed upon were that Rottenberg and Miller should pay to Snyder, Jr., $1,000 cash on the completion of an inventory of the stock and fixtures on hand, and the balance to be evidenced by several promissory notes, to be secured by a chattel mortgage on the stock of goods and the fixtures. The agreement, according to its terms was fully carried out and consummated on the 15th day of February, 1913. Among the notes given by Rottenberg and Miller to Snyder, Jr., is the one in question here.

The plaintiff and his assignor testified that the latter was at the time of the sale of the store to the defendants and the delivery to him of the promissory notes indebted to the former in the full aggregate sum of said notes, and that the notes were on the 15th day of February, 1913, assigned to the plaintiff by his son, Roy Snyder, in payment of said indebtedness. The chief ground of controversy here, however, proceeds from the instrument executed by Snyder, Jr., on the 22d day of May, 1913, which, as seen, purported to release Miller from the obligations of the notes in suit in consideration of the signing and indorsement of said note by the defendant Case.

The defendant's claim is: (1) That the preponderance of the evidence is against the findings that said note was assigned to the plaintiff by Roy Snyder on the 15th day of February, 1913, and that the plaintiff "is now, and ever since has been," the owner and holder of said note, that "there is now due, unpaid, and owing to plaintiff from the said defendant Ben Miller on the said promissory note the sum of $1,159.61," that, at the time of the date of the purported release (May 22, 1913) the said Roy Snyder was a minor, under the age of 21 years, and had no right, power, or authority to make or execute such release, as he had theretofore, on the 15th day of February, 1913, sold, assigned, and transferred unto the plaintiff all his right, title, and interest therein," and that the "plaintiff was not bound by such release and had no knowledge that such release had been executed"; (2) that conceding that the assignment of the note to the plaintiff was made on the 15th day of February, 1913, the evidence shows that he had knowledge of and acquiesced in the execution of the release by his son.

[4, 5] As we have shown, the plaintiff and his son testified positively that the note in suit was, with others given by the same parties, sold and assigned to the plaintiff by Roy Snyder on the 15th day of February, 1913, the date of its execution; the consideration being a then subsisting indebtedness, previously contracted, of Roy to his father. While opposed to this testimony there was some adversary showing, it was, of course, with the trial court to determine the truth of the matter, and its finding that the note was so sold and assigned at the time mentioned is conclusive upon us. But counsel declare that the plaintiff in his testimony contradicted the allegation of his verified complaint as to the time at which the note was indorsed over to him by his son, and point to certain decisions in which causes have been reversed for a conflict so arising. See Branson v. Caruthers, 49 Cal. 374; Guerrero v. Ballerino, 48 Cal. 118. In this case, however, as has been shown, the plaintiff amended his complaint in the respect referred to, and between the allegation thereof as to the time of the assignment of the note and the testimony of the plaintiff upon that point there is no conflict. As before stated, from the fact that the amendment was made we must assume that the original complaint contained an erroneous statement in the particular referred to. At any rate, the amended complaint superseded the original complaint for all purposes of the trial, and by its allegations the testimony of the plaintiff must be viewed and considered. In the cases above cited, the allegations between which and the testimony of the plaintiff there existed a conflict, were contained in the complaints upon which the actions were tried.

As to the question of the understanding of the parties with respect to the transaction eventuating in the execution of the release referred to and upon which the defendant Miller relied as the ground of his resistance to this action the evidence is also conflicting. It appears that Miller, within a few months after he and Rottenberg purchased the clothing store, withdrew from the firm, or, in other words, he and Rottenberg dissolved their copartnership. Both Miller and Rottenberg desired that the former should be released from the note in dispute. Miller testified that he had had a conversation with Roy Snyder and the plaintiff, explained to them that he wished to be released from liability upon the note, and stated that the defendant Case would indorse the note as security for the payment thereof by Rottenberg if he (Miller) was released. On the 22d day of

May, 1913, when the release was executed in the office of an attorney in the city of Stockton, both the plaintiff and Roy Snyder were present; the latter, as seen, affixing his signature to the release in the presence of all the parties. This testimony was corroborated by Case and the attorney in whose office the transaction was executed. On the other hand, the plaintiff testified that the sole purpose and effect of the instrument, as it was explained to him and as he understood it, was merely to release the chattel mortgage given on the goods in the store to secure the notes in consideration of the indorsement of the note in suit by Case. He said that Mr. Rottenberg had previously called upon him at his home and said that he (Rottenberg) was going to buy Miller's interest in the store, and "he wanted me to take Mr. Miller's name from the note. I went to Mr. McNoble's office, and Mr. McNoble said that could not be done; they had a mortgage on the store—security for this second note. * * * Roy had a mortgage on the store. Mr. McNoble had advised him that a mortgage was not a very good thing to leave on the store. Finally they said if they would get Mr. Case to indorse this note—Mr. Case had not indorsed this note until that day—they asked me if they would get Mr. Case to indorse the note would Roy release the mortgage. I said 'Yes,' I thought that would be all right. Mr. Case signed that note in Mr. McNoble's office that day." The plaintiff further testified that the first time he ever saw the release which is pleaded in the answer was in the office of Mr. Freitas, one of the attorneys for the defendant, after this action was commenced. The attorney named, on that occasion asked the plaintiff if he had ever seen the instrument before. "I told him you know I never had. I was surprised that such a thing existed. That was a new thing to me."

Roy Snyder testified, that he clearly understood that the sole consideration for the endorsement of the note by Case was the release by him of the chattel mortgage on the store. He declared that he had no recollection of signing the release, although he admitted that it bore his signature. He said that on the 22d day of May he went to the county recorder's office and caused to be entered a release of the mortgage, and, he testified, "the only thing I remember signing was at the recorder's office, signing there the release of the mortgage."

[6, 7] Thus we have shown sufficient of the testimony on both sides to demonstrate that there is a clear conflict upon the question of the purported release of the defendant Miller. While, as is true in a majority of the cases, where a conflict upon disputed points of fact exists, the evidence in this case might uphold a finding the other way, still, in the very nature of things, where, as here, there is a substantial conflict in the evidence, a court of review cannot substitute its judgment for that of the trial court or jury upon the effect of the evidence. Assuming that Roy Snyder did execute the release with a clear understanding of its full import, still, if he did so without the authority of his assignee of the note and subsequent to the assignment, his act was, of course, without force or effect. He had disposed of his interest in the note, and had no more authority to release an indorser thereon or the payors thereof than if he were wholly a stranger to it or to the transaction culminating in its execution and delivery to the payee. And the testimony of the plaintiff is that he did not authorize his son to execute the release, nor did he after its execution acquiesce in or ratify the act of his son in that particular. The finding based upon this testimony is, under the well-known rule whereby reviewing courts must be governed with respect to conflicting evidence, binding upon this court.

[8, 9] Counsel for the appellant insist, however that under the recent amendment to section 4½ of article 6 of the Constitution, whereby appellate courts in civil cases are authorized, for certain indicated purposes, to examine "the entire cause, including the evidence," etc., it is within the competence of this court to review the evidence with a view of determining where the preponderance or the weight of the evidence lies. We do not think that the constitutional provision contemplates a task so impossible of accomplishment by courts of appeal. The language of that section of the Constitution, fashioned after that of a constitutional provision of similar import applicable to criminal cases, provides that:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of the misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 554, 147 Pac. 238, 243, Mr. Justice Shaw, speaking of that amendment and applying it to that case, thus construed the power of the appellate courts thereunder:

"It has always been the desire and policy of this court to disregard unimportant and unsubstantial errors appearing in the record, and to reverse causes only for reasons affecting the merits of the case and the substantial rights of the parties. Our power to do this has hitherto been somewhat limited by the limitations upon our jurisdiction to consider the evidence. San Jose Ranch Co. v. San Jose, etc., Co., 126 Cal. 324 [58 Pac. 824]. An important result of the aforesaid amendment is that it enlarges our jurisdiction in that particular. Prior to its adoption, if the evidence was in substantial conflict as to a fact in issue, we were concluded by the decision of the trial court thereon for all purposes of the case, unless the error entered into and affected the consideration of that evidence. Under the above section, we have the power to review conflicting evidence for the purpose of ascertaining whether or not an error 'has resulted in a miscarriage of justice.' It is, indeed, made our duty to do so, and the further duty is imposed to disregard manifest

error when upon such examination we shall not 'be of the opinion that the error complained of has resulted in a miscarriage of justice.' It is no longer the case that injury is presumed from error; the injury must appear affirmatively to the mind of the court after the examination required, or from the nature of the error itself. People v. O'Bryan, 165 Cal. 55, 56 [130 Pac. 1042]."

As we understand the foregoing language, the true construction of the constitutional provision referred to is, so far as appellate courts are concerned, that the evidence may be reviewed or examined, not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies, but only for the purpose of determining whether the court may be required to hold that from any error in the misdirection of the jury, or in the admission or exclusion of evidence, or as to any matter of pleading or of procedure, a miscarriage of justice has resulted. The provision applies to trial courts in the matter of passing on motions for a new trial, and, of course, such courts, having heard the testimony, are in a position to pass upon the probative value of the testimony, and, indeed, they are often called upon to do so on such motions. It is, however, obviously different with reviewing courts, since they know and can know nothing of the deportment of the witnesses as they give their testimony, which is an indispensable criterion for the determination of the question of the weight which may and should justly be accorded their testimony. Of course, where the testimony upon which a verdict or a finding is based is characterized by such inherent weakness as to justify the conclusion that it is insufficient to uphold the verdict or the finding, then a question of law arises, in which case, as in the case of any other question of law, an appellate court may review it. The case here does not come within that category, there being nothing inherently improbable in the testimony of the plaintiff and his son; the latter being at the time of the alleged execution of the release a minor, with perhaps little, if any, understanding or a clear perception of the legal effect of such transactions as the one involved herein.

There is obviously no ground upon which to sustain the complaint that the court failed to find on the special defense pleaded by the defendant Miller, said defense involving the setting up of new matter. The above quoted finding is a reply to the objection in this particular.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

172 Cal. 486

In re BIZZELL'S ESTATE.

HATHAWAY v. McMILLIAN et al.

(L. A. 4593.)

(Supreme Court of California. April 17, 1916.)

EXECUTORS AND ADMINISTRATORS ⊂=24—ADMINISTRATOR DE BONIS NON—RIGHT TO APPOINTMENT.

In proceedings by a public administrator for appointment as administrator de bonis non of the estate of the deceased, evidence *held* insufficient to support a finding that the petitioner was incompetent or unfit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 132–140; Dec. Dig. ⊂=24.]

Department 1. Appeal from Superior Court, Ventura County; P. J. McCormick, Judge.

Petition by Lewis P. Hathaway for appointment as administrator de bonis non of the estate of F. A. Bizzell, deceased, to which opposition was filed by James B. McMillian and others. From an order denying the petition, the petitioner appeals. Reversed and remanded.

Argabrite & Drapeau, of Ventura, for appellant. Hulme & Eckman and A. W. Eckman, all of Los Angeles, for respondent James B. McMillian. Earl E. Moss, of Ventura, for respondents Edwards and Watson.

SHAW, J. The appeal is from an order denying the petition of Lewis P. Hathaway for appointment as administrator de bonis non of the estate of F. A. Bizzell, deceased.

Hathaway was public administrator of the county and asked for letters in virtue of his official right. Opposition was filed by McMillian and others, who are heirs of decedent, on the grounds that Hathaway was incompetent and unsuited to act as administrator because he was unfamiliar, inexperienced, and ignorant in the handling of large business affairs, and the estate required the care of some one of business experience, and that

he was also incompetent by reason of his want of integrity. No evidence was given in support of the objection based on alleged lack of integrity.

In regard to the competency and fitness of Hathaway to perform the duties required of him in administering upon the estate, proof was offered. It was shown that Hathaway had held the office of public administrator of Ventura county for 10½ months, that he had resided in California for many years and in Ventura county for more than 5 years, that he had followed from time to time varied occupations, having been a newspaper man for 20 years, the city editor and news manager of a newspaper in Ventura and in charge of the advertising department for about 4 years, also secretary of the county fair association, secretary and manager of the Ventura County Mutual Insurance Company, a local fire insurance company with 1,500 members, carrying about $3,000,000 in insurance, a soliciting agent for a life insurance company, and for 5 or 6 months a deputy in the county clerk's office. He had not served as administrator or executor of any estate prior to the time he became public administrator. The estate consisted of ten acres of land worth $15,540, two lots in Los Angeles, one worth $33,000, the other $12,000, jewelry $710, an automobile at $500, and other personal property worth $2,000. The rentals amounted to several thousand dollars a year. This was all the evidence bearing on the subject.

There is nothing in this evidence tending to show that Hathaway was incompetent or unfit. We are at a loss to account for the decision denying the application, unless, as suggested in one of the briefs, there was a misunderstanding, and the trial court supposed that the petitioner was willing to have the petition denied. Nothing to that effect appears in the record.

The order is reversed, and the cause remanded for further proceedings.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 482

In re BRANICK'S ESTATE.

BRANICK v. LARGE et al.

(L. A. 4478.)

(Supreme Court of California. April 13, 1916.)

WILLS ⊂⊃96—LETTER—TESTAMENTARY CHARACTER.

The jury could properly find that a letter written by decedent, who was shown to have knowledge of the requirements of a will, to his brother, in which he told of the purchase of some property and suggested that his brothers might loan the money to pay for it, and then stated that the property should go to his brothers if he died before they did, with a request that they take care of another, was not testamentary in character.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 228–231; Dec. Dig. ⊂⊃96.]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

In the matter of the estate of Edward B. Branick, deceased. From an order refusing to admit to probate over the objection of Sarah A. E. Large and others a document purporting to be the last will of decedent, James Branick appeals. Affirmed.

James Branick and F. W. Walden, of Los Angeles, for appellant. Allen & Weyl and Slosson & Mitchell, all of Los Angeles, for respondents.

SHAW, J. The appeal is from an order refusing to admit to probate a document claimed to be the last will of the decedent.

The facts are these: On the 9th of December, 1913, the decedent formally executed a will in the presence of witnesses, both of whom signed it, and the execution was attended with all the formalities the statute requires. Afterwards, and on September 22, 1914, he wrote a letter to his brother. His brother's name is James, but was referred to as "Jim." The letter to his brother is as follows:

"Los Angeles, Cal., Sept. 22, 1914.

"Well Jim everything is straightened out this place is in Hyde Park out side of Los Angeles I gave $6,400 for it is a drug store and grocery store and flats a house 2 story I get rent $75 for the house of corse they will move same as huron st. I may sell a gain there is a man looking at it I gave him till the first of this month if he want it if not I will keep it I paide $3,400 down and the mortgage three thousand dollars is due in November now Jim if you or Charley has any money that is not used you can let me have it I will pay youse the same interest as I have to pay that is if dont sell it I will let you know if I do then I dont want you to sell anything that is charging interest you nor Charley if you have it will wright and all wright if youse havent it of course these both propertys goes to you and Charley if I should pass in before yous do only I wish that Mary would be taken care of in case anything should happen Joe her sone I know fany would drop marys help she would have to shift for her self. regards to all Ed."

At the end of this letter are several expressions which it is here contended are testamentary in character. This letter was one of about 30 letters written from time to time to his brother. The words in this letter are grouped together without punctuation, and the alleged testamentary expressions are the following:

"Of course these both propertys goes to you and Charley if I should pass in before yous do only I wish Mary would be taken care of in case anything should happen Joe her sone I know fany would drop marys help she would have to shift for her self. regards to all [Signed] Ed."

It appears that two months afterwards the decedent undertook to make an olographic will, but made it on a printed form, and, not being all in his handwriting, it was invalid. In it he stated that he was having no witnesses because he understood that witnesses were not required in California.

The court below found the letter of September 22d was not testamentary in character, and under the circumstances it was fully justified in so holding. It is quite clear that the testator understood the nature and requirements of a will. It was a fair inference from all the evidence that he fully understood the character of the document that he should execute as a will. The letter in question as a whole does not disclose any purpose or intent to dispose of his estate. The remarks claimed to be testamentary were apparently casual statements intended as information merely. Under the decisions in Estate of Richardson, 94 Cal. 63, 29 Pac. 484, 15 L. R. A. 635, and Estate of Meade, 118 Cal. 428, 50 Pac. 541, 62 Am. St. Rep. 244, we think he had no testamentary intent in writing this letter to his brother.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 497

MANGRUM & OTTER, Inc., v. LAW UNION & ROCK INS. CO. (S. F. 6609.)

(Supreme Court of California. April 19, 1916. Rehearing Denied May 18, 1916.)

INSURANCE ⟹230—CANCELLATION OF POLICY—CONDITIONS PRECEDENT—RETURN OF PREMIUM.

Under a fire insurance policy in the New York standard form providing that it might be canceled at any time at the request of the insured, or by the insurer by giving five days' notice of such cancellation, and that if the policy should be canceled as provided the unearned part of the premium actually paid should be returned on surrender of the policy or last renewal, the insurer retaining the customary short rate, except that on a cancellation by it by giving notice it should retain only the pro rata premium, the giving of the five days' notice was sufficient to cancel the policy, and the return of or offer to return the premium was not an essential element of the cancellation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 509–512; Dec. Dig. ⟹230.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. A. Plummer, Judge.

Action by Mangrum & Otter against the Law Union & Rock Insurance Company. Judgment for plaintiff, motion for new trial denied and defendant appeals. Judgment and order reversed.

Goodfellow, Eells & Orrick, of San Francisco, for appellant. J. F. Riley, of San Francisco, for respondent.

MELVIN, J. Defendant appeals from an adverse judgment and from an order denying its motion for a new trial.

The suit was upon a policy of fire insurance. On February 19, 1907, defendant issued the policy insuring plaintiff's property for one year in the sum of $2,000. The premium, which was paid, was $120. Shortly after the issuance of the policy defendant, being dissatisfied with the rate charged, demanded an additional payment of $20. This demand was not complied with, and on September 26, 1907, defendant sent plaintiff a letter, with the statement that if the sum of $20 was not paid as an additional consideration for the policy by noon of October 3d, the contract would be canceled, pursuant to a power conferred by the terms of the instrument itself. The provision in the policy under which the defendant acted was as follows:

"This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium."

On October 4, 1907, defendant sent plaintiff a notice that the policy was canceled, null, and void, and that the insurer would admit no further liability under it. With this notice was a check drawn in favor of plaintiff for $31.30, which was tendered as the amount of the unearned premium. Soon thereafter this check was returned by one of plaintiff's officers, who stated that the corporation which he represented had not theretofore received any demand for the additional payment of $20, and that $31.30 was not the correct return premium. On October 8th defendant again sent to plaintiff the check for $31.30, which was again returned by plaintiff's representative with the objection that it was not drawn for the proper amount. The check was again sent to plaintiff, but it was not presented for payment and was produced by plaintiff at the trial. Both parties to this suit concede that defendant should have proffered $45.07 instead of $31.30 as return premium. The property covered by the policy was destroyed by fire on December 26, 1907, and the judgment below was for the full amount of $2,000 specified in the contract.

Appellant contends that the giving of the five days' notice was sufficient to cancel the policy without the return or offer to return the unearned portion of the money previously paid on the execution of the contract, and we find this the only contention which we need discuss. This is a matter of first impression in California, so far as this court is concerned, but there is abundant record of adjudication in other jurisdictions, some courts holding that the return of the unearned part of the premium is one of the indispensable parts of the cancellation of such a policy and others that the prescribed notice is all that is required to accomplish that result.

The policy used in the transactions between the plaintiff and the defendant is of

the kind known as the "New York standard form," and the New York Court of Appeals has interpreted it to mean that cancellation of a policy by the insurer may only be accomplished by giving the prescribed notice and by restoring the unearned premium. The opinions of that distinguished court always command great respect, and when they deal with the law of the Empire state and the proper interpretation of a contract drawn under the sanction of that law, such opinions are clothed with peculiar authority; but we find that other courts of great dignity, including the United States Circuit Court for the Southern Division of New York, have held a different view of this contract or of policies not essentially differing from it, and that some of the learned judges of the New York Court of Appeals have dissented from the interpretation of the agreement given by the majority of their associates. Our own examination of the subject has impelled us to accept the doctrine of the courts that hold the return of the premium not an essential element of the annulment of the policy.

And first examining the language of the policy quoted above without reference to decided cases we cannot see that the repayment of a part of the premium is made an essential to the cancellation of the contract. The first sentence provides a complete scheme of cancellation by the assured or by the company:

"This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation."

If the paragraph ended there, no question could be raised. But the contract goes further and properly provides for a return of a just proportion of the premium. The very opening words of that part of the policy so providing indicate that cancellation may precede repayment:

"If this policy shall be canceled as hereinbefore provided, * * * the unearned portion shall be returned on surrender of this policy."

If the return of the money is one of the necessary elements of the cancellation, the last five words of the quotation are meaningless. Even upon the broad principle which authorizes the interpretation of a contract formulated by the insurer to be most favorable to the insured, we cannot convince ourselves that this plain and to us unambiguous language may be disregarded. The last proviso of the paragraph does not contradict the requirement that the return of the policy should be made before repayment of the proportionate share of the premium. It simply provides a regular pro rata compensation for the period of actual assurance when the contract has been terminated by the insurer as contradistinguished from the higher "short rate" which the insured must pay if he chooses to cancel the agreement. The history of this part of the New York standard policy in the courts of New York is interesting. In Nitsch v. American Central Insurance Co., 152 N. Y. 635, 46 N. E. 1149, the New York Court of Appeals, without handing down an opinion, affirmed a judgment against the defendant insurance company. In Tisdell v. New Hampshire Fire Insurance Company, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765, it was determined by a divided court, upon the authority of the Nitsch Case, that cancellation of a policy to be effective must be accomplished by a tender of the return premium as well as by the giving of the prescribed notice. The prevailing opinion written by Judge Bartlett contains no argument regarding the basis of the rule. The opinion is founded upon the rule as settled by the previous decision. A vigorous dissenting opinion was delivered by Chief Judge Parker. In it he pointed out the fact that the affirmance in the Nitsch Case did not rest alone upon the ground taken by the lower court that a tender of the unearned premium must be made as a part of the process of cancellation, but upon the broader reason that the notice of cancellation sent out by the insurance company was subsequently waived. Discussing the meaning of that portion of the contract which we have quoted, he said, among other things:

"The language is unambiguous. It admits of no debate and requires no construction. Words more apt to accomplish the cancellation of a policy by the giving of the five days' notice cannot well be imagined. Having provided for a cancellation of the policy, either by the request of the insured or upon notice given by the company, the next clause of the agreement proceeds to make disposition of the unearned premiums, in the event of the exercise of the option to cancel by either of the parties. * * * The policy having been put an end to by cancellation, at the insistence of one party or the other, then the situation of the parties is such that the company has in its possession certain premiums which it has not earned, and which it does not desire to earn, and the other party has in his possession the policy of insurance, no longer, of course, of use to him, and of no particular value to the company, except that when it finally comes into the company's possession it of itself furnishes evidence that the unearned premiums have been paid to the insured. With this situation, then, the agreement undertakes to deal, and it provides that upon the surrender of the policy the unearned premium, whether at short rate or pro rata premium, depending upon which party brought about the cancellation, shall be returned to the insured. Practically, it says to the insured: You return the policy to the place where you got it from and the company will at once turn over the unearned premium to which you are entitled under this contract. This agreement is so clearly expressed that there does not seem to be opportunity for insisting that the language means something quite different from what is suggested to the mind upon the first reading. And still other readings will not prompt the thought that there is possibly any ambiguity."

Later the Court of Appeals of New York affirmed the Nitsch and Tisdell Cases, but held (Judge Bartlett writing the prevailing opinion from which two of his associates dissented) that where the holder of the policy, in response to the notice of cancellation, surrenders his contract he thereby waives his

right to a return of the unearned fraction of the premium as a necessary part of the annulment of the policy. Judge Vann, expressing the views of the dissenters, said that he could not see how a mere return of the policy by mail in response to a notice by which the insurer promised a return of the premium "when" the policy should be surrendered to said insurer, could possibly amount to a waiver of payment as a necessary part of the process of annulment. We have found the same difficulty in reconciling the doctrine of that case (Buckley v. Citizens' Insurance Co., 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. [N. S.] 889), with the two earlier decisions of that court. The United States Circuit Court for the Southern District of New York, construing the same form of contract in Schwarzchild & Sulzberger Co. v. Phœnix Ins. Co. of Hartford (C. C.) 115 Fed. 653–656, said:

"It was unnecessary for the defendant to return or tender the unearned premium to accomplish a cancellation. The condition is carefully expressed to require the return of the premium only upon the surrender of the policy by the insured to the insurer. Straker v. Insurance Co., 101 Wis. 413, 77 N. W. 752; Norris v. Insurance Co., 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765. The decision of the Court of Appeals of New York holding the contrary in respect to a similar condition is entitled to great consideration (Tisdell v. Insurance Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765), but is not controlling upon this court; and the view of the minority of the court, expressed in the dissenting opinion, commends itself to me as presenting the better reasoning."

In Vance on Insurance, p. 494, after quoting the portion of the New York standard policy which we have been discussing, the learned author uses the following language:

"The cancellation clause of the standard form of policy seems so clearly worded that one is surprised to see that disputes have arisen as to its construction. It is held by the better authority that, after the expiration of the five days' notice required in case the cancellation is by the company, the insurance is deemed to be terminated and inoperative, without further act on the part of the insurer, or any actual cancellation of the policy. * * * By the weight of authority, the repayment of the unearned premium is not, under the standard policy, a condition precedent to the termination of the insurance by the insurer. Such repayment becomes due only upon surrender of the policy. The New York Court of Appeals has, however, in a very unsatisfactory opinion, adopted the contrary rule."

Professor Richards, in his work on Insurance Law (section 288 of the third edition), while admitting that "by the current of authority" up to the date of his writing the duty is laid upon the insurer "when seeking cancellation under the standard policy, to accompany the notice of cancellation with payment or actual tender of the return premium in order to make the notice operative," makes this comment:

"It is indeed difficult, however, to escape the conclusion of the dissenting judges in the New York Court of Appeals, voiced by the chief justice, that this is by interpretation to substitute a new contract in place of unambiguous terms adopted by the Legislature."

We feel impelled, however, to follow that which seems to us the meaning expressed by the unambiguous language of the contract rather than even the "current of authority" which would substitute a judicially manufactured agreement for the one made by the contracting parties. In addition to the authorities which we have quoted above in support of the view which we take of the meaning of the quoted portion of the standard policy of New York, we wish to cite Straker v. Phœnix Ins. Co., 101 Wis. 413, 77 N. W. 752–755; Webb v. Granite State Fire Ins. Co., 164 Mich. 139–142, 129 N. W. 19; Davidson v. German Ins. Co., 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, 12 Ann Cas. 1065; El Paso Reduction Co. v. Hartford Fire Insurance Co. (C. C.) 121 Fed. 937; Schwarzschild & Sulzberger Co. v. Phœnix Insurance Co., 124 Fed. 52, 53, 59 C. C. A. 572; Insurance Co. v. Brecheisen, 50 Ohio St. 542–548, 35 N. E. 53; Parsons & Arbaugh v. Northwestern National Insurance Co., 133 Iowa, 532, 110 N. W. 907; Newark Fire Insurance Co. v. Sammons, 11 Ill. App. 230–235.

Among the cases which announce the other doctrine—that cancellation does not precede payment—are Peoria M. & F. Ins. Co. v. Botto, 47 Ill. 516–519; Hartford Fire Ins. Co. v. McKenzie, 70 Ill. App. 615–618; Peterson v. Hartford F. I. Co., 87 Ill. App. 567–572; Kinney v. Rochester German Ins. Co., 141 Ill. App. 543–549; Kinney v. Buffalo German Ins. Co., 148 Ill. App. 260; Kinney v. Caledonian Ins. Co., 148 Ill. App. 256; Continental Ins. Co. v. Daniel (Ky.) 78 S. W. 866; Chrisman v. Hartford Fire Ins. Co., 75 Mo. App. 310–315; Taylor v. Insurance Co. of North America, 25 Okl. 92–94, 105 Pac. 354, 138 Am. St. Rep. 906; Hartford F. I. Co. v. Cameron, 18 Tex. Civ. 237, 45 S. W. 158; Polemanakos v. Austin Fire Ins. Co. (Tex. Civ. App.) 160 S. W. 1134; Niagara Fire Ins. Co. v. Mitchell (Tex. Civ. App.) 164 S. W. 919.

In spite of this array of decisions in opposition to our views, we are convinced that our reading of the policy is the correct one.

Because of our interpretation of the contract of insurance it is not necessary for us to review the interesting questions discussed in the briefs touching the sufficiency or insufficiency of the tender, made by the insurer, of an amount mistakenly supposed to be the proper return premium.

The judgment and order are reversed.

We concur: HENSHAW, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.

172 Cal. 485

In re SCOTT'S ESTATE.
SMITH et al. v. GALBREATH et al.

(L. A. 4445.)

(Supreme Court of California. April 13, 1916.)

1. EXECUTORS AND ADMINISTRATORS ⟸375 — SALE OF REAL ESTATE—CONFIRMATION—DISCRETION OF COURT—VALUE.

The question whether property of a decedent was sold for a price disproportionate to its value is within sound discretion of the court after consideration of all the facts, including the value and condition of the estate, the necessity for funds, the state of the market, and all other matters bearing on the question.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1529–1538; Dec. Dig. ⟸375.]

2. EXECUTORS AND ADMINISTRATORS ⟸375— SALE OF REAL ESTATE—EVIDENCE—VALUE.

Evidence that land of a decedent was sold for more than it had been recently appraised, that the sale was regularly advertised and only one bid obtained, though the administrator had been for a considerable time endeavoring to sell the property, that the hearing on the return of sale was continued from time to time, but no additional bids were obtained, is sufficient to warrant the court in confirming the sale notwithstanding testimony of a witness that in his opinion the property was worth much more than the amount for which it was sold.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1529–1538; Dec. Dig. ⟸375.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the Estate of Elizabeth M. Scott, deceased. From an order confirming a sale of the real estate, on application of Charles E. Galbreath and others, Sarah J. Smith and others appeal. Affirmed.

Stewart & Stewart, of Los Angeles, for appellants. R. Morgan Galbreth and Robert G. Loucks, both of Los Angeles, for respondents.

SHAW, J. The appeal is from an order confirming a sale of real estate. The property was sold for $866.52. Objections were made to the confirmation on the grounds, first, that the return showed on its face that the price was less than 90 per cent. of its appraised value, and, secondly, that the price obtained was disproportionate to the value of the property.

The objections that the price was less than 90 per cent. of the appraised value is disposed of by the fact that an appraisement made within a year prior to the sale showed that the property was worth only $750, whereas the sale was made for $866.52.

[1, 2] The question whether or not the property is sold for a price disproportionate to its value is one which is always within the sound discretion of the court. It must consider all the facts of the case, including the value and condition of the estate, the necessity for funds, the state of the market, and all other matters bearing on the question. The only evidence relied on to overthrow the finding of the court on the subject is the testimony of a witness, who lived in the vicinity, that in his opinion the property was worth $1,300, some $433 more than the price obtained. On the other hand, it appeared that the appraisement of $750 had been recently made; that the sale was regularly advertised; that the administrator had been for a considerable length of time endeavoring to sell the property; that this was the only bid obtained; that the hearing upon the return of sale was set for the 23d day of June, 1915; that at that time these objections were filed; that the matter was continued from time to time thereafter until the 21st of July; that from the time of the return to the final hearing no additional bids had been obtained; and that there was no evidence that there was any prospect of obtaining any higher bid. All these facts tended to prove that the value was less than the witness believed it to be and that the price was not disproportionate thereto. Under these circumstances we think this court would not be justified in saying that the court below abused its discretion in confirming the sale.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 488

In re DUTCHER'S ESTATE. (L. A. 4499.)

(Supreme Court of California. April 17, 1916. Rehearing Denied May 15, 1916.)

1. WILLS ⟸358—DECISIONS APPEALABLE—ORDERS DENYING NEW TRIAL.

Under Code Civ. Proc. § 963, as amended in 1915 (St. 1915, p. 209), providing for appeals from final judgment and from orders granting new trial in actions tried by jury, where such trial is a matter of right, etc., and from a judgment or order granting or refusing the grant, revoking or refusing to revoke letters testamentary, etc., no appeal will lie from an order denying a motion for new trial after judgment denying a petition to revoke the probate of a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 822; Dec. Dig. ⟸358.]

2. WILLS ⟸111(2) — VALIDITY — SUBSCRIPTION.

Civ. Code, § 1276, declares that a will shall be subscribed at the end by the testator and the subscribing witnesses. An instrument reciting that the testator made and published it, his last will, was signed by him about two inches below the writing and slightly below the word "Witness," under which the signatures of the witnesses appeared. *Held*, that there was a sufficient subscription of the instrument by the testator, his signature appearing at the end of the will, the validity not being affected because the signatures of witnesses were above.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 268, 269; Dec. Dig. ⟸111(2).]

3. WILLS ⟸293(6)—PROBATE—EVIDENCE.

Where a will recited that the testator made and published it as his last will, and it was signed by testator, his signature being below those of the subscribing witnesses, evidence concerning testator's signing before publication and

subscription by the witnesses is admissible to show that the will was validly executed, and, the instrument on its face showing that the testator signed with testamentary intent, such evidence cannot be rejected on the ground that it was sought to show by parol that the testator signed with testamentary intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 676–678; Dec. Dig. ⟹293(6).]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rivers, Judge.

In the matter of the estate of Jasper Dutcher, deceased. An instrument was admitted to probate as the last will of the testator, and thereafter heirs petitioned for revocation of the probate. From a judgment denying the petition and an order denying new trial, they appeal. Judgment affirmed, and appeal from order denying new trial dismissed.

William M. Hiatt, Edmund H. Hinshaw, and Howard R. Hinshaw, all of Los Angeles, for appellants. T. C. Gould, of Los Angeles, for proponent.

SLOSS, J. [1] A paper was admitted to probate as the last will of Jasper Dutcher. Thereafter certain heirs petitioned for revocation of the probate. They appeal from a judgment denying the petition. There is also an attempted appeal from an order denying a motion for a new trial, but such order was no longer appealable at the time the appeal was sought to be taken. Code Civ. Proc. § 963, amended 1915 (St. 1915, p. 209).

[2] The contest was based on various grounds. One of these, and the only one here urged, is that the alleged will was not "subscribed at the end thereof by the testator." Civ. Code, § 1276. It appears that the document was written upon a single sheet of paper. It begins with the words: "I, Jasper Dutcher, do make and publish this my last will." The body of the writing covers about three-fourths of the page. The signature of the testator, "J. Dutcher," appears halfway on the page, from right to left, about 1½ inches below the last line of the text of the will. On the left of the page, about three-quarters of an inch below said last line, is the word "Witness." This is closely followed by the signatures of the witnesses, O. P. Kinnie and Calvin Dutcher, one over the other. These signatures are higher on the page than the testator's name, and Calvin Dutcher's writing is spread out so that his surname covers a space directly above the entire subscription of the testator.

It is argued by the appellants that the paper, on its face, indicates that the decedent signed as a witness, rather than as testator. The evidence shows without conflict that the testator signed first, and that Kinnie and Calvin Dutcher then signed as witnesses. The statute does not require that the testator's signature shall occupy any specific place with reference to the signatures of the witnesses. Section 1276 makes the same provision for the location of both classes of signatures. The testator must subscribe the will "at the end thereof," and the witnesses must "sign * * * at the end of the will." It cannot be doubted that the name of "J. Dutcher," written as it was a short distance below the body of the will, was subscribed "at the end thereof." Estate of Blake, 136 Cal. 306, 312, 68 Pac. 827, 829 (89 Am. St. Rep. 135). The valid execution of the will could not be defeated by the act of the witnesses in thereafter inserting their signatures above that of the testator.

[3] It is argued that oral testimony was not admissible to show that the testator signed "with testamentary intent." But the testimony was not offered, nor was it required, for this purpose. Certainly the proponent was entitled to show that the steps constituting a valid execution of a will had been taken. These steps included the subscription of the will in the presence of witnesses, the declaration that it was a will, and the request that the witnesses sign as such. This proper testimony made it clear that the testator's name had been subscribed "at the end" of the will, before either witness had signed. The conclusion that he had subscribed with testamentary intent did not rest upon any testimony regarding his intent, but followed from the face of the paper itself, as that paper stood immediately after the testator had completed his signing. Estate of Seaman, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, relied on by appellants, is entirely different from this case. There the will had not been subscribed at the end thereof. It was held, and the ruling was obviously correct, that the failure to comply with the statutory requirements for making a will could not be cured by evidence that the testator intended to execute a will.

We may add that we think the will, as it stood when offered for probate, and without regard to the order in which the three names were written, shows plainly that J. Dutcher signed as testator, and not as witness. It is quite clear that the two names, beginning at the left under the end of the word "Witness," are the names of attesting witnesses, and that the third name, beginning far to the right, is that of the person executing the will. Furthermore, the last-mentioned name corresponds to that of the person who in the opening clause is declared to be the testator. The appellants' contention really rests on the entirely accidental circumstance that Calvin Dutcher's signature occupies a considerable space in length.

The appeal from the order denying a new trial is dismissed.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(30 Cal. App. 126)

SAGE LAND & IMPROVEMENT CO. v. McCOWEN et al. (Civ. 1483.)

(District Court of Appeal, Third District, California. March 11, 1916. Rehearing Denied April 10, 1916. Denied by Supreme Court May 8, 1916.)

1. VENDOR AND PURCHASER ⟸112(1)—CONSTRUCTION OF CONTRACT—ENTIRE OR SEVERABLE.

Under a land contract stipulating that failure of title of any of the lands should not work a forfeiture and describing the land as separate parcels, the purchaser was not relieved from its obligation to take any of the land, though title to a particular parcel failed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 199, 200; Dec. Dig. ⟸112(1).]

2. VENDOR AND PURCHASER ⟸55—CONSTRUCTION OF CONTRACT—ENTIRE OR SEVERABLE.

Under an escrow contract providing that at a certain date, if either of the deeds was not delivered, it was to be returned to the vendor, a purchaser was not relieved from liability to take one parcel because title to the other had not been perfected.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 86; Dec. Dig. ⟸55.]

3. ESCROWS ⟸6—CONDITIONS—EVIDENCE.

Evidence of former attorneys of purchaser who examined titles and of former agent of the purchaser *held* to support a finding that deeds were deposited in escrow to be accepted by the purchaser on condition only that defendant in action to quiet title should not appear within a year.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 8; Dec. Dig. ⟸6.]

4. VENDOR AND PURCHASER ⟸141 — PERFORMANCE—WAIVER OF DEFECTS.

Under a contract that the vendee should point out defects in the title, unless this is done, defects are deemed to be waived.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 265; Dec. Dig. ⟸141.]

5. TRIAL ⟸70 — REOPENING CASE — AFTER SUBMISSION.

There was no abuse of discretion in refusing plaintiff's application to reopen a case after it had been submitted, in order that it might offer assessment rolls in evidence, for the purpose of showing they were not in statutory form, in view of counter affidavits and plaintiff's previous opportunity to discover the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 166; Dec. Dig. ⟸70.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Sage Land & Improvement Company against Hale McCowen and others. From a judgment for defendants and from an order denying a new trial, plaintiff appeals. Affirmed.

Mannon & Mannon, of Ukiah, for appellant. Robert Duncan, of Ukiah, for respondents.

BURNETT, J. On September 2, 1911, appellant and Louis A. Moody, Fannie T. McCowen, and Hale McCowen, her husband, entered into a written agreement for the sale and purchase of several tracts of land, comprising 1,404 acres, appellant agreeing to pay the sum of $25 per acre—

"for all of the above-described land, the sum of $5,000.00 gold coin upon the execution and delivery of this contract, and the balance of $——— upon the approval and acceptance of a clear and unincumbered title to the above-described property and the whole thereof.

"And the said parties of the first part [respondents] agree to furnish to said party of the second part, within ten days from date hereof, complete abstracts of title to said lands and premises above described, and the said party of the second part shall have thirty days after the receipt of said abstract in which to examine the same and report defects, and should any defects be found in the title to said land, or any part thereof, parties of the first part will clear such defects within a reasonable time, not exceeding six months, and this contract shall remain in full force and effect.

"It is further understood and agreed that, should parties of the first part refuse or neglect to clear such defects within the time above specified, then and in that case, party of the second part will be under no obligation in law or equity to purchase said premises, and all moneys paid thereunder shall be returned to the said party of the second part, with interest thereon at the rate of 6 per cent. per annum. * * *

"*It is further understood and agreed that, should the title to any of the above-described lands fail, it shall not work a forfeiture of this contract, but a deed properly executed by the parties of the first part to the party of the second part for all the lands to which the title shall have failed, together with the sum of $25.00 per acre for such land, shall be placed in the Commercial Bank of Ukiah, at Ukiah, California, to remain there until the title to said lands shall have been perfected and the title acceptable to party of the second part, but it is understood and agreed that the said title shall be perfected within a reasonable time after said deed and said money is placed in escrow, not exceeding twelve months.*"

We have italicized the portion of said agreement which is peculiar and which has given rise to some controversy here. The contract was executed for the company by its duly authorized agent, D. P. Simons, and Mr. Simons employed as his attorneys in connection with the contract Messrs. Preston & Preston, of Ukiah.

Abstracts of title to the lands described in said agreement were furnished by the vendors to Messrs. Preston & Preston, representing the said corporation, and, previous to March 2, 1912, the attorneys had approved the title to all the lands described in the contract with the exception of 633.37 acres consisting of two separate tracts, one containing 313.37 acres, designated hereinafter as "scrip land," and the other 320 acres, as the "tax title land." Mr. Simons, on behalf of the appellant, paid Preston & Preston $5,000, which was in due time paid over to the vendors on the execution of the contract, and on September 21, 1911, he also sent to J. W. Preston, Esq., sufficient funds to pay for all of the lands to which title had been approved. Thereafter the vendors conveyed to appellant all of the said lands except the said 633.37 acres, and Mr. Preston paid them therefor at the rate of $25.00 per acre. Two separate deeds were made and placed in the

bank in escrow, one for said "scrip land," and the other for the "tax title land." There is no controversy as to the former; it being admitted that respondents had no title thereto. No defects in said tax title were pointed out by appellant, but its attorneys, said Preston & Preston, requested that a suit to quiet title against the possible claim of one Mary G. Andenried be brought, for the reason that the title was, in part, at least, based on a tax deed. The vendors complied with this request, and employed said attorneys for appellant to bring said action. After this was accomplished said attorneys again requested the vendors to wait for a year to elapse to provide against the contingency of Mary G. Andenried appearing in the suit and asking that the proceedings be opened up, as the summons had been served by publication and judgment was taken by default. The vendors agreed to this, and said deeds were placed in escrow as aforesaid, with the sum of $15,834.25 in cash and a written agreement signed by Hale McCowen, Jr., as attorney for L. A. Moody and Hale McCowen, and Preston & Preston, as attorneys for appellant, executed May 2, 1912. This agreement referred to the said contract of September 2, 1911, and especially the provision which we have hereinbefore italicized, and provided that:

Said deeds and money "are to be held subject to the following terms:

"I. The deeds are, or either of them is, to be delivered to the Sage Land & Improvement Company, upon demand at any time within twelve months from the date thereof.

"II. Upon the delivery of each deed to the Sage Land & Improvement Company, the amount of money due under the deed so delivered by the provision hereinabove set forth is to be delivered to L. A. Moody, Fannie T. McCowen, and Hale McCowen, her husband.

"III. If at the end of twelve months from the date hereof the deeds are, or either of them is, still in the possession of the depository, they are, or it is, to be returned to the depositors, and money remaining unpaid is to be returned to the Sage Land & Improvement Company."

Then follows a description of each of the two said tracts.

In August, 1912, Mr. Simons was succeeded by one E. J. James as agent for appellant, and on March 3, 1913, as such agent, he demanded of the bank the return of said $15,834.25, claiming that the title to said lands had not been perfected and rendered acceptable to appellant within the 12 months. On the 3d or 4th of said month Preston & Preston, acting for the vendors, demanded of the bank $8,000 of said money, claiming that the escrow condition as to said tax title land had been complied with, and that respondents were therefore entitled to said sum. The bank refused to pay over any of said money, and plaintiff thereupon brought the action against said bank for the entire sum, and, upon proper proceedings, the said depository paid the money into court and was discharged from further liability; the vendors being substituted as parties defendant. After trial the court found in accordance with the position of the vendors, and held that they were entitled to said $8,000, with interest. The appeal is from said judgment and from an order denying a motion for a new trial.

[1] The first contention of appellant is:

"That, in view of the conceded fact that the title to the 'scrip land' is invalid, and assuming that the title to the 'tax title land' is good and marketable, still, under the terms of its contract, this appellant was entitled to both the 'scrip land' and the 'tax title land,' or it was not bound to take any thereof, and that therefore the decision of the superior court compelling it to take and pay for the 'tax title land' is erroneous as a matter of law."

We cannot so read the contract of the parties. They expressly provided that:

"Should title to any of the above-described lands fail it shall not work a forfeiture of this contract."

It must be remembered that the land had been segregated into separate parcels and so described in said contract, and the price was placed at $25 per acre. "The above-described lands" refers, of course, to all the lands that were contemplated by said agreement and described therein. It seems to us that more accurate language could hardly have been selected to express an agreement that the several parcels should be treated separately, and that, if the title to any should fail, it would not affect the contract as to those parcels impressed with a good title. In view of a previous provision in the contract to the effect that, if the parties owning the lands should neglect or refuse to clear defects within a certain time, the party purchasing the lands should not be required to purchase said premises, and that any money paid therefor should be returned, it is possible that the purchaser might have declined to purchase at all if there was not a good title to all of the land, but surely it was not contemplated that the purchaser might take certain tracts having a good title and reject others. If such was the intention, it must be admitted that the parties were very unfortunate in the selection of terms to express such intention.

[2] There would seem to be even less room for doubt as to the said agreement of March 2, 1912. Therein it is provided that certain deeds are, or either of them is, to be delivered to the Sage Land & Improvement Company, and upon the delivery of each deed the amount of money due under said deed is to be paid over, and if at the end of the year either of said deeds remains in the possession of the depository, it is to be returned to the grantors, and the corresponding amount returned to appellant. This language cannot be interpreted so as to tie the two parcels together. The natural construction, as we view it, is that in case of title to either that parcel should be paid for on delivery of the deed. The parties undoubtedly

so understood the agreement and so construed it. As evidence of this we may refer to the testimony of Mr. Simons, the accredited representative of appellant, in which he declared that he thought at that time that he would have to take the tax title.

"This land, the tax title piece, is light timber, and the scrip piece is heavier, and this question as to whether I would be obliged to take the light piece, and not get the better timber, did not arise until the question of these titles came up. It was understood at the time of the deposit that, if the tax title piece was made good within the year, and the scripped was not, I would have to take the tax title piece."

Of course, they expected both pieces to be clear at the end of the year, and appellant preferred the scrip land naturally, as there was better timber thereon, but there was willingness to take the chance on getting a good title to either or both.

[3] We conclude that appellant's first point is not well taken. The second is that respondents did not furnish a marketable title to said "tax title land." But, precedent to any consideration of the declared defects in said title, we should regard the finding of the trial court:

"That the said deed to said 320-acre tract of land the title to which was quieted as aforesaid and the said sum of $8,000 in cash, being $25 an acre therefor, were placed in said Commercial Bank of Ukiah the 2d day of March, A. D. 1912, upon the sole and only condition that they should remain there for the period of one year, so that the time for appearance of any of the defendants in said suits to quiet title should expire and that no one should appear in said actions during said time; that upon the expiration of said time, if no appearance was made, that the deed to said 320-acre tract should be delivered to the plaintiff in this action and the said sum of money, to wit, $8,000, should be delivered and paid to the said parties of the first part in said contract, but, if any of said defendants should appear in said action during said time, then and in that event the money should be returned to the plaintiff and the said deed to the parties of the first part in said contract."

It is further found that no one so appeared within the year, and this is not disputed. The situation is therefore that, if said finding quoted as above is, with its necessary implications, supported by competent evidence, the question as to any actual defects in said title becomes immaterial, and said finding, in connection with admitted facts, is sufficient to warrant the judgment in the case. Said finding would seem to be supported by the following testimony of Mr. Simons:

"It is a fact that when this money and those deeds were placed in the Commercial Bank of Ukiah that the deed to the tax title lands was placed there upon the sole and only condition that, if Mrs. Andenried appeared within the year that I was not to take the lands, and, if she did not appear within a year, that I was to take the piece of land if that title would be perfected. * * * I understood that the title would not be perfected—would not be perfected for one year."

H. L. Preston testified:

That he was a member of the law firm of Preston & Preston, and that they were employed to pass on all titles for the lands purchased by him for the Sage Land & Improvement Company; that he drew said contract of February 2, 1911, and afterwards Mr. Simons went away and left it with said firm, "and Mr. McCowen delivered his abstracts, * * * and I would take them up and examine them and render a report on them to Mr. Simons, and I give Mr. McCowen a copy of the report, and then, if there were any defects in them, we had them cured, such as getting quitclaim deeds and patents, and, when the title to one piece was cured, why, we paid for it and took the deed to the Sage Land & Improvement Company and recorded the deed and had the abstract brought down to date to that piece and put our opinion in the report, and then I sent them to Mr. Simons. He left the money with us and intended as often as we approved a title to take it and pay for it."

He furthermore testified:

That he never found and pointed out to any of the respondents any defect in the title to this "tax title land," and that the suit to quiet title was "just an extraordinary precaution because the Sages were nonresidents of California, and they were so particular about everything we thought as a double precaution we would have the title quieted. I told Mr. McCowen I thought it would be better to have the suits brought, and he said that it was all right to go ahead and have it done. So he said he would like for Hale McCowen, Jr., to attend to the business, and we told him it was all right, we would oversee it and help him, and I communicated to Simons, and he said that it was all right for us to attend to it, and the proceedings which have been introduced in evidence here were taken as a result of that."

He testified furthermore:

That after the decree was rendered he talked the matter over to Mr. McCowen, and told him that, since service was had by publication, he ought to wait for 12 months for the money, to give the parties an opportunity to appear, and that McCowen objected, but finally consented, and it was decided "to put it up in the bank according to the contract and wait the 12 months, and they both agreed to it. The next day after the decrees were entered we drew this deed to the tax title, and these two deeds and money were put in the bank" with the said written agreement of March 2, 1912. "We talked to Mr. Simons about the matter of this escrow with regard to the tax title, and had correspondence about it before our talk with Mr. McCowen, about the 29th day of January, 1912, and talked about it then; it was understood that afternoon or day before; we talked about it over the phone. We had previously discussed that agreement with Mr. Simons and Mr. McCowen, and told Mr. Simons what it was to be. * * * We already accepted the title to the tax title, and all we were doing was to insure that this woman would not appear within the year; that was the only condition. Never dreamed until Mr. James came here but what we would have to take each piece as the title was perfected, and I told Mr. James that when he came here. * * * When this suit to quiet title business came up, why, we explained it to Mr. McCowen, and also to Mr. Simons, and it was agreed between us that Hale McCowen, Jr., was to do the work and we were to oversee it."

There is other evidence clearly related to the point before us, but sufficient has been quoted to show, as we believe, that such was the agreement, as found by the court, when the said deeds and money were deposited in escrow, and also that Preston & Preston were authorized as the agents of appellant to make such agreement, and, moreover, that

through Mr. Simons appellant was fully informed of the whole transaction, made no objection whatever, but, on the contrary, agreed to and ratified the same. There was no concealment, no misrepresentation, no fraud whatever; in fact, there is no such claim, and we are at a loss to understand how it could be held that said finding is entirely unsupported.

While the foregoing testimony was being taken objections to certain questions were overruled by the court, but we deem specific notice thereof unnecessary, as the evidence admitted without objection is equivalent to what we have set forth.

[4] Another circumstance of moment, apart from the said supplemental agreement of March 2, 1912, appearing from what we have quoted, is that under the contract it was the duty of appellant to point out any defects in the title if any existed. Nothing of the kind was done; in fact, the contrary was conceded by its attorneys. It would seem, therefore, that the defects, if any existed, were waived.

In Easton v. Montgomery, 90 Cal. 313, 27 Pac. 281, 25 Am. St. Rep. 123, after holding that it was the duty of the vendee to examine the title, the Supreme Court said:

"If upon such examination it appeared to him that the title was defective, it then became his duty to report to the vendor the particulars wherein such defects were claimed to exist, and, in the absence of any time fixed by the agreement within which the vendor should remove these defects, or satisfy his objections, a reasonable time would be allowed therefor. * * * The burden is on the vendee to point out the defects in the title. Dwight v. Cutler, 3 Mich. 566 [64 Am. Dec. 105]."

[5] As to the other proposition concerning the sufficiency of the proceedings culminating in the sale of said property for delinquent taxes and the validity of the deeds executed in pursuance thereof it is unnecessary to inquire specifically if we are right in the conclusion as to said contract of March 2, 1912, although we may say that the various objections urged by appellant to said tax title appear to be satisfactorily answered in the argument of respondents. Likewise the point made that the trial court abused its discretion in refusing to open up the case after it had been submitted in order that appellant might offer the assessment rolls in evidence for the purpose of showing that they did not have attached thereto the affidavits of the assessor and clerk of the board of supervisors as required by the statute becomes unimportant, but as to that, in view of the counter affidavits and the opportunity which appellant had previously to discover the facts, we think it cannot be said there was any abuse of discretion.

As we understand the record, we think the judgment and order should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

30 Cal. App. 140

ST. PAUL FIRE & MARINE INS. CO. v. SOUTHERN PAC. CO. (Civ. 1686.)

(District Court of Appeal, First District, California. March 14, 1916. Rehearing Denied by Supreme Court May 11, 1916.)

1. RAILROADS ⟸482(3)—FIRES—NEGLIGENCE —SUFFICIENCY OF EVIDENCE.

In an action against a railroad for destruction of an automobile by fire, evidence *held* sufficient to give rise to an inference of negligence on the part of the road's servants in not properly extinguishing fires they had set along the right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1734; Dec. Dig. ⟸482(3).]

2. RAILROADS ⟸482(3)—FIRES—NEGLIGENCE —PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for destruction of an automobile by fire, evidence *held* sufficient to justify finding that the fire which destroyed the car in a warehouse came from the road's tracks and was the result of its employé's negligent acts.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1734; Dec. Dig. ⟸482(3).]

3. EVIDENCE ⟸529—EXPERT OPINION—ORIGIN OF FIRE.

In an action against a railroad for destruction of an automobile in a warehouse by fire, the admission in evidence of the opinion of the chief of the fire department of the city respecting the origin of the fire was improper, since the question is not necessarily one for expert opinion, but a deduction which the court or jury is competent to draw from visible facts presented in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2338; Dec. Dig. ⟸529.]

4. APPEAL AND ERROR ⟸1050(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a railroad for destruction of an automobile in a warehouse by fire, where the trial was before the court, and there was other evidence to warrant its finding for plaintiff, error in the admission of expert opinion testimony as to the origin of the fire was not sufficiently prejudicial to defendant to justify a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⟸1050(1).]

Appeal from Superior Court, San Benito County; George H. Buck, Judge.

Action by the St. Paul Fire & Marine Insurance Company against the Southern Pacific Company. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Judgment and order affirmed.

Frank McGowan and Blaine McGowan, both of San Francisco, for appellant. Coogan & O'Connor, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment and order denying a new trial in an action wherein the plaintiff recovered judgment in the sum of $350 damages for the alleged destruction of an automobile by fire, caused through the defendant's negligence. The case was tried by the court without a jury. The evidence as to the origin of the fire, and also as to the alleged negligence of

the agents of the defendant, as the result of which it is claimed to have spread to the warehouse in which the plaintiff's automobile was stored, was conflicting; but we think the following facts are fairly deducible from the record before us:

The plaintiffs' assignor, L. H. Stevens, was in the month of June, 1912, the owner of an automobile which he kept in a certain warehouse in the city of Hollister, and which was located along the line of and adjacent to the right of way and railroad tracks of the defendant in said city. Defendant through its agents and employés undertook to burn off the grass along its right of way in the vicinity of this warehouse. They ceased this work about 4 o'clock in the afternoon, and went away after apparently extinguishing the fires. About 5 o'clock Mr. Newton, an employé of the Hollister Warehouse Company, noticed that the men who had been attending to the fires were gone, but that there were still a few smoldering fires along the defendant's right of way which he deemed dangerous to be left, so he took a watering can and went over and extinguished these, or at least thought he had done so. On the following morning, however, about 5:30 o'clock, a man named Tennant, not an employé of the defendant, noticed smoke arising from a pile of sawdust near the warehouse, and also observed a line of burnt grass extending from the defendant's tracks to the sawdust pile, where he found a smoldering fire, which blazed up when stirred, and which had charred the sill of a box factory from which the sawdust had accumulated, and which factory adjoined the warehouse. He put water on the fire, and was satisfied that he had put it out; but at 10:30 o'clock of the same morning flames burst forth in the box factory, which spread to the warehouse and destroyed the automobile of the plaintiff's assignor. There is also some evidence that during the afternoon a fire had been burning on the other side of the defendant's right of way and about 40 or 50 feet from the warehouse, but there was no evidence indicating that this fire had extended across the defendant's tracks.

[1, 2] We are of the opinion that the foregoing facts, which are practically undisputed, were sufficient to give rise to an inference of negligence on the part of the defendant's employés in not properly extinguishing the fires they had set along the defendant's right of way in the vicinity of this warehouse, and were also sufficient to justify the finding of the court that the fire in question came from the defendant's tracks and was the result of the negligent acts of its employés.

[3] The appellant further contends that a prejudicial error was committed by the court during the course of the trial in permitting the chief of the fire department of the city of Hollister to answer questions propounded by counsel for plaintiffs calling for his opinion as an expert witness respecting the origin of the fire. The record shows that he had been at the head of the fire department of the city of Hollister for about 12 years; that a part of his duties was to investigate and render a report upon the origin of every conflagration calling for the services of his department; that the facts upon which he predicated his opinion upon the origin of this fire were those above set forth and which were already before the court from the lips of the other witnesses. We are of the opinion that the court committed an error in permitting this witness to give his opinion as to the origin of this fire, and that the better reasoned line of authorities holds that the question as to the origin of a fire is not ordinarily one of expert opinion, but is a deduction which the court or jury is equally competent to draw from the visible facts presented in evidence. Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292; Norfolk & W. R. Company v. Briggs, 103 Va. 105, 48 S. E. 521; Chicago & E. I. Ry. Co. v. Ross, 24 Ind. App. 222, 56 N. E. 451; Smaltz v. Boyce, 109 Mich. 382, 69 N. W. 21; Ins. Co. of N. A. v. Osborn, 26 Ind. App. 88, 59 N. E. 181; Haynie v. Baylor, 18 Tex. 498.

[4] But, conceding that the court was in error in the admission of this evidence, it does not follow that the cause should be returned for retrial because of this error. The trial was before the court; and the facts upon which alone the opinion of the witness was based had already been presented in evidence. Upon these facts we think the court would have been fully warranted in making a finding in the plaintiff's favor. In fact, we think the court could not from all the evidence before it, aside from the opinion of the fire chief, have fairly arrived at any other conclusion as to the origin of this fire. This being so, we are constrained to hold that the error of the court was not sufficiently prejudicial to justify a reversal of the case. Sampson v. Hughes, supra; Estate of De Laveaga, 165 Cal. 607, 133 Pac. 307.

The appellant's contention that the assignment to the plaintiff of the claim upon which the action was brought was insufficient we find to be without merit.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

30 Cal. App. 157

HOUSE et al. v. FRY et al. (Civ. 1725.)

(District Court of Appeal, Second District, California. March 17, 1916. Rehearing Denied April 14, 1916; Denied by Supreme Court May 15, 1916.)

1. APPEAL AND ERROR ⟸1011(1)—FINDINGS OF FACT.

There is the presumption on appeal in favor of the findings whenever there is a substantial conflict in the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸ 1011(1).]

2. MUNICIPAL CORPORATIONS ⟸705(2)—USE OF STREETS—ORDINANCE—SLOWLY.

Under an ordinance requiring the driver of any vehicle, moving slowly upon any street, to keep as close as possible to the curb on the right, to allow more swiftly moving vehicles free passage to the left, a motor truck moving at 18 miles per hour, when the limit of speed was 20 miles, was not traveling "slowly" within the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. ⟸705(2).]

3. MUNICIPAL CORPORATIONS ⟸706(5)—USE OF STREETS—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action for damages to plaintiff's motor truck from a collision when defendant's automobile overtook and attempted to pass in front of it, evidence *held* to show that the operation of the truck in violation of an ordinance, in that it was not kept reasonably near the right curb, was not the proximate cause of the collision.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⟸ 706(5).]

4. MUNICIPAL CORPORATIONS ⟸706(5)—USE OF STREETS—COLLISION—NEGLIGENCE.

Evidence *held* to show that defendant's negligent violation of an ordinance in driving to the right and endeavoring to pass the truck before his automobile was clear of the truck was the proximate cause of the collision.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⟸ 706(5).]

5. MUNICIPAL CORPORATIONS ⟸706(5)—USE OF STREETS—COLLISION — EVIDENCE — CONTRIBUTORY NEGLIGENCE.

Evidence *held* not to show plaintiff's negligence, causing or contributing to the collision.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⟸ 706(5).]

6. INFANTS ⟸61—TORTS—LIABILITY.

Plaintiff was entitled to a judgment against the minor defendant; as, under Civ. Code, § 41, a minor is civilly liable for a wrong done by him.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 167; Dec. Dig. ⟸61.]

7. MASTER AND SERVANT ⟸330(3)—INJURY TO THIRD PERSON—USE OF MASTER'S AUTOMOBILE—COLLISION.

In an action for damages from a collision of plaintiff's motor truck and defendant's automobile, driven by defendant's son, evidence *held* to sustain a finding that it was being driven without defendant's knowledge and contrary to his express order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1272; Dec. Dig. ⟸ 330(3).]

8. MASTER AND SERVANT ⟸305—INJURY TO THIRD PERSONS—SCOPE OF AUTHORITY.

Where defendant's son was driving his automobile within his general scope as chauffeur for defendant, notwithstanding his disregard of defendant's directions, the defendant would be liable for damages for a negligent collision with plaintiff's truck.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1223, 1224; Dec. Dig. ⟸305.]

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by George J. House and others, copartners doing business under firm name and style of Geo. J. House & Sons Company against William C. Fry and Lawrence Fry. Judgment for defendants, and plaintiffs appeal. Reversed.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, for appellants. Hanson, Hackler & Heath, of Los Angeles, for respondents.

CONREY, P. J. On February 21, 1914, Lester House, one of the plaintiffs, was driv-

ing a motor truck easterly on Sunset boulevard, in the city of Los Angeles. The defendant Lawrence Fry at the same time was driving an automobile, the property of the defendant William C. Fry, easterly on the same street, in the rear of the truck. While endeavoring to pass the truck the automobile, when it came to the place where it was even with the truck, was 2 or 3 feet distant from the truck, and was moving at the rate of more than 20 miles per hour and the truck was moving at the rate of 18 miles per hour. Fry did not blow the horn or give any other warning of his approach, and in passing the truck did not give any signal indicating his intention to change the course of the automobile, and House did not know that the automobile was there until the two vehicles were even with each other, traveling side by side. Thereupon Fry turned toward the right for the purpose of passing in front of the truck and the right rear wheel of the automobile collided with the front left wheel of the truck. By the force of this collision the steering rod of the truck was broken so that the driver had no further control of his machine, and it ran into the curb on the right-hand side of the road, causing further injuries to the truck. By this action the plaintiffs seek to recover damages for the injuries to the truck. From a judgment in favor of the defendants, the plaintiffs appeal.

Ordinance No. 24360 of the city of Los Angeles is an ordinance regulating the operation of vehicles upon streets. It is conceded that the accident in question occurred in a portion of the city where, under the terms of the ordinance, it is unlawful to travel in excess of 20 miles per hour. Sections 6, 8, 9, and 10 of the ordinance are as follows:

"Sec. 6. The driver of any vehicle, upon meeting any other vehicle at any place upon any street shall turn to the right, and, on all occasions, shall travel on the right-hand side of such street, and as near the right-hand curb thereof as possible. * * *

"Sec. 8. The driver of any vehicle shall, in overtaking and passing any other vehicle in or upon any street, pass to the left of such vehicle, and shall not drive to the right until clear of such vehicle, and the driver of such vehicle being so overtaken and passed shall give way to the right.

"Sec. 9. The driver of any vehicle moving slowly in, along or upon any street shall keep such vehicle as close as possible to the curb on the right, allowing more swiftly moving vehicles free passage to the left.

"Sec. 10. The driver of any vehicle, in or upon any street shall before turning, stopping or changing the course of such vehicle, and before turning such vehicle when starting the same, first see that there is sufficient space for such movement to be made in safety, and shall then give a plainly visible or audible signal to the police officer in charge of the crossing or to the drivers of vehicles behind the vehicle so turning, stopping, changing its course or turning from a standstill, of his intention to make such movement. Such signal shall be given by raising the hand or whip and indicating with it the direction in which the turn is to be made."

Lawrence Fry is the son of William C. Fry, and at the time of this accident Lawrence was a minor aged 20 years; but the plaintiffs are not asserting any liability of defendant William C. Fry on account of the fact that the codefendant is his son. The plaintiffs do claim, however, that such liability exists upon the ground that the automobile was the property of William C. Fry and was being driven by Lawrence Fry for the benefit and under the direction and control of William C. Fry. It is charged that the defendant Lawrence Fry at the time in question drove the automobile in a manner contrary to the ordinance and in a negligent, dangerous, and highly reckless manner.

Sunset boulevard at the place where this accident occurred is a street about 100 feet wide on which is located a double-track electric street railway. At the point in question the distance from the south curb of the street to the nearest railroad track is 29 feet. At the time of the accident the truck was carrying a load of one ton, the left wheels of the truck were distant 2 feet south from the most southerly rail of the railroad tracks, and the right wheels of the truck were distant 21 feet from the curb; the distance between the wheels of the truck being about 6 feet. There was at that time no obstruction in front of the automobile in the direction in which these vehicles were moving, and the automobile could have continued in a straight line until it had passed entirely clear of the truck without incurring any additional danger.

The automobile was used principally for business of defendant William C. Fry, but was sometimes used by his family with his permission. William C. Fry did not know how to operate the machine, and was accustomed to have it driven for him by his son when the father needed it for business purposes. On the afternoon in question William C. Fry telephoned to his home that Lawrence should wait there for him until William C. Fry would telephone for the son to come down to the city and meet him; but, instead of waiting for further orders, Lawrence started away in the automobile to go to a telephone in order to ascertain where his father was so that he could bring him home. While driving the car under these circumstances, and, before receiving further orders from his father, Lawrence drove the automobile easterly on Sunset boulevard to the place where the accident occurred. Prior to the time of this accident William C. Fry had given a general instruction to his son not to take the car out for more than "a short distance," unless William C. Fry was at home and gave him permission. With this limitation he had not objected to his son taking the machine out for the boy's own purposes.

[1] Inasmuch as the findings of the court are in favor of the defendants, we have made the foregoing statement of facts in part upon undisputed evidence, and, wherever the evidence was conflicting, we have stated the

facts most favorably to the defendants, in accordance with the presumption which on appeal runs in favor of the findings wherever there is a substantial conflict in the evidence.

The court found that it is not true that the defendant Lawrence Fry at the time in question was driving the automobile for the benefit of the defendant William C. Fry and under his direction and control, but, on the contrary, found that it was being driven without the knowledge or consent of William C. Fry and contrary to his express orders and commands. The court further found that the automobile at the time in question was not being driven unlawfully or in a manner contrary to the ordinance, or in a negligent, dangerous, and reckless manner, and found that the plaintiff Lester House at the time and place in question was not lawfully operating the motor truck, and was not attempting to proceed exercising due care and reasonable caution; that the plaintiff Lester House was not driving his truck as close to the right-hand curb as possible, as required by the ordinance; that defendant Lawrence Fry, in order to pass the plaintiff, was compelled to drive over and across the street car tracks lying in the street; that the plaintiff Lester House saw defendant Lawrence Fry, and saw that he was endeavoring to pass the truck by driving by the plaintiff, but that House did not give way to the right as required by the ordinance; and that the said violations of the ordinance by the plaintiff Lester House contributed directly and proximately to cause the accident.

Appellants challenge the sufficiency of the evidence to support these findings of fact, and it becomes our duty to determine whether the evidence to which we have referred is sufficient to sustain these findings.

[2, 3] Section 9 of the ordinance is not applicable to this case. The truck, moving at the rate of 18 miles per hour, could not be said to be traveling "slowly," since the limit of lawful speed under that ordinance, at the place of the accident, is 20 miles. The truck was being operated in violation of section 6, in that it was not kept reasonably near to the right-hand curb. But the fact that the automobile had passed to the left of the truck, with ample space between them, and had a free way open before it, compels the conclusion that the negligence of House, in traveling farther from the curb than he should have done, was not a direct and proximate cause of the collision. Therefore the defense of contributory negligence, pleaded by the defendants in their answer, is not sustained by the evidence.

[4-6] The defendant Lawrence Fry was guilty of negligence, and violated the requirements of section 8, in that he drove to the right, while endeavoring to pass in front of the truck, before his automobile was clear of the truck; and this negligence was the proximate and sole effective cause of the collision. No warning having been given to House of the approach of the automobile, he did not learn of its presence until it was too late for him to avoid the collision by turning to the right (which under section 8 would have been his duty), and his failure to turn to the right was not, under the circumstances, negligence causing or contributing to the occurrence of the collision. It follows that the plaintiffs were entitled to judgment against the defendant Lawrence Fry. "A minor * * * is civilly liable for a wrong done by him. * * *" Civ. Code, § 41.

[7, 8] The court's finding that the automobile was being driven without the knowledge of William C. Fry and contrary to his express order is sustained by the evidence. He had sent a telephone instruction, which was communicated to his son, to wait at home for further orders, and this instruction was disobeyed. But it also appears without conflict that the trip was being made for a purpose within the general scope of the authority of Lawrence Fry as chauffeur for his codefendant, and for the purpose of finding William C. Fry to bring him home, as was customary with them.

"Where the servant acts within the general scope of his authority, notwithstanding the fact that he may be disregarding directions of the employer, the employer may be held liable. 1 Shearman & Redfield on Negligence (5th Ed.) § 145 et seq." Adams v. Wiesendanger, 27 Cal. App. 590, 150 Pac. 1016.

On the facts of this case, the plaintiffs were entitled to recover against both defendants.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 727

PEOPLE v. PITISCI. (Cr. 570.)

(District Court of Appeal, First District, California. Feb. 23, 1916.)

1. CRIMINAL LAW ⊜819—TRIAL—COMMENTS OF COURT.

Prejudicial comments of the trial judge in a prosecution for murder, characterizing the plea of self-defense that deceased took defendant's dagger and stabbed him as absurd, and that a statement of deceased that she would kill defendant rather than let him marry another was a mere idle threat, were not cured by an admonition to the jury not to regard the comments.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1992; Dec. Dig. ⊜819.]

2. CRIMINAL LAW ⊜819 — COMMENTS OF COURT—CURE OF ERRORS.

Though ordinarily an admonition of the trial judge to the jury to disregard misconduct of the judge or prosecuting attorney will, in the absence of affirmative showing of injury, be presumed to remove any prejudice in the minds of the jury, the presumption does not arise where the remarks of the court were calculated to destroy a substantial defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1992; Dec. Dig. ⊜819.]

3. CRIMINAL LAW ⊂=1144(10)—COMMENTS OF COURT—CURE OF ERRORS.
That prejudicial comments of the trial judge in the hearing of the jury were addressed to counsel, and not to the jury, does not raise the presumption that the jury ignored them.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2741, 2749, 2901, 3026, 3028; Dec. Dig. ⊂=1144(10).]

4. CRIMINAL LAW ⊂=419, 420(12)—EVIDENCE —ADMISSIBILITY.
A letter of deceased to her husband is inadmissible in prosecution of another for her murder.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 980–983; Dec. Dig. ⊂=419, 420(12).]

5. CRIMINAL LAW ⊂=670—CONDUCT OF TRIAL —PREJUDICE.
It is error to permit counsel, in offering in evidence an inadmissible letter, which has already been read by the court, to read the letter previous to the offer, since that puts the evidence before the jury, though it is subsequently ruled out.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 757, 1593–1596; Dec. Dig. ⊂=670.]

6. HOMICIDE ⊂=244(3)—SELF-DEFENSE—DEGREE OF PROOF.
One who defends against a charge of murder need establish self-defense only by a preponderance of the evidence, and not beyond a reasonable doubt.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 509; Dec. Dig. ⊂=244(3).]

7. HOMICIDE ⊂=336—TRIAL—INSTRUCTIONS— PREJUDICE.
An erroneous requirement by the trial judge that defendant establish self-defense beyond a reasonable doubt, coupled with erroneous comments as to the weight of defendant's evidence, which characterized it as absurd and showing mere idle threat, is ground for reversal of conviction.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 554, 707; Dec. Dig. ⊂=336.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Tennuncio Pitisci was convicted of murder in the second degree, and, from the judgment and order denying new trial, he appeals. Reversed.

W. J. De Martini and John O'Gara, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LENNON, P. J. The defendant was convicted of murder in the second degree. His defense was self-defense. He appeals from the judgment and order denying him a new trial.

The facts of the case upon which the conviction was sought and secured are substantially these: The defendant at the time of the homicide was an unmarried man of about 25 years of age. He was a Sicilian by birth. The deceased was an Andalusian. They became acquainted some time in the latter part of the year 1912. The deceased was a married woman, and at the time of the homicide was about 22 years of age, and was living apart from her husband because of marital difficulties. The acquaintance between the defendant and deceased developed into a liaison which continued till within two weeks of her death. At about 8 o'clock on the evening of May 8, 1914, the defendant called upon the deceased at her home, where she resided with her father and two brothers, and, save for the presence of her two babies, found her alone. Shortly thereafter Joseph A. Solemi, who resided with his mother in apartments immediately above those occupied by the deceased, heard a woman screaming. He ran down the stairs into the kitchen of the apartment of the deceased, and called out: "What's the matter, Mary?" The deceased cried out: "I am being murdered! I am being killed!" Save for a light in the kitchen, the premises of the deceased were in darkness when Solemi entered, but he proceeded to the room from whence the voice came, and there by the light of a cigarette lighter he discovered the deceased and the defendant lying upon the floor. The deceased was face downwards, and the defendant, with his hand closed over a dagger, was lying upon his back alongside of her with his head resting upon her hips. The police were then called, and an examination showed that both the deceased and the defendant were suffering from several severe knife wounds. One of the policemen attempted to question the defendant as to the cause of the affray, but the defendant made no reply, save to say: "I wish I was dead." The record shows, however, that whatever was said by the defendant at that time to the policeman was said in Italian; and the witness who acted as interpreter and translated what the defendant had said was not certain whether the words were "I wish I was dead" or "I am dying." The deceased succumbed to her wounds on the way to the receiving hospital, and the defendant for several hours was in a semiconscious condition as the result of his injuries.

As a witness in his own behalf the defendant testified upon the trial, in substance, that in the latter part of the year 1913, and during the time he was living in illicit relations with the deceased, he became acquainted with and began to pay court to a young woman of his own nationality, and in January, 1914, became engaged to marry her. The wedding was to take place in the month of July following; and in the meantime the defendant endeavored to sever his relations with the deceased, and to that end removed his residence from San Francisco to San Jose, where on March 21, 1914, he wrote and mailed to her a letter in which he informed her that he intended to marry a girl of his own nationality. The deceased in her answer and in several other letters which she wrote to the defendant at various times showed that she was deeply infatuated with

him, and indicated that she would not be content to give him up. Upon one occasion the defendant visited San Francisco at the request of the deceased, and attempted, though unsuccessfully, to arrange an amicable severance of their relations. In April, 1914, the defendant returned to San Francisco to reside. After he had been in San Francisco for about a week, during which time he had not called upon the deceased, she, uninvited, called upon him several times at his apartments. Two weeks before the homicide he met her at her request on Powell street near Broadway, and she then asked him to leave San Francisco and go to Los Angeles with her. Upon the defendant declining to do so she said: "Everybody says you are going to marry the Italian girl, but before you do so I will kill you." A few days before the homicide the deceased approached defendant in the street, and said to him: "I want you to come to my house. Will you come?" The defendant promised that he would call, and went there accordingly on the evening of the homicide, at about 8 o'clock, as previously narrated. She received him affectionately; she "kissed him and caressed him"; and while they were sitting upon her bed without a light in the room she said to him: "I want you to go to Los Angeles with me because my husband will be here * * * to-morrow." The defendant replied that he did not want to go to Los Angeles for the reason that he had no money and could not get employment there; whereupon the deceased said, "You want to marry the Italian girl?" to which the defendant answered, "Yes." Thereupon the deceased suddenly pushed the appellant back upon her bed and placed one of her hands against either his chest or throat. The defendant always carried a dagger, of which fact the deceased was aware. While he was in that position on the bed and in the dark he felt a stinging sensation in his breast. He felt blood trickling down his body, and then realized that he had been stabbed by the deceased, evidently with his own dagger, which had been extracted by her from the place where he had been in the habit of carrying it on his person. Thereupon the defendant grappled with the deceased. She still fought with him and stabbed him, but finally he secured possession of the dagger, and in the frenzy of the fight stabbed her with it until she fell at his feet, and he, exhausted, sank alongside of her.

The foregoing statement of the facts of the killing and the circumstances immediately preceding and attending it, as narrated by the defendant, constituted the foundation of his plea of self-defense; and, although that statement is incomplete in many matters of minor detail, nevertheless it will suffice for the consideration of the points presented in support of the appeal, viz.: (1) Misconduct on the part of the trial judge in the presence of the jury resulting in substantial injury to the defense upon which the defendant relied; (2) alleged prejudicial misconduct of the district attorney; and (3) the giving of an instruction which erroneously charged the jury that the burden was upon the defendant to establish the existence of a fact upon which he relied in support of his plea of self-defense to a moral certainty and beyond a reasonable doubt.

The assignment of misconduct on the part of the trial judge deals primarily with certain comments of the trial judge made during the endeavor of counsel for the defendant to show in evidence, in support of his plea of self-defense, by the testimony of a witness upon the stand, that the deceased had made a threat that she would kill the defendant "if he married the Italian girl." The proffered proof was objected to by the district attorney upon the ground that it was irrelevant, incompetent, and immaterial, and the trial judge apparently was of the opinion that it was not admissible in the absence of a showing that the threat of the deceased had been communicated to the defendant. The discussion of this question was had in the presence of the jury, and occupied a large part of two trial days. Upon this phase of the case the record speaks best, and is as follows:

"Q. You were on intimate relations with the deceased? A. Yes, sir. Q. She had visited at your house? A. Yes, sir. Q. During the early part of last winter or the latter part of the fall of last year did you ever have any conversation with the deceased regarding a divorce between herself and her husband? A. Yes, sir. Q. Also a conversation regarding trouble between herself and her husband? A. Yes, sir. Q. Now what was that conversation?

"Mr. Berry (deputy district attorney): Just one moment. We object to that question on the ground that it is incompetent, irrelevant, and immaterial.

"The Court: Sustained.

"Mr. De Martini (counsel for defendant): Q. During the months of February and March did you have any conversation with the deceased relative to—

"The Court (interrupting): Well, now, Mr. De Martini, I don't see how you can expect to prove a conversation with the dead woman by this woman.

"Mr. De Martini: Well, if your honor please, we want to show—

"The Court (interrupting): Well, you can't show it that way.

"Mr. O'Gara (associate counsel for the defendant): If your honor please, the point is this: We expect to show—whether by this question or another I am not able to say— * * * to show threats made by the deceased against the life of the defendant in regard to taking the life of the defendant—

"The Court: Threats?

"Mr. O'Gara: In the course of conversations threats made by the deceased against the life of the defendant—

"The Court: And communicated to this defendant? (Argument between court and counsel and reading of authorities.) That would not assist you, Mr. O'Gara.

"Mr. O'Gara: I am afraid your honor has not read the part I wish to call your honor's attention as to threats made showing motive.

"The Court: Just a mere idle statement made by this deceased and not communicated to the

defendant, in the absence of anything else, is not proper.

"Mr. O'Gara: I wish to point out to your honor that this certain question was discussed by the decision in this case, and threats were made against the life of this defendant, and whether it was communicated or not would not make any difference. In other words, this is the point, your honor: Where it is the claim of the defendant that the other party was the aggressor, and the prosecution claims that it was the defendant who was the aggressor—

"The Court: Well, I have read the decision. I understand it and your point here—

"Mr. O'Gara: Well, I wanted to make a statement to your honor of my point of view.

"The Court: I don't care about any argument. * * *

"Mr. O'Gara: I will offer at this time to prove by this witness that in the conversation referred to the deceased said to her that the defendant was going with an Italian girl and expected to marry her, but that before the defendant married that Italian girl she, the deceased, would kill him. I offer to show that was precisely stated by the deceased at that time and place by this witness.

"The Court: You don't propose to show that this statement was communicated to the defendant?

"Mr. O'Gara: No, your honor; I do not.

"The Court (after argument): I will not hear any more argument. As I say, in the decisions which you have suggested the facts are quite different than are the facts that appear here. In other words, I am satisfied that those facts do not appear here in this case. I don't want the jury to hear any more argument. I will continue the rest of the hearing until to-morrow morning and give you an opportunity to be heard then. Do I make myself plain now?

"Mr. O'Gara: Yes; I understand your honor exactly."

At the resumption of the trial on the following morning the record shows the following:

"The Clerk: The jurors are present, your honor.

"Mr. O'Gara: If your honor please, in relation to the question which was under discussion when the court took an adjournment last evening I have brought to the court this morning some cases on which I rely, and am prepared to submit them to your honor.

"The Court (addressing Mr. Berry): What is the proposition?

"Mr. Berry: If counsel will permit, it will not be necessary to have him continue further on this subject; for I have examined authorities submitted by counsel, and also have delved into other authorities, and I find that under such circumstances as these evidence in this action is admissible, though not being shown to have been communicated. There is one case, and that is where there is some doubt as to who started the affray resulting in the death of the deceased.

"The Court: Yes; but I doubt if you will find any declaration of any court on any facts analogous to those I assume would be developed here. In all those cases I am familiar with there was some evidence of a quarrel, or where both parties were in an excited state of mind; but here the defendant himself is the only person who had a weapon; it is not claimed that this woman had a weapon, but he went to this place, the place of the killing, or the alleged killing, with this weapon. It is claimed she took it from him—an absurdity. Now, you keep in mind that the defendant himself goes to this place, and he goes armed, and he is the only person who is armed. It is not claimed that the deceased was armed.

"Mr. O'Gara: Yes; but there may be half a dozen people in this room who have got pistols in their pockets—

"The Court (interrupting): Confine your argument to the facts. I have stated all the facts, have I not?

"Mr. O'Gara: No, your honor; I don't think you have stated all the facts.

"The Court: I have stated the essential parts as we could gather them.

"Mr. O'Gara: The defendant went there without any thought or intention that there was to be trouble.

"The Court: But he did go there with a weapon and with the weapon that it is alleged caused the death of the deceased. Your statement as to whatever quarrel developed or whatever happened there which led to the death of the decedent was simply an act on her part of taking the weapon from his inside pocket."

Subsequently the proffered proof of the threat made by the deceased was admitted in evidence, and the witness upon the stand, in answer to proper questions, testified, in effect, that the deceased had said to her that, if the defendant married the Italian girl, she would kill him.

[1] The comments of the trial judge made in the foregoing excerpt from the record, wherein he belittled the effect of the proffered testimony, and discredited the defendant's plea of self-defense, were so obviously improper, that nothing can be said in justification of them. The Attorney General on behalf of the people does not attempt a justification of the objectionable comments, nor is it contended that they did not seriously prejudice the defendant and damage his defense in the eyes of the jury; but it is contended that such injury and damage were cured and corrected by the special charge of the trial court given to the jury upon the conclusion of the argument upon the admissibility of the evidence in question, and that therefore the defendant now has no cause for complaint.

[2] We cannot agree with this contention; and in failing to do so we have in mind the rule that ordinarily an admonition of the trial judge to the jury to disregard misconduct of either the judge or district attorney will, in the absence of an affirmative showing of injury, suffice to remove any prejudice resulting therefrom in the minds of the jury. The rule in this behalf is founded upon the presumption that the jury will heed the admonition of the trial judge; but we do not understand that that presumption prevails in the presence of an impropriety upon the part of the trial judge such as is presented for review in the present case, which in its very nature was calculated to weaken, if not utterly destroy, a legitimate and substantial defense apparently interposed in good faith. That such was the tendency of the comments complained of there can be no doubt. The declaration of the trial judge that the claim that the deceased took the dagger from the defendant's person was "an absurdity" expressed the opinion of the trial judge as clearly and as convincingly as the English language could express it that the defendant's plea of self-defense was founded in falsehood; and the trial judge's characterization of the threat relied upon to support that defense as "a mere idle statement

made by the deceased" could have had no other effect in the minds of the jury than to seriously impair, if not utterly destroy, the probative value and effect of the evidence subsequently offered and admitted to establish a material fact in the defendant's favor.

In the case of People v. Conboy, 15 Cal. App. 97, 113 Pac. 703, this court reiterated and reaffirmed the doctrine enunciated by the Supreme Court of Alabama (Hair v. Little, 28 Ala. 236) that:

"It is of the highest importance in the administration of justice that the court should never invade the province of the jury, should give them no intimation as to its opinion upon the facts, but should leave them wholly unbiased by any such intimation, to ascertain the facts for themselves."

When we stop to consider that "from the high and authoritative position of a judge presiding at the trial before a jury his influence over them is of vast extent" (McMinn v. Whelan, 27 Cal. 300, 319), and "that juries, especially in cases which are strongly litigated upon the facts, watch with anxiety to gather from the court some intimation as to what * * * their findings should be upon the facts" (Hair v. Little, supra), and "the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge * * * in a closely balanced case" (People v. Williams, 17 Cal. 142, 147), we cannot conceive that the comments complained of in the present case, although addressed to the counsel for the defendant, did not have the effect of irresistibly and indelibly impressing upon the minds of the jury the belief that it was the opinion of the trial court that the defendant was guilty as charged.

[3] It is idle to argue, and it would be bordering upon the ridiculous for this or any other court to say, that because the objectionable remarks of the trial judge were not addressed directly to the jury, it must be presumed that the jury ignored them. It was but natural for the jury to listen to and become interested in the discussion between court and counsel, and any presumption to the contrary would do violence to the every day experience and observation of lawyer and layman alike.

As was said in the case of State v. Harkin, 7 Nev. 383:

"It is evident that the opinion of the court can be as effectively conveyed to the jury by expressing it in their hearing while ruling upon an objection to the evidence as by embodying it in what purports to be a declaration of law for their instruction. * * * The right to a decision on the facts, uninfluenced and unbiased by the opinions of the judge, has been deemed worthy of a constitutional guarantee. It cannot be lawfully denied by the simple evasion of looking at counsel instead of the jury, or of foisting the opinion into a ruling upon the testimony."

To permit the trial judge to say in the presence of the jury, under the guise of a ruling upon the admissibility of evidence, that which the Constitution prohibits him from saying directly to the jury, would be to put the seal of approval upon a mere subterfuge of which it has been said that:

"The wit of man could scarcely devise a more palpable violation of that provision of our organic and statute law, which prohibits judges from charging juries in respect to matters of fact." State v. Harkin, supra.

Of what avail, then, was it for the trial judge to say to the jury, "I want you, gentlemen, to understand that in all this discussion there is no intent upon the part of the court to show his belief in the testimony, either the truth or the falsity of it; nor does the court intimate any personal view as to the value of the testimony, or of the claim made by counsel of the defendant or the state"? Manifestly this was not a retraction of the previous remarks of the trial judge which indicated that he was strongly of the opinion that the defendant's defense of self-defense was a preposterous fabrication, and that the proof proffered in support thereof was puerile. At best, the trial judge did no more than to disclaim that he had expressed or intended to express an opinion upon the merits of the case; but the verity of the disclaimer was impugned by the fact that he had actually and emphatically expressed an opinion upon the most vital facts of the defendant's case. The fact that such opinion may have been unintentionally expressed did not tend to lessen its weight with the jury, and consequently it cannot be said that the charge in question sufficed to efface the prejudicial effect of the opinion. People v. Willard, 92 Cal. 482, 489, 28 Pac. 585; People v. Kindleberger, 100 Cal. 367, 34 Pac. 852; People v. Chew Sing Wing, 88 Cal. 268, 272, 25 Pac. 1099; People v. Conboy, supra.

[4, 5] A letter addressed to the deceased, and purporting to have been written by her husband, was offered in evidence by the district attorney. When the letter was first offered in evidence objection was made upon behalf of the defendant that it was hearsay, etc., whereupon the trial court upon its own motion read the letter, and then expressed doubt as to its admissibility. Thereupon the district attorney withdrew his offer to put the letter in evidence, but later on in the course of the trial he made another effort to get the letter in evidence, and, notwithstanding the fact that the court had previously read the same, stated its contents to the court in the presence and hearing of the jury.

The evidence sought to be shown by the letter was clearly incompetent, and the trial court finally so ruled. The effect of the action of the district attorney in stating the contents of the letter was to anticipate an adverse ruling, and thereby indirectly to get before the jury that which he was not permitted by the law to put directly in evidence. Counsel for the defendant promptly objected to this procedure; but the trial court, in-

stead of condemning it, commended the district attorney by assuring him that he had "a perfect right to make his offer," notwithstanding the fact that the court was already fully informed of the contents of the letter. In view of the attitude of the trial court, it would have been useless to request that the jury be admonished not to pay any heed to the statement of the district attorney. Although we are not convinced that the course pursued by the district attorney contributed materially to the verdict, nevertheless it was an irregularity which should not be permitted to pass unnoticed; for, as was said in the case of People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719:

"Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. * * * We make due allowance for the zeal which is the natural result of such a battle as this, and for the desire of every lawyer to win his case, but this should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it."

[6] At the request of the prosecution the trial court, in effect, charged the jury not to consider the alleged threat of the deceased to kill the defendant unless that fact had been established in evidence beyond all reasonable doubt. This instruction was clearly erroneous. The defendant in a criminal case is not required to establish a fact in his favor beyond a reasonable doubt. It is the settled rule that such fact need be proved only by a preponderance of the evidence. People v. Coffman, 24 Cal. 230, 236; People v. Mitchell, 63 Cal. 480; People v. Miller (Sup.) 154 Pac. 468.

[7] Under the circumstances of the present case the fact that the deceased had threatened to take the life of the defendant was a most material fact in his favor; and we have no doubt but that the instruction complained of, considered in connection with the previous misconduct of the trial judge, resulted in substantial prejudice to the defendant. The effect of such misconduct was, as previously pointed out, to cripple the evidence of the threat, and the effect of the erroneous instruction under consideration was practically to debar the jury from considering that evidence at all.

We have painstakingly examined the evidence produced upon the whole case in an endeavor to sustain the judgment upon the theory that, notwithstanding the errors and irregularities complained of, the conviction of the defendant was not a miscarriage of justice. We cannot conscientiously come to any such conclusion. As we have previously stated, the defense interposed upon behalf of the defendant was, so far as the record before us discloses, a substantial one and apparently advanced in good faith, and supported by evidence, direct and circumstantial, which merited the serious and unbiased consideration of the jury. On the other hand, the theory of the prosecution that the motive for the killing was not as the defendant claimed, but was to be found in the fact that the deceased rejected the advances of the defendant, was rested, in so far as we have been able to ascertain from the record, largely, if not entirely, upon proof of the fact that upon one occasion the deceased had publicly repulsed and repudiated the defendant.

We do not wish to be understood as intimating that, if the defendant had been given a fair trial in accord with the settled and generally well-understood procedure provided by the law, the evidence adduced upon the whole case would not have supported the verdict and judgment. All that we mean to say in this behalf is that we are convinced that the error of the instruction complained of, coupled with the objectionable comments of the trial judge, operated to prevent the jury from giving that fair and impartial consideration to all of the evidence which the law demands before a verdict can be rightfully reached.

The judgment and order appealed from are reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

(30 Cal. App. 36)

PEOPLE v. JOY. (Cr. 335.)

(District Court of Appeal, Third District, California. March 1, 1916.)

1. STATUTES ⟸100—ENACTMENT—VALIDITY—SUBJECTS AND TITLES OF ACTS.

The title of an act may be general, and need not embrace an abstract or catalogue of its contents.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136–139; Dec. Dig. ⟸109.]

2. STATUTES ⟸118(1) — VALIDITY — TITLE OF ACTS.

St. 1911, p. 602, § 13, entitled "An act to provide for the regulation of the traffic in alcoholic liquors, making it a public offense to sell, give away, or distribute alcoholic liquors within certain territory," is within the constitutional requirement that every act shall embrace but one subject, which shall be expressed in the title, although it provides a penalty for furnishing liquor, and the word "furnish" is not used in the title; the title being comprehensive enough to cover a furnishing of liquors.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158, 159; Dec. Dig. ⟸118(1).]

3. INTOXICATING LIQUORS ⟸146(1)—REGULATION—"FURNISH."

The word "furnish," as used in St. 1911, p. 602, § 13, prohibiting a furnishing of alcoholic liquors in certain territory, means to supply, to offer for use, to give, or to hand.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 163; Dec. Dig. ⟸146(1).]

4. CONSTITUTIONAL LAW ⟸42—VALIDITY OF STATUTE—PERSON ENTITLED TO QUESTION—ILLEGAL GIFT—NO-LICENSE TERRITORY.

The objection that St. 1911, p. 602, § 13, is invalid in that the title fails to embrace the furnishing of intoxicating liquors, even if a valid objection, is of no avail to one properly charged under the statute with giving away

such liquors, where the evidence sustains the charge of the giving.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. ⊂ 42.

For other definitions, see Words and Phrases, First and Second Series, Furnish.]

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Joe Joy was convicted of giving away alcoholic liquors unlawfully in no-license territory, and he appeals. Affirmed.

J. E. Strong, of Woodland, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of the offense charged as follows:

"The said Joe Joy, of Woodland, on or about the 20th day of October, 1915, and within the boundaries of the city of Woodland, county of Yolo, state of California, then and there being, did then and there willfully and unlawfully furnish, distribute and give away alcoholic liquors, and the said city of Woodland then and there being an incorporated city and no-license territory," etc.

It is not disputed that said city constitutes no-license territory, and that the prosecution was had under section 13 of Statutes of 1911, p. 599, providing that:

"It shall be unlawful for any person, corporation, firm, company, association or club, as principal, agent, employee or otherwise, within the boundaries of any no-license territory to sell, furnish, distribute or give away any alcoholic liquors except as provided in section 16 hereof."

The principal contention of appellant is that said statute and also the information filed by the district attorney are broader than the title of said act permits, and therefore unwarranted in and to the extent that each contains the word "furnish."

The title of said act, as far as necessary to quote here, is:

"An act to provide for the regulation of the traffic in alcoholic liquors by establishing local option, * * * making it a public offense to sell, give away or distribute alcoholic liquors within such territory, with certain exceptions, and providing penalties for such offenses."

[1] It is settled that the title of an act may be general and need not embrace "an abstract or catalogue of its contents." Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; Estate of McPhee, 154 Cal. 385, 97 Pac. 878; Pritchard v. Whitney Estate Co., 164 Cal. 564, 129 Pac. 989; Matter of Coburn, 165 Cal. 211, 131 Pac. 352.

The object of the constitutional provision requiring every act to embrace but one subject, which shall be expressed in its title, is to prevent legislators and the public from being entrapped by misleading titles to bills, whereby legislation relating to one subject might be obtained under the title of another; and it must receive a reasonable, and not a narrow or technical, construction. Abeel v. Clark, supra.

[2] Within the spirit of the foregoing declarations it must be held that the provision in the title in reference to the regulation of the traffic in alcoholic liquors in no-license territory is sufficiently comprehensive and accurate to warrant the inhibition of the statute directed against the furnishing of liquor therein. Many cases illustrating the application of the principle have been cited by the Attorney General, but it is sufficient to refer to Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522, wherein the subject is learnedly discussed and the court held that the title, "An act to prohibit sale of intoxicating liquors to minors," was sufficient to justify the provision in the body of the act making it unlawful "to sell, dispose of, barter or give" such liquors to minors, "as being the means to effect the chief design of the act as expressed in the title." The case is reported with an interesting note attached thereto in 74 Am. Dec. 522.

Appellant also complains of an instruction given by the court following the language of the information and containing the word "furnished," but the objection to the instruction is similar to that urged against said information, and it has no good reason in its support.

[3] The definition given by the court of the word "furnish" is also criticized by appellant, but it seems to be in accordance with the standard lexicographers, as follows: "To supply; to offer for use, to give, to hand."

[4] Moreover, it must be apparent from the testimony in the case that the foregoing discussion—brief as it is—might well be eliminated. The evidence shows that the appellant gave the liquor away. In fact, it is not disputed that there is sufficient showing of the violation of the law in that respect. The whole consideration as to the word "furnish" may be disregarded as involving nothing more than mere abstract error which could not have prejudiced appellant. Assuming that the law improperly contains the word "furnish" and the information was defective in the same respect, it simply presents an instance of redundance, and the conviction of the offense of giving away the liquor, which was properly charged, is not affected.

We can see no shadow of merit in the appeal, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

30 Cal. App. 81

FAIRBANKS, MORSE & CO. v. ZIMMERMAN. (Civ. 1780.)

(District Court of Appeal, Second District, California. March 6, 1916.)

1. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS—CONCLUSIVENESS.

Findings on substantially conflicting evidence must be deemed fully supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸ 1011(1).]

2. CONTRACTS ⟸280(5) — INSTALLATION OF PUMP—CONSTRUCTION.

Under a contract whereby plaintiff was to sell, deliver, and install at defendant's well, bored to irrigate about 75 acres of young alfalfa, an engine, pump, and equipment guaranteed to lift 720 gallons per minute, provided the water in the well when pumping did not lower more than 20 feet below the pump, and that it should not be liable for any trouble caused by reason of the well giving up sand or any substance other than clear water, it was the duty of defendant to furnish a developed well producing, when pumped, either the guaranteed capacity of the plant, or at least a sufficient quantity to properly irrigate the alfalfa field, before he could claim damages for any loss by reason of the plant not pumping a sufficient amount of water.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1258; Dec. Dig. ⟸280(5).]

3. CONTRACTS ⟸322(3)—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

In such case evidence *held* not to support a finding that the well in question had been developed so as to produce an ample supply of water for irrigating the field of alfalfa.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1534; Dec. Dig. ⟸322(3).]

4. CONTRACTS ⟸322(3)—BREACH—EVIDENCE—ADMISSIBILTIY—SIMILAR EFFECTS.

The fact that a well of one depth a mile distant produced an adequate quantity of water to irrigate a certain tract of land upon which one kind of crop was growing was no evidence that the well in question must have produced a sufficient quantity of water to irrigate 75 acres of alfalfa.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1534; Dec. Dig. ⟸322(3).]

5. EVIDENCE ⟸9—JUDICIAL NOTICE—WATER-BEARING STRATA.

The court is not justified in taking judicial notice that the flow of water in one well is evidence of a like flow in another well of a different depth a mile or so distant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 8; Dec. Dig. ⟸9.]

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by Fairbanks, Morse & Co., a corporation, against W. A. Zimmerman, with counterclaim by defendant. From a judgment that plaintiff take nothing by its action and that defendant have judgment in the sum wherein he was found to have been damaged, and from an order denying its motion for a new trial, plaintiff appeals. Reversed in part and affirmed in part.

Stutsman & Stutsman and Maurice F. Enderle, all of Los Angeles, for appellant. E. E. Keech, of Santa Ana, for respondent.

SHAW, J. Defendant was the owner of a farm in Kings county, upon which he had growing about 75 acres of young alfalfa. For the purpose of developing a supply of water with which, by means of a pump, to irrigate this field, he bored a 12-inch well 250 feet in depth, with a pit wherein to install a pump. He made a contract with plaintiff whereby the latter agreed to sell, deliver, and install at this well an engine, pump, and equipment which it guaranteed to be capable of lifting 80 inches of water, equivalent to 720 gallons per minute, provided the water in the well did not, when pumping, lower more than 20 feet below the pump. The contract provided that plaintiff should not be held "liable for damage done or any trouble caused by reason of well * * * giving up sand, gravel, chips, or any substance other than clear water." Plaintiff installed the plant in the well which defendant had prepared therefor. The action is to recover the sum of $1,082 which defendant agreed to pay for the plant, plaintiff alleging in its complaint that it had fully complied with the terms of the contract and guaranty contained therein; all of which allegations defendant in his answer denied, and in a counterclaim filed therewith alleged that the plant and equipment did not comply with the terms of the contract, in that it was defective and failed to do the work and raise the water as guaranteed by plaintiff, by reason whereof he had sustained damage.

The court found that the plant and equipment so installed did not comply with the terms of the contract; that at the time of entering into the contract defendant had 75 acres of young alfalfa and a 12-inch well 250 feet in depth, with an ample supply of water and a suitable pit, as described in said contract, already excavated and prepared for the installation of such an engine and equipment at said well; "that plaintiff knew the defendant's purpose in entering into said written contract was thereby, without delay, to secure from said well, and by said engine and equipment, a supply of water for irrigating said alfalfa, * * * and, had plaintiff so installed in workmanlike manner upon said property said engine and equipment capable of lifting 80 inches of water, equal to 720 gallons per minute, as in said written contract provided and guaranteed, defendant would have been enabled thereby to so irrigate said lands and perfect and produce successive crops of alfalfa thereon"; that the equipment installed by plaintiff pursuant to said contract upon said property was not, and never has been, capable of lifting 80 inches of water, as guaranteed in said written contract, or any other amount; and that plaintiff has failed to make delivery of the machinery described in said written contract by reason of which failure defendant was unable to secure any water from said

well for irrigating said alfalfa field, in consequence of which the alfalfa died—all to his damage in the sum of $1,692.50. From these findings, as conclusions of law, the court found that plaintiff should take nothing by its action, and that defendant have judgment in the sum wherein it was found he had been damaged. The appeal is from the judgment and an order denying plaintiff's motion for a new trial.

[1] Plaintiff insists that neither the findings of the court to the effect that it failed to comply with the contract or to furnish and install the machinery in accordance with the terms thereof, nor the finding as to the resultant damage therefrom to defendant by the loss of his field of alfalfa, are supported by the evidence. There is a substantial conflict of evidence, not only touching the question as to whether or not the machinery installed was free from defects and properly installed, but also as to whether the plant and equipment were capable of doing the work in accordance with the guaranty of plaintiff. For these reasons the findings upon which the court based its conclusion that plaintiff should not recover upon the contract must be deemed fully supported by the evidence. Indeed, as we understand appellant's counsel, they do not otherwise seriously contend.

[2, 3] Appellant's chief contention is that there was no evidence to support the finding upon which the court based its judgment in favor of defendant for damages for the loss of his field of alfalfa. Conceding the pumping plant installed by plaintiff to have been, as found by the court, incapable of lifting any quantity of water, the loss of defendant's crop and resulting damage could not have been attributed to such fact, unless it was affirmatively shown by defendant that the well, with the use of a pumping plant, as guaranteed by plaintiff, was capable of supplying a sufficient quantity of water with which to properly irrigate the land. Covering this point, the court found that defendant had bored upon his land a well wherein he had developed and which produced an ample supply of water for irrigating the field of alfalfa. This finding appears to be without any sufficient evidence to support it. Indeed, counsel for respondent concedes that, by reason of the well being undeveloped, it did not produce a full supply of water; that the process of development, which required a period of some two or three weeks, consisted in pumping out from the bottom of the cylinder the surrounding sand and fine substance until a cavity was made having a surface of sufficient area through which the water percolated with sufficient rapidity to maintain a supply therein. There is nothing in the contract, however, which imposed upon plaintiff the duty of spending two weeks or more in pumping sand from the well in order to develop a supply of water therein. In fact, the provision quoted from the contract, to the effect that plaintiff should not be liable for damage done by reason of the well producing sand or substance other than clear water tended to negative the existence of such obligation; and the claim is also inconsistent with the fact that under the terms of the contract plaintiff was required to operate the plant two days only, when defendant was to take charge of its operation. As we construe the contract, it was the duty of the defendant to furnish a developed well producing, when pumped, if not the guaranteed capacity of the plant, then at least a sufficient quantity of water to properly irrigate the alfalfa field, before he could claim damages against plaintiff for any loss by reason of the plant not pumping a sufficient amount of water. The only evidence of a direct character touching the capacity of the well tended to show that, when the pump was started, the water in the well was quickly exhausted, indicating an insufficient flow to maintain the water at a level to be picked up by the pump.

[4, 5] Respondent, however, claims that there were other wells in the vicinity of varying depths and ranging in distance from the well in question a quarter of a mile to a mile therefrom, which, after being fully developed, produced water in sufficient quantity to irrigate the lands tributary thereto. This evidence is not only vague and uncertain, since the quantity of water produced in such wells is not shown, but the fact that a well of one depth a mile distant produced an adequate quantity of water to irrigate a certain tract of land upon which one kind of crop was growing constitutes no evidence that the well in question must have produced a sufficient quantity of water to irrigate 75 acres of alfalfa. Respondent suggests that the court should take judicial notice of the geological formation and water-bearing strata existing in Kings county. We know of no authority sustaining such contention, and respondent presents none, under which the court would be justified in taking judicial notice that the flow of water in one well is evidence of a like flow in another well of different depth a mile or so distant. It devolved upon defendant to affirmatively show that he had developed a sufficient amount of water in the well which, had the pumping plant been what it was guaranteed to be, would, if incapable of pumping 720 gallons per minute, at least have lifted a sufficient volume of water to irrigate his field of alfalfa. From aught that appears to the contrary, the lack of a sufficient amount of water produced by the well and not the defective pump, was the proximate cause of the loss.

In our opinion, the evidence is wholly inadequate to support the finding of the court that the well in question had an ample supply of water developed therein, without which

plaintiff could not be liable in damage to defendant for the loss of his crop for want of proper irrigation.

For this reason that part of the judgment wherein it was adjudged that defendant should recover from plaintiff the sum of $1,092.50 as damages and the order denying a new trial of the issue as to plaintiff's right thereto are reversed, and the judgment denying plaintiff's right to recover upon the contract and that part of the order denying a new trial as to such right are affirmed.

We concur: CONREY, P. J.; JAMES, J.

29 Cal. App. 768

ROBERTS v. JUSTICE'S COURT OF LOS ANGELES TP. et al. (Civ. 1732.)

(District Court of Appeal, Second District, California. Feb. 25, 1916.)

1. JUSTICES OF THE PEACE ⟸127—JUDGMENT—VACATION.

A justice cannot set aside his judgment on evidence not in the docket or files.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 401; Dec. Dig. ⟸127.]

2. JUSTICES OF THE PEACE ⟸81(1), 119(3)—JUDGMENT—JURISDICTION.

The fact that the justice's record shows that service of summons was not had upon the defendant within 3 years after the commencement of the action does not deprive the justice of jurisdiction, or render the judgment void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 258, 375; Dec. Dig. ⟸81(1), 119(3).]

3. JUSTICES OF THE PEACE ⟸91(1) — SUMMONS—SERVICE WITHOUT THE COUNTY.

Under Code Civ. Proc. § 848, subd. 2, prohibiting the service of a justice's summons outside the county, except in an action on written contract to be performed at a particular place, by a defendant residing in another county, an allegation of written contract and place of payment *held* to authorize service in county of defendant's residence.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 307–309, 323; Dec. Dig. ⟸91(1).]

4. JUSTICES OF THE PEACE ⟸119(3)—JUDGMENT—VACATION—BURDEN OF PROVING IMPROPER SERVICE.

The judgment of a justice of the peace is not void because the record fails to disclose that a summons served out of the county was served in the county of defendant's residence; the burden of proving improper service being on the defendant.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 375; Dec. Dig. ⟸119(3).]

5. JUSTICES OF THE PEACE ⟸127—JUDGMENT—VACATION.

Under Code Civ. Proc. § 859, providing that a justice's court may vacate a default judgment for mistake, inadvertence, surprise, or excusable neglect, upon an application supported by affidavit of good cause made within 10 days after notice of entry of the judgment, the justice cannot vacate a judgment not void on its face on a motion not supported by such affidavit nor made on the grounds above stated.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 401; Dec. Dig. ⟸127.]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Certiorari by R. G. Roberts against the Justice's Court of Los Angeles Township and another to review an order vacating a judgment. From an order annulling the justice's order, respondent Francis appeals. Affirmed.

Maltman & Clark and Jas. L. Patten, all of Los Angeles, for appellant. Thos. C. Ridgway and Julius V. Patrosso, both of Los Angeles, for respondent.

CONREY, P. J. Certiorari. This is an appeal from an order of the superior court annulling an order of the justice's court of Los Angeles township in Los Angeles county, vacating and setting aside a default judgment theretofore entered in the justice's court in an action entitled Roberts v. Francis. The complaint in that action was filed and summons duly issued on October 14, 1910. On February 21, 1914, a certificate, in due form to authorize service in another county, was attached to the summons by the clerk of the superior court of Los Angeles county. On March 18, 1914, the summons was filed in the justice's court, with a return showing that the summons and copy of complaint were served on the defendant in the county of Imperial on the 25th day of February, 1914. The time limited for the appearance of a defendant in a justice's court where he has been served outside the county in which the action is brought is 20 days. Code Civ. Proc. § 845. No appearance having been made in that action, judgment by default was entered on the 21st day of March, 1914. On July 18, 1914, pursuant to notice theretofore served on plaintiff's attorney, the defendant presented a motion in the justice's court for an order setting aside the judgment and that the action be dismissed, and said motion was granted. The grounds of the motion were as follows:

"That the court at the time said judgment was rendered had not jurisdiction of the person of the defendant and that jurisdiction of the person of the defendant cannot be had in said action for the following reasons: (1) No copy of the complaint was ever served upon defendant; (2) the name of the attorney who appeared for plaintiff was not indorsed upon the copy of the summons served upon the defendant; (3) service of summons was not had upon the defendant within 3 years from the commencement of the action. The motion will be made upon the docket entries in said cause, the papers, pleadings, records, and files therein, and upon oral testimony and documentary evidence to be produced at the hearing of the motion."

Thereafter plaintiff filed his petition in the superior court for a writ of review, and on the return to that writ the facts appeared as hereinabove stated. The respondent appeals from the superior court's order annulling said order made July 18, 1914, in the justice's court.

In section 859 of the Code of Civil Procedure, it is provided that a justice's court

may, on such terms as may be just, "relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor." The motion made and granted on July 18th was not supported by affidavit and was not made upon any of the grounds referred to in section 859. Appellant insists that although his motion was not made within the time nor for any reason specified in section 859, the justice had power to make the order because the judgment was void upon its face. This contention as to a void judgment finds support in some of the decisions. American Type Founders Co. v. Justice's Court, 133 Cal. 319, 65 Pac. 742, 978; Newman v. Barnet, 165 Cal. 423, 132 Pac. 588. The principle recognized in these cases is that since in contemplation of law a judgment which by mere inspection of the record is shown to be void is no judgment at all, an order of a justice purporting to set aside such a judgment may be said to be nothing more than a correction of his docket so as to specifically and affirmatively state the fact already appearing, that there is no such judgment. That this may be done by a superior court is settled beyond question. Grannis v. Superior Court, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23.

On the other hand, respondent relies upon a line of decisions wherein the authority of a justice of the peace to set aside a judgment rendered by him is denied. The rule as stated in these cases is based upon the fact that justices' courts are of narrowly limited jurisdiction. Winter v. Fitzpatrick, 35 Cal. 269; Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. 849; Simon v. Justice's Court, 127 Cal. 45, 59 Pac. 296. "Inferior courts cannot go beyond the authority conferred upon them by the statute under which they act. They can assume no power by implication, and must keep within the power expressly given." So it was determined that a justice's court cannot take any judicial action modifying or recalling any of its judgments, except in the specific instances where such power is given by statute.

In Storey v. Mueller, 21 Cal. App. 301, 131 Pac. 763, it is said that Winter v. Fitzpatrick, 35 Cal. 269, was "a case wherein the statutory time had not elapsed between the service of summons and the rendition of the judgment." If this were so, the judgment, which was by default, necessarily would have been void; but if we refer to the terms of the Practice Act in force at the time of rendition of the judgment which was under review in Winter v. Fitzpatrick, we find that that judgment was not necessarily void. Section 541 of the Practice Act (St. 1851, p. 136), as amended in 1854 (Stats. 1854, p. 67), was not again amended until March 30, 1868. (Stats. 1867–68, p. 551.) The proceedings under review in Winter v. Fitzpatrick occurred in January and February, 1868. Under the terms of section 541 of the Practice Act as then in force, the summons might have required the defendant to appear on a day earlier than the date of the judgment in that case. Therefore we are not able to say that the judgment was void, unless proved so by other evidence. It may be that in that instance, as was also the case in Weimmer v. Sutherland, and Simon v. Justice's Court, the order made by the justice attempting to set aside his judgment was based upon evidence other than the docket and other than the papers on file. This, it was held, he could not do.

[1] It clearly appears that such attempted judicial action is beyond the power of the justice, even though it be admitted that possibly he has the right to make an order canceling his entry of a judgment where the judgment is void upon its face. We do not believe that the decision in Newman v. Barnet, supra, was intended to affirm the jurisdiction of a justice of the peace to receive evidence and determine facts after judgment, upon a question of this kind.

[2] Turning now to the order of July 18, 1914, which is under review in this action, and to the grounds of the motion upon which that order was based, we find that the judgment did not appear to be void for any of the reasons named in the notice of motion. The return to the summons showed that a copy of the complaint was served upon the defendant. The summons did have upon it the name of the plaintiff's attorney, and the return showed that the constable had served a copy thereof. The third reason stated was that service of the summons was not had upon defendant and return made within 3 years from the commencement of the action. This was true, and so appeared on the face of the record, but the fact was not sufficient to deprive the justice of jurisdiction. Hubbard v. Superior Court, 9 Cal. App. 166, 98 Pac. 394; Pistolesi v. Superior Court, 26 Cal. App. 403, 147 Pac. 104.

But the appellant claims that the judgment was void, and that this fact so appears from a mere inspection of the record thereof, because the attempted service of summons upon him was made in Imperial county, and it does not affirmatively appear that when served he was a resident of that county, nor that at the time of commencement of the action he was a resident of Los Angeles county. Section 848 of the Code of Civil Procedure, relating to actions in justices' courts, states that:

"The summons cannot be served out of the county wherein the action is brought, except in the following cases: * * * 2. When the action is brought against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case the summons may be served in the county where he resides; * * * 4. In all cases where the defendant was a resident of the county when the action was brought, or

when the obligation was incurred and thereafter departed therefrom, in which event he may be served wherever he may be found. * * *"

Section 832, Code of Civil Procedure, provides that the township in which the obligation is incurred is deemed to be the township in which it is to be performed, unless there is a special contract in writing to the contrary.

[3] The complaint in Roberts v. Francis alleged that in the said Los Angeles township the defendant entered into a contract with plaintiff's assignor, which contract was set forth and is in the form of a written order for certain merchandise, and is signed by the defendant. The complaint further alleged that said obligation was incurred and made payable at Los Angeles township, county and state aforesaid. These allegations were sufficient to bring the case within the terms of the above-quoted subdivision 2 of section 848, and authorized service of the summons to be made upon the defendant in the county of his residence, even if he resided elsewhere than the county of Los Angeles.

[4] It is not pretended that in fact the defendant did not reside in the county of Imperial when the summons was served upon him. On this point it is merely claimed that the judgment is "void upon its face," because there is no affirmative statement in the judgment or in the return of summons that the defendant resided in that county. But we think that if he did in fact reside in that county, the court obtained personal jurisdiction over him for the purposes of that case. In History Co. v. Light, 97 Cal. 56, 31 Pac. 627, it was held that a defendant has the right to move to set aside the service of a summons attempted to be made in violation of the above-mentioned provisions of section 848, and that the motion is properly made upon affidavits showing the grounds of the motion, and that the justice has jurisdiction to hear and decide such motion. But the court also said:

"The burden of proving the improper service is, of course, upon the defendant in such a motion, and he should be required to present a clear case."

[5] If this was the rule of evidence upon a motion of that kind before judgment, it seems incontestable that upon a motion to set aside a judgment rendered upon a like record of service of process, the defendant must assume the same burden of showing that he was not a resident of the county where he was served. If this be true, then the judgment in Roberts v. Francis was not void upon its face, and any effort on the part of the justice to hear and act upon a motion to set aside such judgment would be an attempt to act judicially in a matter wherein his jurisdiction had been exhausted.

That the portion of the order of the justice's court which attempted to dismiss the action was beyond its jurisdiction, follows from our conclusion that it was without power to set aside the judgment.

The order of the superior court is affirmed.

We concur: JAMES, J.; SHAW, J.

(30 Cal. App. 107)

RIGDON et al. v. COMMON COUNCIL OF CITY OF SAN DIEGO et al. (Civ. 1781.)

(District Court of Appeal, Second District, California. March 8, 1916. Rehearing Denied April 8, 1916.)

1. CERTIORARI ⟸55 — RETURN—COMPLETION OF RECORD.

If the return to a writ of certiorari is not complete in showing all of the facts essential to any defense which respondents are entitled to make, such facts may be certified, or the court may, on motion, order them into the record.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 139–142; Dec. Dig. ⟸55.]

2. CERTIORARI ⟸62 — EFFECT OF RETURN — PROCEDURE.

On return of certiorari to annul a resolution of a common council, no steps being taken to question the capacity of the petitioners to sue, the court could consider the case on the issue of law presented by motion for judgment, as the competency of parties or sufficiency of petition should have been made the subject of demurrer or motion.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 170–173; Dec. Dig. ⟸62.]

3. CERTIORARI ⟸70(4) — APPEAL — SCOPE OF REVIEW—RECORD ON APPEAL.

Where appeal in certiorari is made on the judgment roll as provided by Code Civ. Proc. § 1077, a supplemental transcript will not be considered.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 201, 202; Dec. Dig. ⟸70(4).]

4. MUNICIPAL CORPORATIONS ⟸108—ORDINANCES—REFERENDUM—EFFECT.

Where petition for referendum is filed, the ordinance in question is suspended pending the vote.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. ⟸108.]

5. INTOXICATING LIQUORS ⟸76—LICENSE—CERTIORARI—WHEN PROPER—ACTS OF MUNICIPAL OFFICERS.

Where the city council was required to examine applications for liquor licenses and investigate the propriety of granting them, its functions were sufficiently judicial to be reviewed by certiorari, though the acts of a council are ordinarily legislative and administrative.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 80; Dec. Dig. ⟸76.]

6. MUNICIPAL CORPORATIONS ⟸116—ORDINANCES—IMPLIED REPEAL.

An ordinance regulating granting liquor licenses in a certain zone will not be construed as impliedly repealing an earlier one establishing the zone; such repeals not being favored.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 268–271; Dec. Dig. ⟸116.]

7. INTOXICATING LIQUORS ⟸76—LICENSE—ORDINANCES—PRESUMPTIONS.

Where a city council is given discretionary power in granting liquor licenses, it will be presumed that it acted upon conditions warranting the acts done.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 80; Dec. Dig. ⟸76.]

8. Intoxicating Liquors ⟹76—License—Ordinances—Validity.

Where an ordinance prohibited licensing saloons except in a certain district, the attempt to license one without such district was illegal, so as to subject the ordinance licensing it to review by certiorari.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 80; Dec. Dig. ⟹76.]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Certiorari by Nathan Rigdon and others against the city of San Diego and others to annul a resolution of the Common Council. From a judgment for petitioners on their motion for judgment on the record presented in the return, the defendants appeal on the judgment roll. Affirmed.

T. B. Cosgrove, City Atty., of San Diego, for appellants. John W. Rummage and Haines & Haines, all of San Diego, for respondents.

JAMES, J. On certiorari petitioners herein secured a judgment annulling a certain resolution of the common council of the city of San Diego, by which resolution a retail liquor license was attempted to be awarded to one Green. The writ issued brought before the trial court for review the resolution, the validity of which is questioned by the proceeding, as well as certain ordinances and other records of the city of San Diego. After an amended return had been made, the petitioners moved for judgment to be entered as prayed for upon the record presented in the return, and the judgment appealed from was entered responsive to such motion. The appellants brought up in their record the papers designated by section 1077, Code of Civil Procedure, which provides, referring to the record in proceedings of certiorari, that "a copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll."

[1] Preliminarily it is contended on behalf of the appellants that they were not accorded a hearing on the petition and writ; in other words, it is their contention that the petitioners should have been put upon proof as to all of the allegations of their petition, including the allegation as to the competency of the petitioners to appear in the proceeding. They claim the right to have tried the question as to whether the parties petitioning were "beneficially interested," as section 1069, Code of Civil Procedure, requires that they shall be before they are entitled to invoke the aid of the court in annulling a proceeding of a public body. They assert that, under the procedure outlined in the chapter of the Code regulating certiorari proceedings, they were not entitled to file an answer controverting the allegations of the petition, and cite Stumpf v. Board of Supervisors, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350, cited in Townsend v. Parker, 21 Cal. App. 317, 131 Pac. 766. In the Stumpf Case the court said:

"The return to the writ constitutes the answer, as well as the evidence, and the case is heard thereon unless upon motion an additional or amended return is made."

There might be added to this citation Reynolds v. County Court, 47 Cal. 604; Rauer v. Justice's Court, 115 Cal. 84, 46 Pac. 870.

If the return was not complete in showing all of the facts essential to any defense which respondents were entitled to make to the writ, these facts could have been certified, or the court upon motion had the right to order a statement of them into the record. Stumpf v. Board of Supervisors, supra.

[2] We do not agree with counsel for appellants in his contention that after the return to the writ was made and no other steps were taken on behalf of the respondents in the proceeding to question the sufficiency of the petition as to the capacity of the parties petitioning to sue, the court should have demanded proof upon the allegation as to the interest it was asserted the plaintiffs had in the matter sought to be reviewed. At such a point in the proceedings and upon such a state of the record, the court was entitled to consider the case upon the issue of law presented by a motion for judgment upon the facts shown in the return. The matter of the competency of the parties to sue or the sufficiency of the petition in its statement of facts showing such competency should all have been raised and determined by objection appropriately expressed by demurrer or motion. A demurrer would call into question the sufficiency of the facts alleged in the petition showing the competency of the parties petitioning; a motion to dismiss could have been made challenging the existence of the facts asserted showing the beneficial interest of the petitioners. This latter motion would have entitled the parties to introduce evidence by affidavit or otherwise, as the court might suggest, touching the existence of those facts. It is not made to appear at all from the judgment roll as brought up by appellants that they sought to raise any objection, either as to the competency of the parties petitioning or the existence of facts showing a beneficial interest as alleged in the petition.

[3] Respondents have presented, by way of diminution of the record, a copy of their petition, also a bill of exceptions which shows that in fact the appellants here did demur and move to quash the writ issued, which latter motion was submitted on the pleadings and record. We are not inclined to consider this supplemental transcript for the reason that the appellants have chosen to present their appeal upon the papers and record first mentioned herein as being that record designated in section 1077, Code of Civil Procedure.

[4] We think that the appeal should be decided upon that record, which brings us to the merits of the proceeding and leaves for determination the one question as to whether the resolution of the common council of the city of San Diego awarding a liquor license to Green was effective or void. Briefly stated, the facts appearing by the amended return made to the writ show that by ordinance of the city of San Diego it was made unlawful for any person to engage in retailing intoxicating liquors outside of a certain designated portion of the city. This ordinance was numbered 1434. On the 25th day of May, 1914, the common council adopted an ordinance repealing ordinance No. 1434, and on the 17th day of June following passed a resolution granting to Green a license to engage in the retail liquor business. The repealing ordinance carried a clause making it immediately effective as an urgency measure.

The charter of the city of San Diego provides that no ordinance shall become effective until 30 days have elapsed from the date of its passage, unless the occasion is certified as being one of urgency for the immediate preservation of the public peace, health, and safety. In that charter it is also provided that the right to the referendum may be invoked during the 30 days immediately following the adoption of any ordinance. A referendum petition was filed as against the ordinance of repeal and checked by the clerk and found to contain the requisite number of signatures. It was filed within the period of time limited by the charter. That the filing of this referendum petition had the effect of suspending the operation of the ordinance by which the restrictive zone ordinance was sought to be repealed, seems to be conceded. We do not find it argued on behalf of appellants that the mere fiat of the council expressed in the repealing ordinance to the effect that the public health and safety demanded that the repealing ordinance should take immediate effect, is of any force or virtue whatsoever. It has been held otherwise. In re Hoffman, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75. The subject-matter affected by the ordinance was not one suggesting the propriety of the use of the emergency provision.

[5] It is claimed that the case presented was not a proper one for certiorari because the action of the council which was sought to be remedied was not judicial in its nature. Primarily, of course, a city council, board of supervisors, or like body, exercises ministerial and legislative functions. Quite generally and almost invariably added to these duties is the requirement that judicial or quasi judicial functions shall be called into exercise, and generally it may be said that wherever discretionary judgment depends for its guidance upon evidence to be heard that judgment will be judicial in its nature. Under the ordinance of the city of San Diego the city council was required to examine applications for liquor licenses and, as the ordinance in its language states, "upon the presentation of such application * * * said common council shall fully investigate the question of whether the person making such application is a sober, suitable, or proper person to carry on and conduct the business for which he requests a license, and whether the place described in said application is a proper or suitable place for such business, and conforms to the requirements of this ordinance. * * *" Great Western Power Co. v. Board of Supervisors, 21 Cal. App. 146, 131 Pac. 88; Grumbach v. Lelande, 154 Cal. 679, 98 Pac. 1059.

[6-8] It is further contended that irrespective of whether the repealing ordinance has been suspended in its effect, the restrictive zone ordinance was effectually repealed by the general ordinance passed subsequent to the date of the adoption of the former and which is known as ordinance No. 2341. The ordinance which has been called the "zone" ordinance was one which by an inspection of its contents appears to have been adopted for the direct purpose of marking out the boundaries of the zone outside of which there should be no retail liquor establishments allowed. Ordinance No. 2341, in its original and amended form, was an ordinance which in its plain import was designed to regulate the granting of licenses within the zone where liquor-dealing establishments were permitted. We find no words therein contained which seem appropriate as words intended to repeal the zone ordinance, and we apply the rule of statutory construction, to wit, that a repeal by implication is not to be favored. As to whether the boundary lines fixed by the zone ordinance were fixed in such a way as to discriminate between properties upon the same street, we think is not here a question for debate. In the map attached to the return, illustrating the boundaries of the zone district, it does appear that portions of blocks have been included on the same street and other portions left out. In the absence of a contrary showing, it must be presumed that conditions existed which warranted the legislative body in fixing the boundaries of the restricted district in the way that they did. With the zone ordinance in effect, the council had no authority to license any person to conduct a retail liquor business in violation thereof, and an attempt to do this would make the act amount to an excess of jurisdiction within the control of a certiorari proceeding. Great Western Power Co. v. Board of Supervisors, supra, is in point.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(30 Cal. App. 144)

CROWLEY v. SAVINGS UNION BANK & TRUST CO. (Civ. 1476.)

(District Court of Appeal, Third District, California. March 16, 1916.)

1. EVIDENCE ⇐471(2)—OPINION.

In an action by a widow to recover the balance of a joint bank account, the words, "This account was closed," were properly stricken from the testimony of a bank officer, as being the conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2150; Dec. Dig. ⇐471(2); Witnesses, Cent. Dig. § 833.]

2. BANKS AND BANKING ⇐301(5) — JOINT SAVINGS DEPOSIT—RIGHT OF SURVIVORSHIP.

Where a husband and wife opened a savings bank account in their names jointly, the direction to the bank reading that all moneys on deposit should be the joint property of, with the right of survivorship in, the husband and wife, payable to them or either of them, or the survivor, or the executors, administrators, or assigns of such survivor, without reference to the original ownership of the money, such agreement constituted a joint tenancy as to the fund, with the right of survivorship, and at the death of either party the ownership of the balance remaining on deposit passed to the survivor; survivorship being an incident of joint tenancy.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1174; Dec. Dig. ⇐301(5).]

3. EVIDENCE ⇐236(3) — SELF-SERVING DECLARATIONS.

Where a husband and wife opened a joint savings bank account under agreement between themselves and the bank constituting them joint tenants, with the right of survivorship, and both deposited and drew out money amounting to many thousands of dollars, under such agreement, up to the time of the husband's death, the declarations of the husband in his will that all moneys in the joint name and custody of himself and wife constituted part of his separate estate, and should be administered upon by his executors, pursuant to the terms of the will, are inadmissible in disparagement of the interest of the wife in the joint deposit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 878; Dec. Dig. ⇐236(3).]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Katherine S. Crowley against the Savings Union Bank & Trust Company, individually and as executor of the last will and testament of Timothy J. Crowley, deceased. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

W. H. Chapman and Sullivan, Sullivan and Theo. J. Roche, all of San Francisco, for appellant. O'Gara & De Martini, Bert Schlesinger, and Pillsbury, Madison & Sutro, all of San Francisco, for respondent.

CHIPMAN, P. J. Plaintiff, the surviving widow of Timothy J. Crowley, deceased, commenced this action to recover the balance of a bank account alleged to have been deposited with defendant bank by Mr. and Mrs. Crowley in the name of T. J. Crowley or Katherine Crowley, wife, payable to the survivor of them. The amended complaint alleges:

"(2) That prior to and on the 21st day of January, 1913, plaintiff, Katherine S. Crowley, and Timothy Jay Crowley, were the joint owners with right of survivorship of and in a certain deposit of money amounting to the sum of fourteen thousand thirty-four dollars and ninety-two cents ($14,034.92) on deposit as a savings bank deposit with said defendant, a corporation, in its individual capacity. That said deposit was and is represented by ordinary deposit account No. 131,260 on the books of said defendant in its individual capacity. That said deposit was and is the balance of moneys deposited by said plaintiff and said Timothy Jay Crowley with the said corporation upon the understanding and agreement made by said Timothy Jay Crowley and plaintiff with said corporation that all moneys at any time deposited by said Timothy Jay Crowley and plaintiff, or either of them, in the said account, were and should continue to be the joint property, with right of survivorship, of said Timothy Jay Crowley and said Katherine S. Crowley, and were and should continue to be payable to them, or either of them, or to the survivor of them, without reference to the original ownership of such moneys, and upon the further understanding and agreement that the act of so depositing said moneys was and should be an absolute termination of any original ownership thereof.

"(3) That said defendant accepted said deposit and ratified and agreed to the agreement and understanding aforesaid in relation thereto.

"(4) That on the 21st day of January, 1913, and while said deposit was owned as aforesaid, and was on deposit with said defendant under said agreement and understanding, said Timothy Jay Crowley died and plaintiff survived him.

"(5) That upon the death of said Timothy Jay Crowley as aforesaid, plaintiff, Katherine S. Crowley, became, ever since has been, and now is the sole owner of said deposit and entitled to receive from said defendant in its individual capacity said sum of fourteen thousand thirty-four dollars and ninety-two cents ($14,034.92)."

The cause was tried by the court without a jury. The court made the following findings:

"(1) That each and all of the allegations of plaintiff's amended complaint in the above-entitled action are true.

"(2) That at the time of the death of said Timothy Jay Crowley, deceased, said Timothy Jay Crowley was not the owner of the whole or of any part of the deposit of money described in said amended complaint except as joint owner with plaintiff, Katherine S. Crowley, subject to the right of survivorship. That upon the death of Timothy Jay Crowley, his interest in said deposit passed to plaintiff. That since the death of said Timothy Jay Crowley, his estate has not been and is not the owner of the whole or of any part of said deposit. That defendant Savings Union Bank and Trust Company, a corporation, as executor of the last will and testament of Timothy Jay Crowley, deceased, is not entitled to receive the whole or any part of said deposit and is not entitled to all or any of the interest or dividends accruing thereon or which have accrued thereon.

"(3) That since the commencement of the above-entitled action, to wit, on the 30th day of June, 1913, a dividend amounting to two hundred eighty and $^{70}/_{100}$ dollars ($280.70) accrued and became due upon said deposit."

It appears that after the account was opened the Savings Union changed its name to Savings Union Bank & Trust Company; the corporation otherwise remaining unchanged. The account bearing the number 131,260 was opened on the 5th day of January, 1909, by

a deposit of $7,000, under the following agreement:

"San Francisco, Cal., Jany. 5, 1909.

"To the San Francisco Savings Union:

"All moneys now on deposit, or at any time hereafter deposited by or for us or either of us, to the credit of Timothy J. Crowley or Katherine, wife, ordy. deposit account No. 131,260, with the dividends thereon and accumulations thereof, are, and shall be, the joint property (with right of survivorship) of the undersigned, and are payable to us, or either of us, or to the survivor of us, or to the executors, administrators, or assigns of such survivor, without reference to the original ownership of such moneys, the act of so depositing said moneys being absolute termination of any original ownership thereof, and are subject to all national and state laws governing such moneys, now or hereafter in force.

"This account may be terminated at any time by the board of directors of said San Francisco Savings Union; and the opening of this account is sufficient and complete evidence of the acceptance and ratification by said San Francisco Savings Union of the terms of deposit herein set forth, without other or further action on its part.

"[Signed] T. J. Crowley.
"Katherine Crowley.

"O. D. No. 131,260. Joint agreement signed.
"$7000.00.

"Your names in full: Timothy J. Crowley, or Katherine, wife.

"We admit full knowledge of the 'Conditions of Agreement' on which deposits may be made with, and will be repaid by, the San Francisco Savings Union, as per copy of said 'Conditions' in our passbook, and we hereby accept same and agree to be bound thereby in the relation of depositors with said San Francisco Savings Union.

"Witness our hands and seals this Jan. 5, 1909.

"[Signed] T. J. Crowley.
"Katherine Crowley.

"Address: 1403 Willard St.

"Mother's maiden name: Margaret Sheehan."

One of appellant's contentions is that the evidence shows that Mrs. Crowley was not present when this document (Plaintiff's Exhibit No. 4) was signed by her husband and that it was not signed by her at that time. Such was the testimony of one of the witnesses, Assistant Cashier Whittle, who was deposit teller of defendant bank. He further testified:

"Q. Now, at that time that $7,000 was deposited in that bank, was there anything said by Mr. Crowley to you as to the character of the account? A. Well, he wished the account in the name of himself and wife."

Mrs. Crowley testified:

"To Mr. Schlesinger. I live at 1403 Willard street. I am the widow of Timothy Jay Crowley, deceased, and was his wife during the last 14 years of his life. He died on January 21, 1913. The name Katherine Crowley, appearing on Plaintiff's Exhibit No. 4 for identification, is my signature. I first signed that paper in the San Francisco Savings Union in 1909, I think it was, on the date appearing on the document. My husband was with me when I signed it. I read the paper over before I signed it. I understood it. My husband read the paper over to me. After he read the paper to me, and after I signed it, he handed it to me to read over myself. That is the paper that was handed to the bank officials. I have seen before these two bank books, numbered 131,260, marked Plaintiff's Exhibits 2 and 3. I always had them in my possession. I am the Katherine S. Crowley mentioned in those bank books."

On cross-examination she testified:

"To Mr. Roche: I certainly was present in the bank upon the day upon which that signature was made by me. I was present in the San Francisco Savings Union Bank the day upon which I signed this instrument, and that was the same date upon which my husband signed his name. I recall distinctly that my husband and I were both present at the time this document was signed. * * * I think Mr. Whittle filled out the body of this agreement, but I am not quite sure about that. That is my best recollection."

She testified to many things she remembered as occurring at the bank and to instructions given her by her husband where to sign the document.

Mr. Whittle testified:

"Upon the death of Mr. Crowley, this paper (Plaintiff's Exhibit 4) was amongst the official documents in our bank, and was kept in the usual place and in its present condition, with the exception of the filing marks on the reverse side. The number appearing on that contract is 131,260, which is the same number appearing on the passbook."

As to the fact of Mrs. Crowley's presence and the signing of the agreement by her at the bank, the court accepted Mrs. Crowley's testimony, and we find nothing in the record to warrant us in holding that the court was not justified in its action.

[1] It is further contended by appellant that this account, No. 131,260, was closed on April 1, 1909, and the entire balance transferred to ordinary deposit account No. 131,975. Witness Whittle testified:

"On the 1st day of April, 1909, the $7,000 previously deposited at the time this account was opened was transferred to another account, numbered 131,975. I cannot now recall, without referring to our records, what account that was, but in any event this account was closed."

The words "This account was closed" were on motion of plaintiff, stricken out, and the ruling is assigned as error. We pause to say that we think the ruling was not error. In the sense defendant sought to apply the words, they were but the conclusion of the witness. The facts as to this transaction were fully shown.

It appeared that, on April 1, 1909, this $7,000 deposit was withdrawn and deposited to an account opened in the name of San Francisco National Bank, trustee for T. J. and Katherine Crowley, to enable this bank to issue letters of credit to the Crowleys, who intended to visit Europe. The account No. 131,260, however, was not closed, for, on April 20, 1909, a deposit was made to that account and on the return of the Crowleys, in September, 1909, many deposits, some of them large ones, were made to this account, as shown by the ledger account and passbooks in which all the transactions from the initial deposit of $7,000 to the death of Mr. Crowley, were entered.

Witness D. L. Clarke, assistant secretary of defendant bank, testified:

"Referring to ordinary deposit book No. 131,260, which was marked for identification Plaintiff's Exhibit No. 2, I do not wish to be understood as saying that the account was closed. The book was closed, and a new one issued of

this same account, issued under the same number and same ledger. That particular passbook was called in, as it appears, on October 12, 1912. It was not pursuant to any resolution of the board of directors, but it was customary, in connection with the changing of the name of the bank, for us to take in the old passbooks when they came in, whenever customers were willing to sign them, and issue a new book in the name of the bank."

The withdrawal of the initial deposit was explained, and nothing in connection with the withdrawal indicated an intention to close the account. On the contrary, deposits began to be made shortly after to this same account, and continued for a period of four years, and until Mr. Crowley's death. It was an open and active account, deposits being made during the Crowleys' absence through instructions given before their departure for Europe, and continued after their return, as we have said, until Mr. Crowley's death.

Mrs. Crowley testified:

"I have seen before these two bank books numbered 131,260, marked Plaintiff's Exhibits 2 and 3. I always had them in my possession. On some occasions I withdrew money from this bank account, and on other occasions my husband drew money from it. On the occasion when I would withdraw money from this particular account, I had the passbook with me and presented it to the bank. I have been present at times in that bank when my husband withdrew moneys from that account, and on those occasions he presented the bank book to the bank. He had the bank book whenever he wanted it, and so did I. It was kept in our home—that is, the home of myself and Mr. Crowley. It was in the possession of both of us."

Mr. Whittle testified:

"Some of the time when Mr. Crowley came in and withdrew or deposited money, Mrs. Crowley accompanied him, and she came in by herself and dealt with the bank."

Mr. Clarke testified:

"I know that withdrawals were made by both Mr. and Mrs. Crowley; that is, separate withdrawals. Mr. Crowley withdrew some of these moneys on some occasions, and Mrs. Crowley withdrew. These withdrawals occurred after the opening of the account."

The contention that the account was closed on April 1, 1909, and that subsequent deposits and withdrawals were not made under the original agreement, is not supported by the evidence. On the contrary, the evidence showed that the account as represented by the two passbooks, Exhibits 2 and 3, both numbered 131,260, was an open, running account, to which deposits were frequently made, and from which withdrawals were also frequently made, both by Mr. and Mrs. Crowley, sometimes when both were present, and at other times by them separately, from January 5, 1909, to December 24, 1912. Passbook No. 2 was called in, and passbook No. 3 issued, when the bank changed its name; but the account remained throughout under the original number, 131,260.

[2] The agreement under which all these transactions occurred unmistakably constituted a joint tenancy as to the fund, with right of survivorship, and that at the death of either the ownership of the balance, whatever it might be, remaining on deposit passed to the survivor. The right of plaintiff to the balance for which she brought the action arises from the well-understood incident of a joint tenancy—that, upon the death of one of two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship, and in virtue of the original event creating the tendency. The principles governing this case are so well settled that discussion of them would be supererogatory. Let it suffice to refer to Carr v. Carr, 15 Cal. App. 480, 115 Pac. 261, Drinkhouse v. German Savings & Loan Society, 17 Cal. App. 162, 118 Pac. 953, Sprague v. Walton, 145 Cal. 228, 78 Pac. 645, Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, and the recent cases of Kennedy v. McMurray, 169 Cal. 287, 146 Pac. 647, and Estate of Harris, 169 Cal. 725, 147 Pac. 967.

There remains only to be considered alleged errors of the court in excluding certain evidence offered by defendant. Defendant offered in evidence the will of Timothy J. Crowley, bearing date March 23, 1909, in which the testator declared:

"All the property possessed by me is separate property, and not community property."

Two codicils were attached to this will. "Codicil No. 1" bears no date. "Codicil No. 2" is dated "San Francisco, November —, 1912." In codicil No. 1 Crowley directed:

"In case of my death prior to the death of my said wife all moneys, stocks, bonds or other securities now in our possession to be drawn by me or her shall be turned over to my executors and trustees as the same constitute a part of my estate."

In codicil No. 2 he makes no reference to the character of his property, and there was no evidence tending to show when codicil No. 1 was executed. Codicil No. 2 was made shortly before the last will of Crowley, which was offered in evidence and is dated December 3, 1912, and revoked all prior wills. In this will he made a declaration similar to that found in the will of 1909; also:

"That all moneys, bank accounts, stocks, bonds and other securities now in the joint name or joint custody of myself and wife, constitute a part of my said separate estate and are to be administered upon by my said executor pursuant to the terms of this will."

In his last will he devised the residence property to his wife and one-half of all other property for her life. These wills were admitted subject to a motion to strike out, subsequently made and granted, on the ground that they were incompetent, irrelevant, and immaterial, and on the further ground that the instruments were self-serving declarations and hearsay, and not binding in any way upon this plaintiff, and are not competent to change the contract.

Mrs. Crowley testified that she never knew that her husband had made a will until after his death and was never consulted as to any provisions in any will and had no knowl-

edge that he had made a will until after he died. Appellant, in support of its contention that the ruling was error, cites the following California cases: Ruiz v. Dow, 113 Cal. 490, 497, 45 Pac. 867; Sprague v. Walton, 145 Cal. 228, 78 Pac. 645; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Estate of Hall, 154 Cal. 527, 98 Pac. 269; Fanning v. Green, 156 Cal. 279, 104 Pac. 308; Fulkerson v. Stiles, 156 Cal. 703, 105 Pac. 966, 26 L. R. A. (N. S.) 181; Cooney v. Glynn, 157 Cal. 583-588, 108 Pac. 506; Runo v. Williams, 162 Cal. 444, 451, 122 Pac. 1082; Williams v. Kidd, 170 Cal. 631, 151 Pac. 1; Bertelsen v. Bertelsen, 7 Cal. App. 258, 261, 94 Pac. 80.

In Ruiz v. Dow the declarations were against interest and not in disparagement of title. So also in Sprague v. Walton. In Estate of Hall the declarations were made at the time the husband executed the deed to his wife and showed an intention to retain absolute ownership during his lifetime and have title pass only upon his death. The rule of res gestæ applied. Fanning v. Green was not a case involving declarations, but concerned the admissibility of testimony of the grantor as to his intention in making the deed. The court held that a witness may be examined as to the intent with which he did a certain act where that intent is a material thing in the action. In Fulkerson v. Stiles the question was the same. So also in Runo v. Williams. In Cooney v. Glynn the evidence showed that the will which was held admissible was intimately connected with the deed made two or three days later. The court said:

"Under the circumstances appearing here, the fact of the execution of the will by Mrs. Gallagher, the devise of this property to Mrs. Cooney, its subsequent destruction at the instance of the defendant and the execution of the deed in lieu thereof * * * in trust for Mrs. Cooney, would be material and competent evidence to establish the constructive trust alleged. The evidence should have been admitted."

Williams v. Kidd is particularly relied upon by appellant. The vital question in that case was: Did the grantor of the land, when he placed a deed in the hands of a third party to be delivered at the death of the grantor, intend that the title to the property should pass presently to the grantee? The court held that:

"The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing on the question." "Acts and declarations of a grantor made after he has parted with the title to property and in disparagement of it are inadmissible when made in the absence of the grantee; but where the very question at issue is as to whether the grantor had ever parted with title, the conduct and declarations of the grantor subsequently to the making of the deed are admissible as bearing on the issue as to whether there had been a delivery of the deed." (Syllabus.)

The facts in that case were such as probably never before occurred, and will never again occur, and are not to be overlooked as a controlling factor in applying the rules there laid down. We cannot for a moment believe that the court intended to sweep aside all established rules upon the question of the admissibility of declarations by a grantor made subsequently to the grant. Indeed, the court distinctly states that declarations made after he has parted with his title and in the absence of the grantee are inadmissible.

In the Williams v. Kidd case the very question at issue was as to whether the grantor had parted with title or had in fact delivered the deed. The facts and circumstances attending the transaction were very fully brought out in the opinion and are too numerous to be here repeated. Briefly, the grantor was a large owner of real property; he conceived the plan of disposing of it to take effect at his death, and called in his clerk, Kidd, who was a notary, to help him work out his plan. Kidd got together what data he could, but informed Williams that he thought he was hardly capable to do the work. It involved the necessity of making 30 or 40 different deeds. The work was, however, commenced, and four deeds were made out and signed by Williams—one to his niece, Laura Miller (the deed to a certain warehouse property), and three others to members of his family. The deed involved was signed and acknowledged by Williams, who handed it to Kidd, "with instructions to the latter to keep the same and to give it to Laura Miller, the grantee named therein, after he (Williams) was dead." Kidd took the deed and kept it in the safe where the papers of Williams were kept until the death of Williams, eight years later, when he delivered it to the grantee, who had meanwhile become his wife. Nothing further was done toward carrying out Williams' plan. The other three deeds were not delivered, and were not afterwards seen. The original plan seems to have been abandoned. Williams continued to control and manage all of his property as before to the day of his death, and the plan he had conceived was never again mentioned. He did not recall the deed placed in Kidd's hands and never referred to it afterwards. He spent several thousand dollars improving the property embraced in the Laura Miller deed. At one time, in Kidd's presence, an offer was made by a buyer to purchase this property from Williams, who claimed to own it, but he declined to consider a sale unless it included the hotel property. Kidd at that time and at no time reminded Williams that he had conveyed this warehouse property to Miss Miller. The foregoing are some of the many acts and circumstances which the court held to be admissible as tending to throw light on the vital question whether there had been a delivery of the deed with the intention of presently passing title. One must read the very able and exhaustive opinion in the case fully to appreciate the rulings which the court

felt constrained to make. We fail, however, to discover that the case is in any fair sense controlling here.

[3] It seems to us that the parties interested in the fund now involved dealt with it under an agreement so clear and unmistakable in its meaning and intent as to leave no room for doubt concerning their object originally in opening the account and in their treatment of it from January 5, 1909, when it was opened, until January 17, 1913, when the last entry in the passbook appears, four days before Mr. Crowley's death. He and his wife had been depositing and drawing out money from this account amounting to many thousands of dollars under an agreement declaring all moneys deposited to be "the joint property (with right of survivorship) of the undersigned, and payable to us, or either of us, or to the survivor of us," and further declaring that "this right was without reference to the original ownership of such moneys, the act of so depositing said moneys being absolute termination of any original ownership thereof." Under such circumstances, upon what principle can we say that a declaration of the husband in his will, made without her knowledge or consent, that all his property is separate property, is admissible in disparagement of the interest of his surviving wife? To do so would be to hold that declarations purely self-serving and in direct contradiction to the terms of the written instrument of the two spouses are admissible. Here was a transaction commenced under a written declaration of the parties thereto whereby the defendant became the trustee as custodian of the fund deposited with it. This trust relation existed and was recognized and acted upon by Mr. Crowley and his wife to the day of his death, and the fund then remaining in the hands of defendant by virtue of the executed agreement, as we think, became the property of the plaintiff by right of survivorship.

The declarations made in the will of Timothy Crowley were inadmissible as evidence of an intention other than that expressed in this executed agreement. Rowe v. Hibernia Savings & Loan Society, 134 Cal. 406, 66 Pac. 569; Eaton v. Locey, 22 Cal. App. 769, 136 Pac. 534; Batcheller v. Whittier, 12 Cal. App. 262, 107 Pac. 141; Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35. It is true that the first will was made two or three months after the first deposit was made; but its provisions were unknown to plaintiff and, so far as appears, to their trustee. The testator continued, as did plaintiff, to recognize the account with the bank as controlled by their written agreement, by an unbroken series of acts inconsistent with the declarations in the will, and it was not until he made the will on December 3, 1912, a little over a month before his death, that he made any declarations as to moneys in bank, in the joint name of himself and wife, being a part of his separate estate. Codicil No. 1 to the first will bore no date, and we must presume that it was executed after the will was made; but, so far as we know, it may have been made long after, and it is fair to presume that it was made while both he and his wife were treating the account as described in their written agreement.

It was held, in Rulofson v. Billings, supra, that self-serving declarations by a decedent, made outside of the presence of the person affected thereby, are inadmissible. Speaking of the rule of res gestæ, it was held that self-serving declarations, made long subsequent to the contract sought to be enforced, are not admissible as being part of the res gestæ.

"A declaration, to be admissible as part of the res gestæ, must be an incident, or the natural and spontaneous outgrowth of the main occurrence in question, and must exclude the notion of deliberation, or calculation, or design to make evidence for future purposes." (Syllabus.)

Appellant claims that the deposit account "did not divest Crowley of his ownership of the funds, or make Katherine Crowley a joint tenant as to such funds." In support of this claim appellant cites Denigan v. Hibernia Sav. & L. Society, 127 Cal. 137, 59 Pac. 389. In that case the deposit was made by Ellen Denigan of funds concededly her separate property. She received a passbook "entitled No. 133,269, Frank Denigan or Ellen Denigan in Account with the Hibernia Savings & Loan Society." Frank Denigan was the husband of Ellen. Later Ellen died and Frank caused this deposit and its accumulations to be transferred to an account entitled "No. 212,-145, Francis Denigan or James Denigan in Account" with the Hibernia Bank. Still later Frank died, and the question arose whether Frank had acquired a right to this fund superior to that of the personal representatives of Ellen. The court said:

"As it was conceded at the trial that at the time the money was deposited by Ellen it was her separate property, it was incumbent upon any one setting up a claim thereto against her personal representative to show that he had in some way acquired her title. There is nothing in the record herein showing any declarations or conversations respecting the purpose of making the deposit in the form in which it was made, or the circumstances under which the deposit was made," except the form of the passbook. "It is not shown that the husband had any possession of the bank book until after the death of his wife. * * * The form in which the deposit was made is entirely consistent with a desire on the part of the wife to give to her husband authority to withdraw money from the bank from time to time as she might need it, and it should not be held that she intended to part with her title thereto by reason of an ambiguous phrase, which is quite consistent with a contrary purpose."

It was held that the administrator of Ellen's estate was entitled to judgment. A glance at the facts in that case and the case here shows that they are essentially unlike. In the case here the purpose of the deposit was expressly stated and the character of the funds deposited, whether separate or commu-

nity property, was expressly disposed of, and both parties to the deposit had possession of the passbooks, and both drew out money under their declared purpose in making the deposit, and both expressly stated what should become of the fund in case of the death of either.

We have been cited to no case, and have been cited to no principle, which convinces us that the learned trial court was in error in its conclusions of law or in its judgment. We infer from the provisions of the last will of Crowley that he died possessed of much property aside from the balance left in this deposit account. With that property we are not concerned, but as to the deposit balance we think there can be no doubt of plaintiff's right to it.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

29 Cal. App. 664

HESTER v. McMULLAN. (Civ. 1956.)

(District Court of Appeal, Second District, California. Feb. 14, 1916.)

1. APPEAL AND ERROR ⟸2—ORDERS APPEALABLE—DENYING NEW TRIAL—STATUTES.

Code Civ. Proc. § 963, as amended by an act effective in August, 1915, taking away the right to appeal from an order of the superior court refusing a new trial, applies to an order denying a motion for a new trial, made after the amendment became effective in a proceeding commenced before it became effective.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3–7, 1882, 2421; Dec. Dig. ⟸2.]

2. APPEAL AND ERROR ⟸2 — TIME FOR PROCEEDINGS—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 939, as amended by an act effective in August, 1915, providing that appeals shall be taken within 60 days from the entry of judgment or order, but, where proceedings for a new trial are pending, an appeal may be taken within 30 days after entry of the order determining the motion for new trial, does not enlarge the rights of a party to appeal in cases other than those specified in Code Civ. Proc. § 963, enumerating the cases in which an appeal can be taken from a superior court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3–7, 1882, 2421; Dec. Dig. ⟸2.]

Motion to dismiss appeal.

Action by Thomas Hester against Ed McMullan. Judgment for the defendant. From an order denying plaintiff a new trial, he appeals. On motion to dismiss the appeal. Motion granted.

E. R. Simon and Galen Nichols, both of El Centro, for appellant. O. V. Willson, of El Centro, and Noland, Kibbey & Frazier, of Calexico, for respondent.

JAMES, J. [1] Motion to dismiss an appeal taken from an order denying the application of the plaintiff for a new trial. The principal ground of the motion is, as stated in the notice, that the law does not provide for the taking of an appeal from such an order. It appears that on the 26th day of April, 1915, a judgment was entered in the cause; that on June 25th plaintiff filed an undertaking on appeal; and that on October 15, 1915, a statement of the case on motion for a new trial was settled by the judge, and the notice of appeal from the order denying plaintiff's motion for a new trial was filed on the 17th day of December, 1915. No appeal was taken from the judgment. The Legislature of the year 1915 enacted a statute amending section 963 of the Code of Civil Procedure, and by that amendment took away the right theretofore existing in a party to appeal from an order refusing a new trial. This statute became effective in August, 1915, so that at the time the order was entered, denying to the plaintiff a new trial, there was no statute law permitting an appeal to be taken therefrom. It is complained that if such effect be given to the statute as to deprive plaintiff of his privilege of taking an appeal from the order denying the motion for a new trial, rights will be interfered with which became vested prior to the taking effect of the statute, and the statute, to that extent, would be invalid. Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48, is the principal case cited. There the question was as to what effect should be given a statute which limited the right of appeal from a judgment which had been entered prior to the time that the statute took effect. The Supreme Court held that upon the entry of the judgment the right of appeal became vested for the full time allowed by the statute then existent. The plain inference to be drawn from the argument of that decision, viewed negatively, is that, had the statute taken effect prior to the time of the entry of the judgment, its effect would have been to limit the right of appeal from the judgment. It is here argued that, because the plaintiff had instituted proceedings in the direction of applying to the court for an order granting him a new trial, therefore the making of the order would be considered as relating back so as to relieve the appeal from the effect of the statute. If this argument be of force, then in those cases where, like the one above cited, the date of the entry of the judgment was viewed as the material thing, it might as well have been held that the plaintiff, when he filed his action and so instituted a proceeding which eventuated in a judgment, caused a right to accrue to the adverse party in the matter of the taking of his appeal which could not be affected by the changed statute, regardless of the date of the actual entry of the judgment, whether that entry was before or after the statute took effect. We find no added weight given to the appellant's argument in opposition to this motion to dismiss, by an examination of Boin v. Spreckels Sugar Co., 155 Cal. 612, 102 Pac. 937, Estate of Richmond, 9 Cal. App. 402, 99 Pac. 554, and People v. Nash, 15 Cal.

App. 320, 114 Pac. 784, all of which he cites, as those decisions go no further than does the announcement of the court as expressed in Pignaz v. Burnett, supra.

[2] Neither do we find that section 939 of the Code of Civil Procedure, as amended in 1915, enlarges the right of a party to appeal in cases other than those specified in section 963, Code of Civil Procedure.

The motion to dismiss the appeal, attempted to be taken from the order denying to the plaintiff a new trial, is granted.

We concur: CONREY, P. J.; SHAW, J.

29 Cal. App. 708

EVANS v. HINDES. (Civ. 1676.)

(District Court of Appeal, First District, California. Feb. 18, 1916. Rehearing Denied March 16, 1916.)

BROKERS ⊂⊃71—CONTRACTS—COMMISSIONS—CONSTRUCTION.

Where defendant had agreed to pay his real estate broker $1,650 commission, and the broker agreed in writing to extend the time of payment until a certain crop was sold, the proceeds thereof to the amount of $1,650 to be turned over to the broker in liquidation of the indebtedness, both parties expecting that the crop would bring over $2,000, the subsequent agreement merely limited the amount of the proceeds to be paid from the crop, and did not limit defendant's liability to the value of the crop, if less than the stipulated amount.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 56; Dec. Dig. ⊂⊃71.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by George E. Evans against Edward B. Hindes. Judgment for plaintiff, and defendant appeals. Affirmed.

Perry Evans, of San Francisco, for appellant. O. L. Berry, of San Francisco, for respondent.

PER CURIAM. The plaintiff, as assignee of E. J. Davis, a real estate broker, sues to recover a sum which he claims as a balance due upon a commission for effecting an exchange of properties for the defendant.

It is conceded that Davis was entitled under the contract as written to a commission for his services amounting to the sum of $1,650, but it is contended by the defendant that Davis agreed to accept in liquidation of his claim the proceeds of a certain potato crop, and that such proceeds having been turned over to him the obligation under the contract was discharged, although Davis received only the sum of $670 as such proceeds.

The contract for the broker's commission is in the usual form and subscribed by the defendant. Immediately following it, and apparently on the same sheet of paper, and doubtless executed on the same day, is the following addenda:

"I, the undersigned, accept the above employment, and agree to extend the time of payment until such time as the crop is harvested, it being mutually understood that, when the crop is sold, the proceeds to amount of sixteen hundred fifty ($1,650.00) dollars is to be turned over to me in liquidation of above indebtedness. E. J. Davis."

From the record it appears that after the negotiations for the exchange of properties were completed Davis and the defendant discussed and agreed upon the amount of the former's compensation. The amount being agreed upon, and the written form of contract providing that it should be payable upon the consummation of the exchange, the defendant informed Davis that unless he received some money from a certain source he would be unable to settle with Davis promptly, and that the latter would have to wait until he had harvested a crop of potatoes belonging to him, which would be in about 60 days. This was satisfactory to the broker, and the above-quoted addition to the contract was signed. There seems to have been a further conversation concerning the time Davis should receive the amount of his commission, during which conversation it transpired that the defendant had been offered $2,000 or $2,500 for his potato crop. At this time apparently both parties expected that the proceeds from the crop would exceed the amount of the commission, so that a part of them would be payable to the defendant. Davis, according to his testimony, was not informed as to the proportionate interest in this crop owned by the defendant, which, in fact, was but one-fifth.

If there is any ambiguity in the memorandum regarding the payment to Davis of the proceeds of the crop, so as to make it susceptible of the construction contended for by the defendant, this ambiguity is removed, we think, by the testimony of the circumstances under which it was entered into, which strongly support the contention of the plaintiff that the language "the proceeds to amount of $1,650 is to be turned over to me in liquidation of above indebtedness" was merely a limitation upon the amount of money to be paid to Davis from the proceeds of the crop, which interpretation also more readily accords with the natural and ordinary meaning of the words used than that contended for by appellant. It further appears that the appellant was disappointed with the trade he had made, so that a construction of the agreement which would diminish his liability would be more apt to suggest itself to him than to a disinterested reader of the language employed. Defendant had agreed to pay his broker $1,650; and the language of the memorandum above quoted cannot, in our opinion, be fairly construed as an agreement on the latter's part to accept less than this amount.

The judgment is affirmed.

29 Cal. App. 711

ROBERTSON v. BALLOU. (Civ. 1712.)

(District Court of Appeal, Second District, California. Feb. 18, 1916.)

TRIAL ⊜252(15) — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

In an action on a note, where there was nothing in the record tending to prove that the note was executed without consideration or that it was procured by fraud, it was not error to refuse to instruct the jury that the burden of proof rested upon the plaintiff to show that he purchased the note without knowledge that it was obtained by fraud or without consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 605; Dec. Dig. ⊜252(15).]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by J. L. Robertson against George A. Ballou. Judgment for plaintiff, and defendant appeals. Affirmed.

Farnsworth & McClure, of Visalia, for appellant. Edwards & Smith, of Dinuba, and J. S. Clack, of Visalia, for respondent.

SHAW, J. Action to recover upon a promissory note. In accordance with the verdict of a jury which tried the case, judgment was entered for plaintiff, from which defendant appeals.

The record is presented as provided for by sections 953a, 953b, and 953c, Code of Civil Procedure, the latter of which provides that:

"In filing briefs on said appeal the parties must however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

Appellant makes no attempt to comply with this provision, but suggests that the court read all of the testimony, which it is claimed "sustains appellant's position in every particular." Notwithstanding appellant's failure to direct our attention to any evidence supporting his contention, we have made an examination of the record sufficient to satisfy us that his claims of error committed by the court in the trial are without foundation.

The note was dated May 27, 1913, negotiable in form, and made payable one year after date to the order of the defendant, who indorsed and delivered the same in the purchase of shares of stock in a corporation known as the Big Four Electric Company. The sale of the stock appears to have been negotiated by one Avery, who at the time of the purchase thereof by defendant gave him a written agreement as follows:

"On and after 10 months after date, if the purchaser desires, he has the option of returning the within-named stock at the price paid, together with 10 per cent. interest. Avery Investment Company, by Frank Avery, Gen. Mangr."

The "within-named stock" referred to the stock so purchased by the defendant. Leaving out the question as to Avery's authority to make such an agreement on behalf of the owner of the stock, as to which the record is silent, it does not appear that defendant ever exercised the option to return or offered to return the stock, or ever demanded a return of the money paid therefor, together with interest thereon. For aught that appears to the contrary, he retained, and still retains, the stock, the value of which may have greatly exceeded the amount of the note given in exchange therefor. We find nothing in the record tending to prove that the note was executed without consideration. Nor was there anything in the transaction which, upon the record presented, justifies the claim that the note was procured by fraud. This being true, it was not error for the court to refuse to instruct the jury that the burden of proof rested upon plaintiff to show that he purchased the note without knowledge that it was obtained by fraud or without consideration. The record is entirely silent as to any evidence upon which to predicate such an instruction. It clearly appears that not only plaintiff, but Cross, from whom he obtained the note, were both innocent purchasers, having acquired the same in the ordinary course of business, each paying therefor substantially its face value, prior to the maturity thereof and without any notice of the alleged infirmity in the execution thereof.

The appeal is without merit, and the judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 18

PEOPLE v. CHIN YOU. (Cr. 508.)

(District Court of Appeal, First District, California. Feb. 29, 1916.)

FALSE PERSONATION ⊜4 — SUFFICIENCY OF INFORMATION.

An information under Pen. Code, § 529, subd. 3, making it an offense to impersonate another, and in such assumed character to do any act which, if done by the person falsely impersonated, might render him liable to suit or prosecution, or any charge or penalty, which did not affirmatively allege the things required by the statute, where the act of impersonating itself would not show upon its face that an injury or benefit would accrue, was insufficient on demurrer.

[Ed. Note.—For other cases, see False Personation, Cent. Dig. § 2; Dec. Dig. ⊜4.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Information against Chin You, charging him with impersonating another. Demurrer to the information sustained, and the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People. Edward F. Moran, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order sustaining a demurrer to an information, wherein the defendant was charged, under the provisions of subdivision 3 of sec-

tion 529 of the Penal Code, with impersonating another person. The demurrer was grounded mainly upon the contention that the information did not state facts sufficient to constitute a public offense, because it did not, either expressly or by implication, allege that the impersonation by the defendant of another person had the effect of making the latter liable to any suit or prosecution, or to pay any sum of money, or to incur any charge or forfeiture, whereby any benefit might accrue to the defendant or to any other person.

We think that the information should have alleged affirmatively the things required by subdivision 3 of section 529 of the Penal Code, or else that it should have appeared from the act of impersonation that the injury or the benefit referred to in the section would have been produced; that is to say, there might be a case where the very act of impersonation itself would show upon its face that an injury or a benefit would accrue, but, if it did not so show, then the information should have alleged in express terms that that benefit or that injury did accrue or occur, as the case might be.

We think the order appealed from should be affirmed, and that is the order.

30 Cal. App. 112

MANNING v. BROADMOOR IMPROVEMENT CO. (Civ. 1756.)

(District Court of Appeal, First District, California. March 10, 1916.)

CONTRACTS ⟸322(4)—ACTIONS FOR BREACH—EVIDENCE—SUFFICIENCY.

In an action to recover the balance of a bonus claimed to be due plaintiff under an agreement to build houses on land purchased from defendant according to specifications, it appearing that the contract had been breached by plaintiff in several respects, evidence *held* sufficient to support a finding for defendant.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1536, 1537; Dec. Dig. ⟸322(4).]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Samuel E. Manning against the Broadmoor Improvement Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. B. Rinehart, of Oakland, for appellant. H. L. Breed, of Oakland, for respondent.

PER CURIAM. This is an appeal from a judgment entered in favor of the defendant and against plaintiff. The sole question in the case is: Does the evidence sustain the findings?

The defendant, desiring to promote the sale of a suburban tract of land divided into building lots, known as Broadmoor, in Alameda county, sold to the plaintiff six lots for the aggregate sum of $11,205, and at the same time entered into an agreement with him, whereby the defendant was to give to the plaintiff a bonus of $6,000 upon condition that the latter should build on each of the six lots a dwelling house, to cost $2,500, according to plans and specifications to be approved by the defendant; that the work should be prosecuted with due diligence, and no mechanics' liens to be filed against the property. Of the $6,000 bonus all has been paid but the sum of $449.07, and the purpose of this action is to recover that sum. Five of the buildings were completed, and the reason the defendant refused to pay the balance of the bonus was, as he claimed, that the sixth building was left uncompleted.

We agree with the position taken by the defendant. The buildings were not completed within the time specified in the contract, nor did the plaintiff, as agreed, keep the property free from liens of laborers and materialmen. But aside from those matters, and so far as the last house is concerned, it appears that the plaintiff, notwithstanding that his attention had been called to certain defects in that building, and that he had promised to remedy them, failed to do so in the following particulars: By omitting to put an ash gate on the outside of the chimney, to repair certain back windows, to construct gutters on the roof and two sides of the house, to install doors to a china closet, and to put in place certain electric fixtures. These things were not done promptly or at all. The plaintiff admitted that the house was unfinished in the respects mentioned, and, as before stated, promised to complete the building and obviate the objections, whereupon, according to the testimony, the defendant expressed himself as willing to pay the balance of the bonus, notwithstanding that the contract was violated in other respects. It also appears from the testimony that the defects were important and substantial, having regard to the purpose of the defendant in entering into the contract.

Under the state of the evidence outlined we do not think it can be said that it fails to support the findings.

The judgment is affirmed.

29 Cal. App. 678

RUCKER v. CARPENTER. (Civ. 1436.)

(District Court of Appeal, Third District, California. Feb. 14, 1916.)

1. BILLS AND NOTES ⟸191 — INDORSEMENT FOR TRANSFER—FORM.

In suit by the holder of a note indorsed by payee's signature below the words "demand, notice and protest waived," the indorsement was sufficient under Civ. Code, § 3117; the note being thereby made payable to bearer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 456, 457; Dec. Dig. ⟸191.]

2. BILLS AND NOTES ⟸198 — INDORSEMENT FOR TRANSFER—FORM.

In such case, subsequent indorsement by a bank for collection, "Pay to the order of any

bank or banker," did not affect the rights of the indorsee as owner and holder of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 465–467, 473; Dec. Dig. ⊂⊃198.]

3. EVIDENCE ⊂⊃471(29) — CONCLUSION — TRANSFER.

In suit by transferee of a note against the maker, it is not error for plaintiff's attorney to ask plaintiff when and where the note was assigned to him, as the question did not call for a conclusion, and plaintiff later testified, without objection, that the note had been assigned to him for valuable consideration and never paid, and his explanation of all the facts, on cross-examination, was not disputed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2174; Dec. Dig. ⊂⊃471(29); Witnesses, Cent. Dig. §§ 833–836, 988.]

4. EVIDENCE ⊂⊃471(29) — CONCLUSION — EFFECT OF CONTRACT.

In suit by the transferee of a note against the maker, a question to the payee whether he had "assigned the note in writing to plaintiff" was objectionable as calling for a conclusion, where it appeared that he had indorsed the note in blank.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2174; Dec. Dig. ⊂⊃471(29); Witnesses, Cent. Dig. §§ 833–836, 988.]

5. BILLS AND NOTES ⊂⊃489(3) — ACTIONS — PLEADING—GENERAL DENIAL.

In suit by transferee of a note against the maker, the assignment of the note to the plaintiff cannot be called in question by defendant, under a general denial of assignment, where he has alleged no matter by way of special defense.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1590–1595; Dec. Dig. ⊂⊃489(3); Pleading, Cent. Dig. § 1325.]

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by George H. Rucker against Samuel Carpenter. From a judgment for plaintiff and an order denying defendant's motion for new trial, defendant appeals. Affirmed.

L. E. Coburn, of Yreka, for appellant. James D. Fairchild, of Yreka, for respondent.

CHIPMAN, P. J. Plaintiff alleges in his complaint: That, on May 20, 1913, at Charlestown, W. Va., defendant executed and delivered to J. R. Pentuff his promissory note in words and figures following:

"$600.00. Charlestown, W. Va., May 20th, 1913.

"Six months after date, I promise to pay to the order of J. R. Pentuff, Six Hundred Dollars for value received, negotiable and payable at the Farmers and Merchants Deposit Co., Charlestown, W. Va.

"Samuel Carpenter,
"Post office, Gazelle, Cal."

That, prior to the commencement of this action, for a valuable consideration, said J. R. Pentuff sold, assigned, and transferred said promissory note to plaintiff, and plaintiff ever since has been and now is the owner and holder thereof; that at maturity, to wit, on November 20, 1913, said note was presented at said Farmers' & Merchants' Deposit Company, at Charlestown, W. Va., to defendant for payment, but payment was not made; that due notice thereof was given to said Pentuff; that defendant has not paid said note, or any part thereof, to said Pentuff or to plaintiff, and the whole thereof is due, owing, and unpaid, together with interest at 7 per cent. per annum from said May 20, 1913, amounting to $58.80. The complaint is verified. A general demurrer to the complaint was overruled, and defendant answered: Denied the alleged sale and transfer of said note and plaintiff's alleged ownership thereof, but did not deny its execution and delivery; denied, on information and belief, that said note was presented for payment, or that due notice thereof was given to said Pentuff, as alleged in the complaint; denied that "said note was ever presented to him in person at any time or place." For further answer, alleged that said note was given by defendant to said Pentuff as security for the payment of $300 and no more; that $300 was all the money or thing of value received by defendant for said note. A jury was waived, and the court tried the cause and made the following findings: That defendant executed and delivered the note as alleged in the complaint, setting out the note in the findings; that, prior to the commencement of the action, said Pentuff sold and transferred said note to plaintiff, who ever since has been, and now is, the owner and holder thereof and that at its maturity as alleged in the complaint the note was presented for payment as alleged, and was not paid, and that due notice thereof was given said Pentuff, and that neither said Pentuff nor defendant has paid the same, nor any part, but the whole thereof is due and unpaid, together with interest at 6 per cent. per annum from May 20, 1913. Thereupon judgment was duly entered for the sum of $670.40 and costs, amounting to $14.25. Defendant appeals from the judgment and the order denying his motion for a new trial and brings up the record under the alternative method.

The testimony was taken by deposition. Plaintiff testified that he is the holder and owner of the promissory note attached to his deposition, which reads as set out in the complaint, and was thus indorsed:

"May 22, 1913. Demand, notice and protest waived. J. R. Pentuff."

Also indorsed with rubber stamps under the foregoing as follows:

"Pay to the order of any Bank, Banker or Trust Co., prior indorsements guaranteed. Nov. 11, 1913, the Arlington National Bank, 69-424, of Rosslyn, Va., 68-424, G. T. Merchant, Cashier."

Plaintiff testified to the genuineness of Pentuff's signature. He was asked the following question: "When and where was said note assigned to you?" To which defendant objected "on the ground that it called for the conclusion of the witness, that it was incompetent and not the best evi-

dence." The objection was overruled, and defendant excepted. Plaintiff answered: "May 22, 1913, at Arlington National Bank, Rosslyn, Va." He testified further, without objection, that "the note was assigned for a valuable consideration"; that it was cashed, and he paid the money to Pentuff, and neither defendant, nor any one else, "has ever made any payment on account of said note, and that the note was protested." The note was then offered in evidence as above set out, to which defendant objected on the ground "that the same was not indorsed by Pentuff and, further, that it appears that the Arlington National Bank, on November 11, 1913, had indorsed it payable to any bank, banker, or trust company and that no bank, banker, or trust company had subsequently indorsed the same to any one, or at all; that the same was incompetent, irrelevant, and immaterial." The objection was overruled and defendant excepted. On cross-examination plaintiff testified as follows:

"The arrangements regarding said note other than appears thereon was Pentuff gave his note for 90 days, putting up this note as collateral with the understanding that the Pentuff note should be renewed at the expiration of 90 days, and at maturity of the Carpenter note, Pentuff's note was to be paid. The Pentuff note was not paid. The consideration on my part for the note was: That Mr. Pentuff represented himself to be a preacher, saying he ran a female seminary, saying that he had to take a great many notes in settlement of tuition fees, and therefore had to use some of the notes in other banks than those at Charlestown, W. Va., where his seminary was. I paid Pentuff $500 in cash, and was to refund him the difference when Carpenter's note was paid. It is not a fact that the note in question was delivered to me in pledge by Pentuff as security for money by him borrowed from me. The Carpenter note was the one offered for discount, and the Pentuff note was subsequently added only because of the rule of the bank, that no paper could be discounted when running for more than 90 days; therefore the Pentuff note was made for 90 days and renewed for a like period to mature with the Carpenter note. The Pentuff note has never been paid."

Defendant, called as a witness in his own behalf, was asked the following question: "For what purpose did you give this note sued on in this case?" Plaintiff objected on the ground that "it calls for a conclusion of the witness, and is an attempt to vary the terms of a written instrument." The objection was sustained, and defendant excepted. He was also asked whether he received anything except $300 as a consideration of the note, to which objection by plaintiff was sustained, and exception noted, on the alleged ground that it was an attempt to vary the terms of a written instrument. He testified, on cross-examination, that "he never received a notice of protest," and that he "signed the note in question." He gave no further testimony.

Pentuff, payee of the note, was called as a witness for defendant, and was asked the following questions: "Did you ever indorse that note to the plaintiff?" To which plaintiff objected that "it called for a conclusion of the witness, and tended to vary the terms of a written contract." Objection sustained, and exception taken. "Q. Did you ever sell, assign, or transfer that note to the plaintiff in writing?" To which a like objection was made and sustained, defendant excepting. On cross-examination he testified:

"Defendant never paid me any part of this note; plaintiff never made any demand upon me for the payment of this note. No part of this note has been paid to me."

The foregoing is all the evidence in the case appearing in the transcript.

[1, 2] We will notice the points now urged in defendant's brief. The introduction of the note was objected to on the ground that it had not been indorsed by the payee, and that the only indorsement was to a "bank," etc., which had not indorsed the note to plaintiff. It is contended that the words, "demand, notice and protest waived" did not constitute an indorsement. In Loustalot v. Calkins, 120 Cal. 688, 53 Pac. 258, the words, "waiving notice and protest," above the payee's signature on the back of the note, were held to be an indorsement as defined in section 3117, Civil Code. See Bunker v. Osborn, 132 Cal. 480, 64 Pac. 853. The question here is not whether Pentuff became liable by the indorsement as an indorser or as an assignee, a distinction sometimes arising out of the form of the indorsement. The question is, Did it have the effect to pass title to the holder? Pentuff is not a party to the action, and is not concerned in it. An assignment would follow by implication by the mere signature. The writing over the signature does not destroy the assignment which the law imports from the signature per se. 1 Daniel on Negotiable Instruments, § 688c. The words preceding the signature were not meant to apply to the indorser. He intended to waive demand, notice and protest in favor of the holder by virtue of his indorsement. In other words, he, in effect, assigned the note and waived demand, notice and protest upon him. Hendrix v. Bauhard, 138 Ga. 473, 75 S. E. 588, 43 L. R. A. (N. S.) 1028, Ann. Cas. 1913D, p. 692, cited by respondent. The indorsement was in blank, i. e., to no particular person, and the note became payable to bearer. 1 Daniel on Negotiable Instruments, § 693. The subsequent indorsement by the Arlington National Bank did not affect plaintiff's right as holder and owner of the note, and that he was the owner and holder was undisputed. He could strike out any subsequent or intermediary indorser. Id., § 694a. The note was properly admitted in evidence.

[3] It was not error to ask plaintiff when and where the note was assigned to him. The objection was not that the question assumed an assignment made, and did not call for the conclusion of the witness. Without objection the witness testified that the note was assigned to him for a valuable considera-

tion, and has never been paid. On his cross-examination he explained all the facts, and they were not disputed.

[4, 5] When Pentuff was testifying he was asked, "Did you ever indorse that note to the plaintiff?" and "Did you ever sell, assign, or transfer that note to the plaintiff in writing?" These questions were put to the witness upon defendant's theory that the indorsement did not amount in law to a transfer. The witness was not asked whether his signature on the back of the note was genuine. The question called for the opinion of witness whether he had "assigned the note in writing to plaintiff," which called for a conclusion. Counsel could have brought out all the facts, had he so desired, from which the court could have determined whether an assignment had been made. Furthermore, the fact that Pentuff had indorsed the note as shown was not disputed, and hence it was not allowable for him to testify as to its effect, nor could he, under the general denial of assignment, having alleged no matter by way of special defense, call the assignment in question. Giselman v. Starr, 106 Cal. 651, 658, 40 Pac. 8.

Appellant complains that he was by the ruling of the court deprived of the opportunity to prove by Pentuff that but $300 was given to him. Counsel says:

"Where there is any doubt of the intention of Pentuff in affixing his signature to the back of that note, his testimony ought to have been allowed to clear it up."

We do not doubt that the court would have permitted defendant to show by Pentuff just what the transaction was, but no other questions were asked him; the purpose of counsel apparently having been to get from the witness an opinion as to whether what he did amounted to an assignment.

We discover no prejudicial error in the record.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(29 Cal. App. 699)

GUERNSEY v. JOHNSON ORGAN & PIANO MFG. CO. (Civ. 1729.)

(District Court of Appeal, Second District, California. Feb. 16, 1916.)

1. NOVATION ⊂⊃7—ASSUMPTION OF DEBT OF ANOTHER—SUFFICIENCY OF WRITING.

Where the secretary of defendant corporation wrote a letter not under seal to plaintiff, seeking adjustment of their account, and included a statement that it was "attending to" obligations of another firm, which it had taken over, and "expected to take care" of plaintiff's claim, such writing was insufficient to show a promise in writing to assume and agree to pay such other firm's debts.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 7; Dec. Dig. ⊂⊃7.]

2. CORPORATIONS ⊂⊃412 — POWERS OF OFFICERS—RIGHT TO BIND CORPORATION.

A corporation secretary has no inherent power to assume an obligation for the corporation, or agree without consideration in behalf of the corporation, to pay the debt of another.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1654–1656; Dec. Dig. ⊂⊃412.]

3. CONTRACTS ⊂⊃27 — IMPLIED CONTRACTS — ACCEPTANCE OF BENEFITS.

Civ. Code, § 1589, providing that voluntary acceptance of the benefit of a transaction is equivalent to a consent to all obligations arising from it so far as the facts are or ought to be known to the persons accepting, cannot be invoked unless benefit be shown.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 121–132; Dec. Dig. ⊂⊃27.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by R. B. Guernsey, doing business as R. B. Guernsey & Co., against the Johnson Organ & Piano Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frank Bryant, of Los Angeles, for appellant. Hardy, Wheeler & Hardy, of Los Angeles, for respondent.

SHAW, J. Defendant, a corporation, appeals from the judgment in favor of plaintiff, presenting the record by bill of exceptions. It appears, as found by the court, that:

"The Murray M. Harris Company became indebted to the plaintiff for goods sold and delivered in the sum of $497.50, and that thereafter on the 18th day of December, 1913, * * * the defendant, Johnson Organ & Piano Manufacturing Company, in writing assumed and agreed to pay the same to this plaintiff."

The only evidence whatever offered in support of this finding was a letter, dated December 16, 1913, addressed to plaintiff, signed "Johnson Organ & Piano Mfg. Co., by A. E. Streeter, Secretary," wherein he said:

"Your favor of the 10th inst. received. Regarding our account with you, we shall be more than glad to make settlement as soon as the proper adjustment and agreement on our account can be reached. In the first place, the statement rendered by you on the 10th does not contain a credit of $63.60 to which we are entitled. We have also returned some blowers to your local warehouse and are holding their receipt for same, but have not as yet received proper credit. At such time we shall be glad to make final settlement with you. The difficulty in this account has been through an agency agreement between your company and the Murray M. Harris Co., which we took over at the time we took over the Murray M. Harris Co. business. We are attending to all obligations of the Murray M. Harris Co. and expect to take care of this one. This agency agreement has never been well defined, and your Mr. Cochran views same in a light different to that which we were led to understand. Please render us a statement containing the credits of which we have spoken, and we shall be glad to settle with you immediately."

[1] No corporate seal was attached to this letter, and with reference thereto Streeter testified that he caused the same to be written, and signed the corporate name thereto; that he was secretary and a director of defendant; that the letter was written as a means devised by himself of assisting the Murray M. Harris Company to extend its

indebtedness. The letter, in our opinion, is wholly insufficient to justify the finding made by the court. Plaintiff's letter of the 10th, receipt of which is acknowledged, was not offered in evidence. The letter at most merely shows that defendant had taken over the Murray M. Harris Company, which was a debtor of plaintiff in some amount not shown; that defendant was *attending* to all obligations of the Murray M. Harris Company and expected to take care of this one. What this one was does not appear. It also shows there was some controversy existing between defendant and plaintiff with reference to the accounts between them, and a difference of understanding regarding some agency contract out of which the indebtedness of the Harris Company had grown. Moreover, the promise made to "settle with you immediately" was not with reference to the Murray M. Harris Company matter, but as to an indebtedness due from defendant directly to plaintiff.

[2] Aside from this, however, is the fact that Streeter, as secretary, had no inherent power to assume any obligation on behalf of defendant, or agree without any consideration whatsoever, as appears here, to bind defendant to pay the debt of another. No express authority whatever is shown in Streeter; nor is it shown by a scintilla of evidence that he had any ostensible authority to act in the matter. See Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; Bonner Oil Co. v. Pennsylvania Oil Co., 150 Cal. 658, 89 Pac. 613; Read v. Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131; Thomasson v. Grace M. E. Church, 113 Cal. 558, 45 Pac. 838; Cook on Corporations (6th Ed.) § 717.

[3] It is true, as claimed by respondent, that:

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Civ. Code, § 1589.

There is nothing in the record, however, which in the slightest degree indicates that defendant was benefited by the transaction, or accepted any benefits thereof. Indeed, the cause of action is based solely upon the letter without any other showing whatsoever.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 85

FREDE v. JUSTICE'S COURT OF LOS ANGELES TP. et al. (Civ. 1969.)

(District Court of Appeal, Second District, California. March 7, 1916.)

CERTIORARI ⟸70(1) — APPEAL — JUDGMENTS APPEALABLE.

A minute order, purporting to show that a writ of review was denied, when contradicted by the fact that the writ was issued and return made, is not appealable, where the writ issued in response to the petition, and motion to quash the writ was denied, after which the transcript of the record was transmitted, so that the matter stood for hearing below, under Code Civ. Proc. § 1075, providing that, when a full return has been made, the court must hear the parties, and may thereupon give judgment.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 195, 196; Dec. Dig. ⟸70(1); Appeal and Error, Cent. Dig. §§ 366, 571.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Proceeding for writ of review by Sadie G. Frede against the Justice's Court of Los Angeles Township, County of Los Angeles, State of California, and another. From a purported judgment in a proceeding for writ of review, the petitioner appeals, and defendants move to dismiss the appeal. Appeal dismissed.

Wm. Lewis and Charles Robert McCarty, both of Los Angeles, for appellant. Winslow P. Hyatt, of Los Angeles, for respondents.

SHAW, J. This is a motion to dismiss an appeal from a purported judgment rendered in a proceeding instituted in the superior court for a writ of review directed to respondents. The ground for the motion is that no judgment was rendered from which an appeal would lie.

It appears from the judgment roll that the writ was issued on May 12, 1915, and that pursuant thereto the respondent certified and transmitted a transcript of the record and proceedings in a certain action wherein Thomas B. Henley was plaintiff and petitioner herein was defendant; that thereafter, on May 21, 1915, a demurrer was filed to the petition, also a motion to quash the writ of review, which demurrer was overruled, and the motion to quash denied. On the same date, as appeared from the minutes of the court, it was ordered that "petition for writ of review herein is denied." The appeal, as stated in the notice of motion, is "from the order of the above-entitled court denying plaintiff's petition for a writ of review, made by said court on June 21, 1915." Section 1075, Code of Civil Procedure, provides that:

"When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling, or modifying the proceedings below."

In our opinion, the minute order from which the appeal is prosecuted is not a judgment rendered upon the return of the inferior tribunal, from which an appeal would lie. It purports merely to be a denial of the writ upon the petition filed. But this is contradicted by the fact that the writ *was issued* and a *return thereafter made.* It does not appear, however, that any hearing was ever had upon the return. Since the writ was issued in response to the petition, the sole function of which was to secure the writ, and the court having denied defendant's motion to quash the writ pursuant to

which a transcript of the record of the proceeding was transmitted to the court, a hearing should be had thereon. As shown by the record before us, the matter is still pending in the superior court; no hearing having been had, and no judgment having been rendered, as directed by section 1075.

The appeal is dismissed.

We concur: CONREY, P. J.; JAMES, J.

29 Cal. App. 702

Ex parte WILSON. (Cr. 342.)

(District Court of Appeal, Third District, California. Feb. 16, 1916.)

PARDON ⊂⊃4—COMMUTATION OF SENTENCE—CONDITIONS.

Under Const. art. 7, § 1, empowering the Governor to grant reprieves, pardons, and commutations of sentence after conviction, for all offenses except treason and impeachment cases, on such conditions, restrictions, and limitations as he may think proper, since no distinction is made between pardons and commutations, the Governor may commute a sentence, and provide that it shall revive and be operative if the convict is thereafter convicted of a felony.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 4–6½; Dec. Dig. ⊂⊃4.]

Application by Frank S. Wilson for writ of habeas corpus. Writ denied.

Frank S. Wilson, pro se.

PER CURIAM. It appears from the petition that petitioner was, in the month of June, 1902, convicted of the crime of robbery and sentenced to undergo imprisonment for the term of his natural life, in the state prison at Folsom; that, on March 19, 1909, the Governor of the state commuted the sentence "from the serving of his natural life to serve 6 years, 9 months, and 3 days, or from June 16, 1902, to March 29, 1909"; that the order of commutation of said sentence contains the following provision:

"Now, therefore, I, J. N. Gillett, Governor of the state of California, * * * do hereby commute the sentence of the said Frank S. Wilson * * * provided that if said Frank S. Wilson shall thereafter be convicted of any felony, this commutation shall become void, and in addition to the sentence imposed for such felony, he shall serve the remainder of the sentence cut short by this order."

By section 1, art. 7, of the Constitution:

"The Governor shall have power to grant reprieves, pardons, and commutations of sentence, after conviction, for all offenses except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper."

It was held in Ex parte Marks, 64 Cal. 29, 28 Pac. 109, 49 Am. Rep. 684, that the Governor is authorized to grant pardons upon conditions stated which may be defeated by a breach of such conditions. In a note to State v. McIntire, 59 Am. Dec. 566, 572, 576, numerous cases are cited showing that it is well settled that the executive may grant conditions to a pardon. Such conditions as the following are among others which may be imposed: That the prisoner refrain from the use of intoxicating liquors; that he shall use all proper exertions to support his mother and sister; that he shall not be convicted of any offense against the criminal laws of the state. Cases are cited where it was held that if the prisoner fails to perform the condition, the original sentence remains in full force and may be carried into execution.

The Constitution makes no distinction between the power to grant pardon and commutations of sentence. The rule above stated applies equally to pardons and commutations of sentence.

The writ is denied.

29 Cal. App. 722

PACIFIC RYS. ADVERTISING CO. v. CARR. (Civ. 1689.)

(District Court of Appeal, Second District, California. Feb. 19, 1916.)

1. CONTRACTS ⊂⊃75(1)—VALIDITY—CONSIDERATION — PERFORMANCE OF LEGAL OBLIGATION.

A promise to perform a legal obligation is not a sufficient consideration for a contract based thereon.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273–275, 277–279; Dec. Dig. ⊂⊃75(1).]

2. BILLS AND NOTES ⊂⊃92(2) — CONSIDERATION.

Release by the plaintiff of a purported claim against a corporation of which the defendant was a stockholder, and which the corporation was under no legal or moral obligation to pay, it being executed by its secretary and treasurer without authority, and not being a compromise of a disputed claim, was not sufficient consideration for a note given by the defendant.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 173, 176, 185, 186; Dec. Dig. ⊂⊃92(2).]

3. EVIDENCE ⊂⊃434(12) — VARYING NOTE — MISREPRESENTATIONS.

In an action on a note executed on representations to the defendant that a binding contract existed between the plaintiff and the corporation, of which the defendant was a stockholder, which obligated the corporation to pay the plaintiff a sum of money, the defendant was entitled in defense of the action to show that there was no such obligation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2016; Dec. Dig. ⊂⊃434(12).]

4. BILLS AND NOTES ⊂⊃141—RENEWAL—CONSIDERATION.

A note given in renewal for one void for want of consideration is affected by the invalidity in giving the first and is invalid and unenforceable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 338, 339, 350–354; Dec. Dig. ⊂⊃141.]

5. BILLS AND NOTES ⊂⊃141 — EXTENSION — CONSIDERATION.

Giving the defendant an extension of 90 days within which to pay a void note constitutes no consideration for her renewed promise to pay it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 338, 339, 350–354; Dec. Dig. ⊂⊃141.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Pacific Railways Advertising Company against Jessie Williamson Carr. Judgment for the defendant, and, from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Slosson & Mitchell, of Los Angeles, for appellant. W. E. So Relle, of Los Angeles, for respondent.

SHAW, J. Action to recover upon a promissory note made by defendant to plaintiff. The case was tried before a jury which brought in a verdict for defendant. Judgment followed in accordance therewith. Plaintiff appeals from an order of court denying its motion for a new trial. While admitting the making of the note and nonpayment thereof, defendant insists there was no consideration for its execution. The note was given in renewal of one theretofore executed by defendant to plaintiff under the following circumstances: Under a purported contract made by plaintiff with a corporation known as the Amritam Company there was, on August 21, 1912, claimed to be due to plaintiff from the latter company the sum of $442. This contract was executed on behalf of the Amritam Company, without the corporate seal affixed thereto, by J. S. Benner, secretary and treasurer thereof. No authority was ever conferred upon him to execute such contract, nor was there any ratification thereof. After the alleged liability had been so incurred, defendant acquired an interest in the Amritam Company, and upon being informed by said Benner, secretary of the company, that the contract constituted a binding obligation of the company, she accompanied him to the office of plaintiff and agreed to assume the alleged indebtedness based upon said proposed contract, then past due, and as evidencing such agreement she executed her note upon the maturity of which she, in renewal thereof, executed the note here involved. Whereupon plaintiff released said Amritam Company from liability upon the contract.

[1-3] Conceding the contract was not an obligation of the Amritam Company, as to which there seems to be no doubt (Black et al. v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; Oscar Bonner Oil Co. v. Pennsylvania Oil Co., 150 Cal. 658, 89 Pac. 613; Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580), appellant nevertheless insists that defendant could not avail herself of such fact as a defense to the action based upon the note, and therefore the court erred in permitting defendant to show that the pretended obligation of the Amritam Company to plaintiff which constituted the consideration for executing the note, had in fact no existence. The consideration for her note was the purported obligation of the company upon this contract; but there was no obligation, either express or implied. This being true, it cannot be said there was any consideration for the execution of the note sued upon. Clearly, if suit had been brought upon the contract against the Amritam Company, no recovery could have been had thereon upon a showing of the facts here presented; and, if there was nothing upon which to base an action against the Amritam Company, it must follow that plaintiff in releasing the company from liability which did not exist suffered no prejudice by reason thereof. A promise to perform a legal obligation is not a sufficient consideration for a contract based thereon. Sullivan v. Sullivan, 99 Cal. 187, 33 Pac. 862. Neither is the release of a purported claim against one upon whom there rests no legal or moral obligation to pay the same a sufficient consideration for a third party's promise to pay such nonenforceable claim, unless it be upon the compromise of a doubtful or disputed claim. At the time of executing the note, there existed no dispute between plaintiff and the Amritam Company; indeed, for aught that appears in the record to the contrary, the company had no knowledge of the existence of the purported contract, or alleged services performed by plaintiff thereunder. In 9 Cyc. p. 357, it is said:

"So by the weight of authority, where services are rendered to another without any request and under circumstances which do not raise an implied contract on his part to pay for them, a promise founded on motives of honor or gratitude is not on a sufficient consideration."

Since the note was executed upon representations to defendant that a binding contract existed between plaintiff and the Amritam Company which obligated the latter to pay to plaintiff a sum of money, she was entitled, in defense of the action, to show there was no such obligation.

[4, 5] A note given in renewal for one void for want of consideration is, like the first, invalid and unenforceable. Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 South. 522; Comings v. Leedy, 114 Mo. 454, 21 S. W. 804; Cochran v. Perkins, 40 South. 351.[1] This being true, it was therefore not error, as claimed by appellant, for the court to instruct the jury that, where a note is executed by a payee in renewal of a former note given by him for which there was no consideration, such renewal note is likewise affected with the infirmity in the giving of the first. Giving defendant an extension of 90 days within which to pay a void note constituted no consideration for her renewed promise to pay the same.

There are no other errors presented which merit discussion.

The order from which the appeal is prosecuted is affirmed.

We concur: CONREY, P. J.; JAMES, J.

[1] Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 146 Ala. 689.

30 Cal. App. 63

KING v. JOHNSON et al. (Civ. 1721.)

(District Court of Appeal, Second District, California. March 3, 1916.)

1. BROKERS ⟸58 — COMPENSATION — DEFENSES.

An agent cannot recover commissions for the illegal sale of lands in violation of Act March 15, 1907 (St. 1907, p. 290) §§ 8 and 9, which prohibits the sale or offer for sale of lands by reference to an unrecorded map or plat.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 90; Dec. Dig. ⟸58.]

2. CONTRACTS ⟸105—VIOLATION OF STATUTE —VOID.

A contract founded on an illegal consideration or made for the purpose of furthering any matter or thing prohibited by statute or to aid or assist any party therein is void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 477, 478, 480–497; Dec. Dig. ⟸105.]

3. PLEADING ⟸428(4) — ADMISSIBILITY OF EVIDENCE—ILLEGALITY OF CAUSE DISCLOSED BY COMPLAINT.

Where the complaint discloses that the transaction upon which plaintiff rests his right to recover is illegal, no evidence is admissible in support of the alleged cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1436; Dec. Dig. ⟸428(4).]

Appeal from Superior Court, Los Angeles County; Curtis C. Legerton, Judge.

Action by Earl B. King against W. R. Johnson and Amanda A. Johnson. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Judgment affirmed.

Gilbert F. Wyvell, of Los Angeles, for appellant. Phil M. Chandler, of Los Angeles, for respondents.

SHAW, J. Action to recover commissions for the sale of real estate. As disclosed by the record, it is difficult to understand the procedure adopted by the trial court in disposing of the case. It seems to be conceded by counsel, however, that its effect was to sustain, without leave to amend, a general demurrer to the complaint, which ruling was followed by a judgment for defendants, from which and an order denying his motion for a new trial plaintiff appeals.

While the complaint is most awkwardly drawn, it fairly appears therefrom that the defendants were the owners of a tract of land situated in lot 2, block 21, in the town of Lancaster; that on October 25, 1913, plaintiff and defendants agreed there should be made a subdivision of the parcel of land into 46 lots, which subdivision they designated "the Umbrella Tract." No map or plat thereof was filed, nor any attempt ever made to comply with the provisions of the act of March 15, 1907 (Stats. 1907, p. 290), and amendments thereto; nor did defendants ever agree to file a map or plat thereof. At the same time defendants made a written contract with plaintiff whereby they constituted him their exclusive agent for a period of one year to sell said lots so described as being in the Umbrella Tract, as per schedule of prices agreed upon. Thereupon plaintiff, with full knowledge of the fact that no attempt had been made to comply with the provisions of the statute, nevertheless proceeded to offer for sale and, as alleged, did sell 14 of said lots by reference to a purported but unrecorded map, to responsible persons who were at all times ready, willing, and able to comply with the terms and conditions of purchase which were agreed upon between them and defendants, which sales were made "subject to the recording by defendants of an accurate map or plat of said tract with the county recorder of Los Angeles county, wherein said tract is situated"; that defendants neglected to record any map or plat of said tract, by reason of which fact the sales so made by plaintiff were never consummated.

Section 8 of the act referred to provides that "no person shall sell or offer for sale any lot or parcel of land, by reference to any map or plat, unless such map or plat has been made, certified, indorsed, acknowledged and filed in all respects as provided in this act. * * *" And section 9 provides that "every person who violates any of the provisions of this act is guilty of a misdemeanor," the penalty for which is fixed at both a fine and imprisonment. It thus appears that not only is the selling or offering for sale of lots in contravention of the provisions of the statute expressly prohibited, but section 9 attaches a penalty to every violation thereof.

[1, 2] It would seem clear that, in the absence of a compliance with the statute, it was a violation of law for defendants to even offer the lots for sale; and, if this be true, it was likewise a violation of law for plaintiff, as their agent, to offer them for sale, thus joining with his principals in a known illegal act for the doing of which he asks compensation. He is then seeking to recover for services, the performance of which was prohibited by law; hence the sole consideration for the contract upon which he bases his claim was the doing of known illegal acts. In Swanger v. Mayberry, 59 Cal. 91, it is said:

"The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction malum in se, or which is prohibited by statute, on the ground of public policy."

[3] The complaint discloses the illegal transaction upon which plaintiff founds his right to recover, and this being true, no evidence was admissible in support of the alleged cause of action. The statute was enacted, not as a revenue measure, but as a declaration of the public policy of the state. Being in the interest of the public, we cannot

in applying it consider matters of private justice between individuals; for "the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an * * * illegal act." Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31, and cases there cited.

Appellant insists that the statute is intended for the benefit of vendees only and should not be construed as affecting the right of a broker to recover for services rendered in selling lots in a subdivision by reference to an unrecorded map thereof. It is unnecessary to determine the rights of a vendee, since such right is not involved. Cases cited from other jurisdictions are based upon statutes which the courts, for different reasons, construed as not prohibiting the sale, while the statute under consideration in express terms prohibits the doing of the act for which it is sought to recover. No purpose could be subserved in reviewing such cases here.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

29 Cal. App. 604

PEOPLE v. BARBERA. (Cr. 458.)

(District Court of Appeal, Second District, California. Feb. 9, 1916.)

1. ARSON ⇐9—BURNING INSURED PROPERTY—OWNERSHIP—STATUTE.

Defendant can be guilty of the offense of willfully burning or destroying insured property, denounced by Pen. Code, § 548, though the property belongs to himself.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 19–22; Dec. Dig. ⇐9.]

2. ARSON ⇐22—BURNING INSURED PROPERTY—INDICTMENT—SUFFICIENCY.

An indictment for the crime of willfully burning, injuring, or destroying insured property, denounced by Pen. Code, § 548, which omits to state the name of the person to whom the property belonged, or who was the beneficiary of the insurance, is not subject to demurrer.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 45–49; Dec. Dig. ⇐22; Indictment and Information, Cent. Dig. § 282.]

3. ARSON ⇐2—BURNING INSURED PROPERTY—ELEMENTS OF OFFENSE—STATUTE.

The essential elements of the crime of willfully burning, injuring, or destroying insured property, denounced by Pen. Code, § 548, are that property be insured against the loss, and that defendant burn or otherwise injure or destroy it, with intent to defraud or prejudice the insurer.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 1–3; Dec. Dig. ⇐2.]

4. CRIMINAL LAW ⇐1159(4) — APPEAL AND ERROR — REVIEW — CREDIBILITY OF WITNESS.

The credibility of witnesses is for the jury, and not for the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3077; Dec. Dig. ⇐1159(4).]

5. CRIMINAL LAW ⇐438—EVIDENCE—PHOTOGRAPHS.

In a prosecution for burning insured property, photographs taken a few hours after the fire showing the appearance of the building then, the conditions illustrated by the pictures being corroborative of witnesses, were admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 893; Dec. Dig. ⇐438.]

6. CRIMINAL LAW ⇐814(1)—INSTRUCTIONS—CHARGING ON DIFFERENT CRIME.

In a prosecution for burning insured property, an offense denounced by Pen. Code, § 548, an instruction defining malice as a necessary ingredient in the offense of arson should not be given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. ⇐814(1).]

7. CRIMINAL LAW ⇐1172(6) — APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTION.

In a prosecution for burning insured property, an offense denounced by Pen. Code, § 548, an instruction defining malice as a necessary ingredient in the offense of arson was harmless error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3159; Dec. Dig. ⇐1172(6).]

8. CRIMINAL LAW ⇐1171(1) — TRIAL — CONDUCT OF DISTRICT ATTORNEY.

In a prosecution for burning insured property, an offense denounced by Pen. Code, § 548, where the district attorney on several occasions attempted to introduce testimony to show former fires which had occurred on the same and other premises belonging to the defendant, offering the evidence in good faith, and not to raise a prejudice against defendant, no suggestion of misconduct being made by defendant's counsel, and the court sustaining objections to such evidence, there was no prejudicial misconduct on the part of the district attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. ⇐1171(1).]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Joe Barbera was convicted of burning and destroying insured property, and from the judgment and an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

See People v. Turco, 156 Pac. 1001.

Carter & Torchia, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Roberto B. Camarillo, for the People.

CONREY, P. J. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

The defendant and one Salvatore Turco were jointly indicted and accused of the crime of burning and destroying property insured. It was charged that the defendants at a stated time and place did willfully, etc., burn, injure, and destroy certain property, to wit, a certain store building situate as described in the city of Los Angeles, which said property was then and there insured against loss and damage by fire in the London Assurance Corporation, with the intent then and there and thereby to defraud and prejudice the insurer. This defendant demurred upon several grounds, one being that

the facts stated did not constitute a public offense, and another being that the indictment was not direct and certain with respect to the offense charged, and that it did not, with sufficient particularity to constitute a complete offense, state the circumstances thereof. The defect claimed and upon which appellant relies is the omission to state in the indictment the name of the person to whom the property belonged, or who was the beneficiary of the insurance.

[1-3] This prosecution was not for the crime of arson. It was that defendants committed the crime defined in section 548 of the Penal Code, as follows:

"Every person who willfully burns, or in any other manner injures or destroys any property which is at the time insured against loss or damage by fire or by any other casualty, with intent to defraud or prejudice the insurer, whether the same be the property of or in possession of such person, or of any other, is punishable by imprisonment in the state prison not less than one nor more than ten years."

In a prosecution for this offense the defendant might be guilty even if the property belonged to himself, and a statement of the fact that the property burned was property of any particular person is not essential to a complete description of the offense. The essential facts are that the property was insured against such loss, and that the defendant burned or otherwise injured or destroyed the property with intent to defraud or prejudice the insurer. The question of ownership would arise only as a matter of evidence for the purpose of showing that the person in whose favor the policy had been issued had an insurable interest in the property described in the policy. The order overruling the demurrer was not erroneous.

[4] This defendant, who was tried separately from the defendant Turco, claims that the evidence was insufficient to show any intent on the part of Barbera to defraud the insurance company. The argument in support of this proposition is based upon the claim that the testimony of certain witnesses for the state was unworthy of belief, rather than upon any claim that there is no evidence tending to prove such criminal intent. Since the jury believed this testimony, we are not authorized to find that it was untrue. It appears from this evidence that this defendant is the person who set fire to the building, that he did this under instructions from Turco, and that Turco had told him that after he would collect the insurance and have his bills paid that he and Barbera would divide up the balance of the money. The commission of this crime was encouraged by a detective, who wormed himself into the confidence of the defendants, and who was in the employ of the insurance company and whose testimony is a part of the evidence which led to the conviction of this defendant. All of the argument directed against the credibility of the testimony of such witness relates to circumstances which were appropriately submitted to the jury for their consideration. They did not affect the admissibility of the testimony or the rulings of the court thereon.

[5] There was no error in admitting in evidence certain photographs taken a few hours after the fire, showing the appearance of the building at the time the photographs were taken. The conditions illustrated by these photographs were corroborative of the testimony of witnesses showing what they found on the premises at and after the fire, and under the circumstances shown the time of taking the photographs was not so remote from the time of the fire as to render such photographs inadmissible.

[6, 7] Appellant complains that the court erred in giving people's instruction No. V, defining malice as a necessary ingredient in the offense of arson. Since the crime charged was not arson, this instruction should have been omitted; but the giving of such instruction does not, in our opinion, constitute such prejudicial error as will alone require a reversal of the judgment or authorize a new trial. The other assignments of error with respect to instructions given and with respect to instructions refused are without merit.

[8] Finally, it is claimed that the district attorney was guilty of misconduct because on several occasions he attempted to introduce testimony showing former fires which had occurred on the same and on other premises belonging to the defendant Turco. Objections to this evidence were sustained by the court. Our reading of the record indicates to us that the offers of this evidence by the district attorney were made in good faith, and not for the wanton purpose of raising a prejudice against the defendant. Also we observe that no suggestion of misconduct of the district attorney was made during the trial; and in view of the court's rulings it cannot be said that the defendant suffered prejudice by reason of these acts of the prosecuting officer.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 627

PEOPLE v. CHOBER. (Cr. 337.)

(District Court of Appeal, Third District, California. Feb. 9, 1916.)

1. CRIMINAL LAW ⇐241 — COMMITMENT — CONSTRUCTION.

A commitment reciting that defendant was charged with assault to commit murder, and that it appeared that the "offense above mentioned has been committed, to wit, assault with a deadly weapon," construed, and *held* to be a commitment for an assault with a deadly weapon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 458, 501–508; Dec. Dig. ⇐241.]

2. Indictment and Information ⇐45 — Successive Informations.

Under Pen. Code, § 997, providing that a new information may be filed in lieu of one previously filed, where the latter is set aside on any of the grounds specified in section 995 of said Code, the court may set aside the information where it charges an offense different from that for which the accused was committed, and order a new information filed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 156; Dec. Dig. ⇐45.]

3. Indictment and Information ⇐138—Amendment—Motion to Set Aside.

Under Pen. Code, § 1008, providing that an information may be amended after plea, a motion to set aside the amended information on the ground that an information cannot be amended after plea does not raise the question that the amendment resulted in substantial prejudice to the rights of accused.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 472; Dec. Dig. ⇐138.]

4. Criminal Law ⇐1167(4)—Harmless Error—Amendment of Information—Motion to Set Aside.

Where, after plea, an information charging assault to commit murder was by order of court amended to charge assault with a deadly weapon in accord with the commitment, no substantial prejudice resulted to the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3104; Dec. Dig. ⇐1167(4).]

5. Indictment and Information ⇐138 — Amendment—Motion to Set Aside.

Under Pen. Code, § 1382, where an amended information which changes the offense charged and in legal effect is a new information is filed after the time prescribed, a motion to set aside on the ground that an information cannot be amended after plea does not properly raise the defects complained of.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 472; Dec. Dig. ⇐138.]

6. Indictment and Information ⇐137(5)—Amendment—Motion to Set Aside.

Under Pen. Code, § 995, where an amended information charges an offense not shown by the evidence at the preliminary hearing, a motion to set aside the information on the ground that the accused has not been legally committed by a magistrate, is the proper remedy, not a motion, on the ground that the information cannot be amended after plea.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 485; Dec. Dig. ⇐137(5).]

7. Criminal Law ⇐742(1) — Trial — Province of Jury.

The extent to which inconsistent statements discredit a witness is a jury question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1719; Dec. Dig. ⇐742(1).]

8. Criminal Law ⇐747—Trial—Province of Jury.

Controverted questions of fact upon conflicting evidence are questions for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1714, 1727; Dec. Dig. ⇐747.]

9. Criminal Law ⇐1159(2) — Evidence — Sufficiency.

Where the evidence against the defendant considered without regard to conflicting evidence is sufficient to support the verdict, the decision of the jury is final.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. ⇐1159(2).]

10. Assault and Battery ⇐92—Evidence —Sufficiency.

Conflicting evidence examined, and *held* sufficient to sustain the conviction of assault with a deadly weapon.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137–139; Dec. Dig. ⇐92.]

11. Criminal Law ⇐829(5) — Trial — Requested Instructions.

Requested instructions on the law of self-defense, the subject of which is fully and fairly given in the charge, are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⇐829(5).]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Denton Chober (true name Antonio Chavez), was convicted of assault with a deadly weapon, and appeals. Judgment and order denying a new trial affirmed.

A. H. Carpenter, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted in the superior court of the county of San Joaquin of the crime of an assault with a deadly weapon. He appeals from the judgment and the order denying his motion for a new trial.

The first assignment of error involves the action of the court in allowing the district attorney to amend the information after the defendant had entered a plea of not guilty to the information as originally filed. The reason for the allowance of the amendment was that the original information did not conform to the commitment by the magistrate, in that it charged a different offense from that for which the defendant was committed.

It appears that the defendant was charged in the complaint filed with the magistrate with the crime of assault to commit murder. The commitment recited that the defendant was charged with the crime of assault to commit murder, and that it appeared that the "offense above mentioned has been committed, to wit, assault with a deadly weapon," etc. Upon this commitment, the district attorney filed an information charging the defendant with the crime of assault with the intent to commit murder. After his arraignment upon and plea to the information as so filed, and on the day upon which the case was called for trial, which was several months after his arraignment and plea, the district attorney, calling the court's attention to the commitment and declaring that he construed it as an order holding the defendant to trial for the lesser offense of assault with a deadly weapon, asked leave to amend the information so that it would charge the latter offense. The court, over objection by

counsel for the defendant, granted the motion, and the information was amended accordingly. The defendant's attorney thereafter moved to set aside the information as so amended on the ground that an information cannot be amended after the defendant has entered his plea thereto.

[1] The commitment is somewhat ambiguous as to the crime for which the magistrate intended to hold the defendant to trial, but we agree with the district attorney that, properly construed, the commitment was for an assault with a deadly weapon.

[2] Section 997 of the Penal Code authorizes the court to order a new information to be filed in lieu of one previously filed where the latter or the original information is set aside on any of the grounds specified in section 995 of said Code. This section (997) applies where, before the filing of the original information, the defendant had not been legally committed by a magistrate, and this ground is available and the information will be set aside thereon, if the facts warrant it, and a new information substituted therefor, if the court so orders, when the original information charges an offense different from that for which the accused has been committed. People v. Clayberg, 26 Cal. App. 614, 147 Pac. 994, and cases named therein.

Section 1008 of the Penal Code authorizes the court to allow the district attorney to amend either an indictment or an information under certain qualifications. That section, in so far as it is of interest to the present discussion, reads as follows:

"An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. * * *"

From the nature of the order allowing the district attorney to change the charge against the defendant, it is obvious that the court assumed to act under section 1008 and so intended that the effect of its order should merely be to grant to the prosecuting attorney leave to amend the original information. But we do not conceive it to be important here to consider whether the act of the district attorney in changing, by permission of the court, the offense charged in the information as it was originally filed constituted, in legal effect, an amendment of the original information or, viewing the order as having the effect of setting aside the original information, the filing of a new information in lieu of the original; for, in either case, the objection of the defendant to the proceeding cannot be sustained upon any view of which it may be susceptible.

[3] Assuming that the amendment of the information and not the filing of a new one was the proper course (and a forceful argument might be advanced that it was properly a case for an amendment, inasmuch as the lesser crime to which the charge was reduced is necessarily included in the crime originally charged), then, in that case, the ground upon which the defendant based his motion would not in any event be tenable. Section 1008, as will be noted, expressly provides that an information may be amended at any time after a plea has been entered thereto by the defendant, in the discretion of the court, and the only question which could arise in such case is whether the allowance of the amendment, after the plea, constituted an abuse of discretion or, which would be equivalent thereto, resulted in prejudice to the substantial rights of the defendant, and that question cannot be raised by such a motion.

[4] But, assuming that that question is now properly before us, we cannot perceive, from the circumstances of the case, wherein the substantial rights of the defendant could have been prejudiced in the remotest degree by the action of the court in allowing the amendment. The crime charged under the amendment is, as before suggested and as is manifest, included within the crime of assault to commit murder, which, as seen, was the original charge upon which the defendant was informed against. All the elements of the original charge, except that of an intent to take life, are involved in the charge preferred under the amendment. The evidence taken and heard at the preliminary examination necessarily showed that the crime of assault with a deadly weapon had been committed, even if it went further and disclosed that such assault was made with the intent to commit murder. The witnesses, both those for the people and those for the defendant, must have been the same in either case. Their testimony, except that of the physician who professionally attended the prosecuting witness, necessarily bore upon the circumstances under which the assault was made. Had the charge remained as originally made, the element of intent to murder, if really in the case, must necessarily have been shown by or inferred from the circumstances of the assault as detailed by these witnesses, and, as stated, these same circumstances necessarily constituted the subject of their testimony in the trial of the lesser offense charged. The defendant was therefore as well prepared to proceed with the trial of the case under the purported amended information as he would have been had the trial been had upon the original information.

[5] But let us look at the situation from another viewpoint. Suppose that the changing of the offense as it was originally charged amounted in legal effect to the filing of another information charging the offense for which the defendant had been committed, but which offense was of an entirely different nature from the one originally charged, and the later information had been filed after the time within which it should have been filed

after the accused had been committed. In that case the defendant should have moved and, in the absence of a showing of good cause for deferring the filing of said information after the time prescribed, the court would have been required, to dismiss the same. Pen. Code, § 1382.

[6] Or, granting that the purported amendment, in actual legal effect, involved the charging of an offense not shown by the evidence taken at the preliminary examination, then the course which the law points out and which the defendant should have pursued was to make a motion to set aside the information on the ground that, before the filing thereof, he had not been legally committed by a magistrate. Pen. Code, § 995, supra. But the ground upon which the defendant moved to set aside the new or amended information, to wit, that an information cannot be amended at any time after the defendant has pleaded thereto, is not among those enumerated in section 995 of the Penal Code, which expressly prescribes and, by consequence, necessarily limits the grounds of such a motion, as follows:

"1. That, upon the filing thereof [the information] the defendant had not been legally committed by a magistrate. 2. That it [the information] was not subscribed by the district attorney of the county."

From the foregoing views, it follows that the objection to the action of the court in the respect here considered cannot, as before stated, be sustained upon any theory upon which it may be considered. It is next contended that the evidence is insufficient to support the verdict. We cannot say so.

The assault took place at Lathrop, in San Joaquin county, on the afternoon of the 30th day of May, 1915. The person assaulted was one Jactano Decicco. The latter's brother owned a house in Lathrop. It was occupied by a tenant and used as a rooming and boarding house. At this house the defendant lived. It appears from the testimony of Decicco that, on the day the assault was committed, he went to his brother's house to procure some garden hose. When he was approaching and within sight of the house he saw the defendant standing in the yard, which was inclosed by a fence. Upon reaching the gate opening into the yard and just as he was about to enter the yard through the gate the defendant, addressing him, asked him what he wanted, to which question Decicco replied that he wanted to get the hose or a mower (the testimony is somewhat confusing or inconsistent as to the article Decicco wanted), and thereupon the defendant said to Decicco: "You are not wanted here." Some words were then exchanged between the two, Decicco saying, "All right," and turned to leave the premises. Decicco observed, while they were quarreling, that the defendant had a knife in his hand. When Decicco started to leave the place, the defendant left the yard and followed and overtook him and thrust a knife blade into the middle of Decicco's back. The wound thus produced was near the spine, and the doctor, who was immediately called to attend Decicco, said that it was at least an inch deep, an inch or an inch and a half wide, and bled profusely, and caused Decicco to be confined to his bed for some days.

The witness Miss Amy Taylor testified that, as she was walking along the street near where the trouble occurred she was attracted by loud talking and, turning to the direction from which the sound of the voices came, saw the defendant and Decicco, the former on the inside and the latter on the outside of the yard of the house above referred to. They were talking in a foreign language and apparently quarreling. Later she again turned to see if they were still quarreling, and at this time they were both on the outside of the yard and on the ground, engaged in a struggle with each other. Finally she saw the defendant thrust the knife into the body of Decicco. Several other witnesses saw Decicco after the encounter lying on the ground on the outside of the yard. There is also testimony that, immediately after stabbing Decicco, the defendant left the scene, going away from the house where he roomed and boarded. The constable at Lathrop, having been informed of the trouble and the assault upon Decicco, started in quest of the defendant, and found him lying in a manger in a barn in Lathrop, his entire body being covered with hay.

The defendant claimed self-defense, and told an entirely different story. He testified that the difficulty occurred in the room occupied by him in the rooming and boarding house mentioned; that Decicco had invited him to drink some wine, which he refused; that Decicco then charged him with a gallon of wine for which he had already paid; that a quarrel over that matter ensued, and that Decicco called him a "s—n of a b——h" three different times, grabbed hold of and "embraced" him and he fell to the floor; that thereupon Decicco struck him four times and was in the act of getting hold of a piece of iron lying on the floor hard by, when, believing himself to be in danger of losing his life or suffering serious bodily injury at the hands of his assailant, he drew a knife from his pocket and thrust the blade into the back of Decicco.

[7-9] Thus it is readily to be seen that there is a pronounced conflict in the evidence upon the question whether, in assaulting the prosecuting witness, the defendant acted in necessary self-defense. There were also shown some inconsistent statements made by the prosecuting witness as to some of the circumstances leading to the trouble between the two men. These contradictory statements, however, were, in the main, as to matters which were of little consequence. For illustration, it was shown that the prosecuting witness stated at the preliminary hearing of the charge that his purpose in going to the house where or near which the assault

took place was to procure a mower, whereas, at the trial, he said that his object in going there was to get some hose. But, whatever might have been the nature of the inconsistent statements made by the witnesses, it was for the jury and not for this court to consider them in determining how far, if at all, they discredited the witnesses whose testimony was so characterized, and thus to ascertain and admeasure the weight to which such testimony was entitled as in proof of the defendant's guilt. And likewise, as has so often been declared in the cases, the decision of controverted questions of fact upon conflicting evidence is wholly a function of the jury and not of reviewing courts. As was well said in the case of People v. Emerson, 130 Cal. 563, 62 Pac. 1069:

"If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive."

[10] The record clearly discloses evidence sufficient to support the verdict.

[11] The next assignment involves an attack upon the action of the court in refusing to adopt and read to the jury a number of instructions proposed by the defendant and which contained a statement of the law of self-defense. The court in plain language instructed the jury at length and correctly upon the law of self-defense, and in substance and effect stated all that was contained in the instructions proposed by the defendant. A trial court is not required repeatedly to state the same principle of law to a jury; hence the rejection of the defendant's instructions upon self-defense cannot stand as the predicate for a reversal.

We have found no error in the record violative of the substantial rights of the defendant, and the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(30 Cal. App. 52)

JENKINS v. LOCKE-PADDON CO.

(Civ. 1628.)

(District Court of Appeal, First District, California. March 3, 1916.)

1. BROKERS ⊂⊃86(1)—COMMISSIONS—EVIDENCE—SUFFICIENCY.

Evidence *held* sufficient to sustain judgment in favor of a broker, who sued another brokerage firm for commissions agreed between them to be paid in case of consummation of a sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 117, 118; Dec. Dig. ⊂⊃86(1).]

2. BROKERS ⊂⊃66—"COMMISSION."

The word "commission," in cases holding that an oral contract of one broker to share his commission is valid, must be given a broader meaning than a mere per centum valuation, and includes any profit made from the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. ⊂⊃66.

For other definitions, see Words and Phrases, First and Second Series, Commission.]

3. BROKERS ⊂⊃43(2)—NECESSITY OF WRITING—DIVIDING COMMISSIONS.

While a parol agreement by the owner of realty to pay an agent a commission for sale of real estate is invalid under Civ. Code, § 1624, subd. 6, nevertheless an agreement by one person to share his advantage on a sale of real estate with another, though not in writing, is valid.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⊂⊃43(2).]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by C. A. Jenkins against the Locke-Paddon Company, a corporation. From a judgment for plaintiff, and order denying a motion for nonsuit, defendant appeals. Judgment and order affirmed.

J. L. Smith, of San Francisco, for appellant. Norman A. Eisner, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor for the sum of $450, alleged to be due from the defendant as a commission in a transaction involving the exchange of real properties, and from an order denying a motion for a nonsuit.

The complaint alleges in substance that both plaintiff and defendant are real estate agents; that the defendant as such agent had for sale or exchange certain real property near Woodland known as the "Hollingsworth tract"; that the plaintiff knew of a man named Gibney, who had certain real estate in Stockton which he would exchange for country property, and with this knowledge went to the defendant, with a view to bringing about such an exchange; and it was then agreed between them that, if the plaintiff would arrange for an exchange of the property of said Gibney for lots in the Hollingsworth tract, the defendant would share with plaintiff its commission on said exchange, and pay plaintiff 10 per cent. on the value of the land so taken by Gibney in such exchange; that said exchange was negotiated by the plaintiff, and that the same was fully consummated; but that the defendant had failed and refused to pay said commission due thereon. The answer admitted that the defendant was a corporation and that the parties were each real estate agents, but otherwise denied all the other averments of the complaint.

Upon the trial of the cause the testimony of the plaintiff and of Mr. Charles L. Paddon, the secretary of the defendant and the one of its officials with whom the plaintiff chiefly dealt in the premises, was sharply in conflict as to most of the matters involved in the agreement and leading up to the exchange;

but the jury apparently resolved these conflicts in favor of the plaintiff and rendered its verdict accordingly. A careful reading of the testimony satisfies us that the following facts may fairly be educed therefrom:

The defendant, Locke-Paddon Company, was a corporation engaged in the business of selling real estate. There was also another corporation, known as the "Small Farms Improvement Company," which was also engaged in handling real estate, having its office in the same rooms with the Locke-Paddon Company. The two companies were so closely interrelated that the president and secretary of the one was also president and secretary of the other, and the stockholders of each were largely, although not wholly, the same. The relation of these two corporations was in fact so intimate that neither charged the other commissions on any sales or exchanges which either might negotiate on behalf of the other, but received the reward or advantage of such co-operation in the profits accruing therefrom to those mutually interested as officers and stockholders of both corporations. According to Mr. Paddon, the president and secretary were the controlling spirits of both corporations, and the Locke-Paddon Company was the managing agent of the Small Farms Improvement Company which owned the Hollingsworth tract and had placed it with the Locke-Paddon Company for sale or exchange. The plaintiff, having seen an advertisement soliciting exchanges for lots in the Hollingsworth tract, went to the office of the defendant, and there met Mr. Charles L. Paddon, its secretary, and informed him that he had two parties with whom he thought he could negotiate an exchange. Mr. Paddon showed him the map of the Hollingsworth tract, and told him that if he could arrange for an exchange with either of his parties there would be 10 per cent. for him on whatever his customer took in value. The plaintiff testified that his understanding from the first interview and from a later one in which the matter of his taking his commission in the form of lots was discussed, was that such commission was a part of whatever commission or advantage the defendant would derive from the exchange. After the first interview the plaintiff interested Mr. Gibney in the proposition, and brought him in touch with the defendant, which, through its secretary, Mr. Paddon, undertook to close the deal with Mr. Gibney personally. The plaintiff held a number of later interviews with the defendant, in which for some time he was led to believe that the negotiations with Mr. Gibney had fallen through, but later learned that the transaction had actually been consummated with Gibney and along the lines of his initial proposition to him. Upon learning this fact the plaintiff went to the secretary of the defendant, who, while finally admitting that the exchange had been made, refused to allow or pay the plaintiff's commission. Hence this suit.

The first contention of the appellant is that its motion for nonsuit should have been granted, because of an asserted variance between the plaintiff's pleadings and his proof. Appellant, in making this contention, concedes that the complaint alleges an agreement by one real estate agent to share with another real estate agent its profit or advantage as the result of a sale or exchange of the properties of their principals; but the appellant contends that the evidence shows merely an agreement to pay the plaintiff a percentage commission on the transaction, and in this connection the appellant also contends that such a contract as it claims the evidence discloses must have been made in writing in order to satisfy the statute of frauds, and that since the only proof tendered by the plaintiff was of an oral agreement the nonsuit should have been granted upon that ground also. These contentions at the last analysis reduce themselves to the single question as to whether the evidence sustains the averments of the plaintiff's complaint that, if he would arrange an exchange of a portion of such properties for certain property of Mr. Gibney, it would share with plaintiff its commissions on the consummation of such exchange, which share thereof was fixed at 10 per cent. on the valuation of the lots taken by Gibney in the course of such exchange.

[1] Upon this aspect of the case we are of the opinion that the evidence is sufficient to sustain the verdict of the jury in plaintiff's favor. Such verdict was evidently predicated upon the following instruction given by the court:

"Under the terms of the contract sued upon the plaintiff is entitled to recover a judgment if you find that all of the following are facts; and if any one of these elements is wanting then your verdict should be for the defendant: (1) That the contract referred to in the complaint was actually made by the defendant and the plaintiff. (2) That an exchange of the property was actually consummated by the plaintiff in accordance with the terms of that contract. (3) That the defendant was interested otherwise than as owner in the exchange which was consummated, and was to receive some advantage from the owner of such tract upon the consummation of the exchange, and did receive such advantage, and that the 10 per cent. referred to in this action is a part of the advantage so to have been received by the defendant.

"You are further instructed that, while a parol agreement by the owner of real property to pay an agent a commission for the sale of real property is not valid, because it rests in parol, nevertheless an agreement by one person to share his advantage on a sale of real estate with another person, though not in writing, is valid; and if you find that some advantage was to be derived to this defendant from the exchange, and that the defendant was to share its advantage with plaintiff, and that plaintiff consummated the exchange, and that defendant actually received some advantage from the exchange, the verdict should be for the plaintiff."

In the case of Gorham v. Heiman, 90 Cal. 346, 27 Pac. 289, it was held that the provisions of subdivision 6 of section 1624 of the Civil Code were designed to protect owners of real estate against unfounded claims of

brokers; that it did not extend to agreements between brokers to co-operate in making sales for a share of the commissions. The rule as thus stated has been approved and applied by this court in the later cases of Casey v. Richards, 10 Cal. App. 57, 101 Pac. 36; Saunders v. Yoakum, 12 Cal. App. 543, 107 Pac. 1007; Baker v. Thompson, 14 Cal. App. 175, 111 Pac. 373; and Johnston v. Porter, 21 Cal. App. 97, 131 Pac. 69.

In the case of Aldis v. Schleicher, 9 Cal. App. 372, 99 Pac. 526, however, it was held that the provisions of subdivision 6 of section 1624 of the Civil Code were applicable to agreements between agents for the sale or exchange of the properties of others when the contract was an unconditional agreement to pay a stipulated sum for the performance of the agreed services of the second agent regardless of whether the first agent had a valid contract for the sale of the property by the terms of which he was to receive a commission. The case of Saunders v. Yoakum, supra, followed the doctrine thus stated in the Aldis Case. In the case of Johnston v. Porter, supra, this court distinguished the cases of Aldis v. Schleicher, supra, and Saunders v. Yoakum, supra, from the case then at bar, to the extent of holding that, when it appeared that at the time the action was begun there had actually been received by the first agent a fund in the nature of a commission in which the plaintiff could be awarded a share, it was immaterial what sort of a contract, valid or otherwise, the first agent had with his principal, the owner of the property.

[2, 3] In the endeavor to harmonize these cases, and apply their principles to agreements between real estate agents affecting the sale or exchange of the properties of their respective clients, and particularly to the facts of the case before us, it would seem that the term "commission" should be given a broader meaning than merely that of a per centum valuation on the services of either agent, and that if it is made to appear that the first agent, by virtue of whatever understanding he may have with his principal, is to derive a definite advantage in the way of a material profit from the sale or exchange of his principal's property, and that such agent does derive such advantage from a transaction brought about through the co-operation and services of the second agent, as the result of an oral agreement between them, the former must account to the latter therefor; and a case is thus presented to which the above named provision of the statute of frauds has no application. Such is the case at bar. The above-quoted instruction of the court was evidently framed upon this theory, and we think it correctly phrased and stated the law applicable to this class of cases. We are also of the opinion that the jury was warranted in finding, from the facts before it, and particularly from the evasions of the secretary of the defendant touching the real relation between the two corporations in question, that the plaintiff was entitled to recover the amount of his claim.

From this view of the case it follows that the instruction above quoted was properly given, and that the instructions asked by the defendant were properly refused. This disposes of the appellant's several contentions.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

29 Cal. App. 613

PACIFIC COAST MAIL ORDER HOUSE v. STILLENS. (Civ. 1778.)

(District Court of Appeal, Second District, California. Feb. 9, 1916.)

1. PLEADING ⟸349—ADMISSIONS—JUDGMENT.
In an action for a balance due on a note, where the answer admitted its execution, and that the principal and interest thereon remained wholly unpaid, and failed to state any legal defense thereto, merely denying that any amount was then due, judgment for the plaintiff on the pleadings was proper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1067–1069; Dec. Dig. ⟸349.]

2. PLEADING ⟸8(5)—CONCLUSION OF LAW.
In such answer a denial that the note was then due, or that any amount was then due, stated a mere conclusion of law, which should be disregarded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 15, 16; Dec. Dig. ⟸8(5).]

3. BILLS AND NOTES ⟸477—SUFFICIENCY OF ANSWER—ACTION FOR DAMAGES.
In an action for the balance due on a note, an answer admitting its execution, and that the principal and interest remained wholly unpaid, and alleging that the note was given in exchange for shares of stock in the plaintiff corporation, and in consideration of certain favors to be extended to the defendant, that plaintiff had agreed to issue a trade discount certificate entitling defendant for five years to a certain discount from the catalogue prices of merchandise purchased from plaintiff, that the privilege therein stated was repudiated by the plaintiff, that a further consideration for the note was plaintiff's promise of a catalogue, which was never finished, and that the plaintiff's agent falsely represented that plaintiff was a strong corporation and would shortly pay dividends, which representations were relied upon by defendant to his damage, stated no cause of action for damages, as it did not appear what the value of the shares of stock, or of the alleged privileges, was.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1524, 1525, 1558; Dec. Dig. ⟸477.]

4. JUDGMENT ⟸251(1) — CONFORMITY TO PLEADING.
Such answer was insufficient to support a judgment of rescission, as it failed to show that defendant ever tendered back the certificates of stock received by him, or any vigilance on his part in asserting any right to rescind the contract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. ⟸251(1).]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Pacific Coast Mail Order House against E. R. Stillens. Judgment for plaintiff upon the pleadings, and defendant appeals. Affirmed.

J. F. Seymour, Jr., of Los Angeles, for appellant. Maltman & Clark, of Los Angeles, and James W. Glassford, of El Centro, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff, after answer filed by the defendant; the judgment being entered without trial as to the facts, but upon the application of plaintiff for decision in its favor upon the pleadings.

[1, 2] Plaintiff brought this action to recover a balance alleged to be unpaid on a promissory note executed by the defendant. The answer admitted the execution of the note and then proceeded as follows:

"Admits that the principal and interest on said promissory note remains wholly unpaid. Denies that same is now due and owing, or that any amount is now due and owing."

The admission contained in the first clause of the paragraph quoted was an admission of the ultimate fact as to the nonpayment of the note. The second clause in its terms of denial stated a mere conclusion of law which should be disregarded. Penrose v. Winter, 135 Cal. 289, 67 Pac. 772, and cases therein cited.

[3, 4] Attached to defendant's answer was a set of allegations which were termed a cross-complaint. In this portion of the answer the execution of the promissory notes was again admitted, but it was alleged, in effect, that the same were given in exchange for 1,200 shares of stock in the plaintiff corporation, and the further consideration that "plaintiff would extend certain favors to defendant herein because of such purchase." It was further alleged that the plaintiff had agreed, "in case said execution of such notes above referred to by defendant was had," that a certain trade discount certificate should be issued which provided that for a period of 10 years the defendant should be entitled to a 5 per cent. discount from catalogue prices of merchandise purchased from the plaintiff. It was then alleged that, after the certificate had been issued, the privilege therein stated was repudiated by the plaintiff, and "that plaintiff ever since has refused and still refuses to allow defendant discounts as set forth in said certificate." In another allegation it is said that a further consideration, "as an inducing cause to secure the two notes," was that the defendant was promised a catalogue showing prices of goods for sale by the plaintiff, which catalogue was never furnished. It was then alleged that an agent of the plaintiff, at the time of the execution of the notes, represented to defendant that the corporation was a "strong corporation, and within 18 months or thereabouts would pay dividends." The allegation follows that the representations were false and untrue, and were intended to deceive the defendant, and were relied upon by him, and that they did deceive him and result in his damage.

If it was the intention of appellant to state a cause of action for damages in his alleged cross-complaint, he failed to do so, for nowhere does it appear by any of his allegations as to what the value of the shares of stock received by him was, or what was the value of the alleged privileges, which he claims to have been denied the right to enjoy. The allegations of the answer are wholly insufficient to state a cause of action for damages, and so also are they insufficient to support a judgment of rescission. Nowhere among the allegations is it in any wise alleged or shown that the defendant ever tendered back the certificates of stock received by him. For aught that appears, those shares may be of great value. And it is very correctly argued by the respondent that, even had the answer been complete in the essential last referred to, there is no showing of vigilance on the part of the defendant in asserting any right to rescind the contract, nor any excuse for the long delay which had occurred at the time this action was commenced. The promissory note was dated in January, 1912. This action was commenced on March 30, 1914. By his own allegations defendant shows that, whatever repudiation there was by the plaintiff of the alleged rights granted under the certificate of discount, that repudiation took place "immediately after the issuance of said certificate." The answer having admitted all of the material matters contained in the complaint, and having failed to state any legal defense thereto, the ruling of the trial judge granting the motion for judgment on the pleadings was correct.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(30 Cal. App. 183)

PEOPLE v. FOWLER. (Cr. 591.)

(District Court of Appeal, First District, California. March 22, 1916. Rehearing Denied by Supreme Court May 18, 1916.)

1. HOMICIDE ⟸253(1) — EVIDENCE — SUFFICIENCY.

Circumstantial evidence, though not strong and convincing, examined, and *held* sufficient to sustain a conviction of first degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523, 531; Dec. Dig. ⟸253(1).]

2. HOMICIDE ⟸174(7)—EVIDENCE—FLIGHT.

Testimony that the defendant went to another county immediately after the murder may be regarded by the jury as a flight from the

scene of the crime and considered as evidence of guilt.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 365; Dec. Dig. ⟸174(7).]

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Vernon W. Fowler was convicted of murder in the first degree, and appeals from the judgment and order denying a new trial. Affirmed.

McClellan & McClellan, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged with the crime of murder, alleged to have been committed on the 18th day of December, 1914; one William Fassett being the victim. The defendant was tried, found guilty of murder in the first degree with the punishment fixed at life imprisonment, and he was sentenced accordingly. This appeal is from the order denying his motion for a new trial and from the judgment.

No complaint is made as to any of the rulings of the trial court on the admission or rejection of evidence. The defendant did not take the witness stand himself, nor was any evidence introduced in his behalf. The sole point relied upon for a reversal of the judgment and order is the alleged insufficiency of the evidence to sustain the verdict.

[1] On the evening of December 18, 1914, three men engaged in burglarizing a house situated on Oak street between Ashbury and Clayton streets, in San Francisco, during the absence of the occupants, were interrupted by their return, and in the excitement which ensued one of the latter was shot and killed by the burglars, who immediately fled, and were seen to run into what is known as the Panhandle, a portion of Golden Gate Park covered with trees and shrubbery. Soon thereafter two men were seen to emerge from the opposite side of the Panhandle and disappear, followed in a few moments by a third man, the latter without a hat. While engaged in the burglary the men concealed their features with pillow slips, and consequently the occupants of the house were unable to describe or identify the men. One witness, however, was able to testify that the eyes of one of the intruders were like the eyes of the defendant, in that they were bright and had an expression of positiveness of character. The principal circumstance relied upon by the prosecution to connect the defendant with the homicide is that a few hours after its commission a brown hat bearing on the sweatband thereof the defendant's initials was found at a place about where the three men crossed the Panhandle, and the prosecution advance the theory that in running across that portion of the park the defendant's hat was knocked from his head by a limb of a tree, and that in stopping to pick it up he became separated from his companions. Other evidence in the case is as follows:

Vincent P. McDevitt lived on Fell street facing the Park Panhandle, and about opposite to the house on Oak street where the homicide was committed. Hearing a pistol shot, he went to the front porch of his residence, and in a few moments noticed a man emerging from the shrubbery of the Panhandle at a point about 100 feet easterly from his residence, and who walked by his house, the witness observing him from his porch, which was about 8 feet above the sidewalk. As he was passing McDevitt inquired of him what had happened, and the hatless stranger replied: "I think it was a burglary." Comparing the appearance of this man with the defendant, McDevitt testified that he had dark hair and was bald-headed, and, referring to the defendant, added: "This man is dark-haired and bald-headed, and they have the same resemblance in common." He further described the man he saw as between 5 feet 7 or 8 inches in height, and quite, but not so very, stout—which description seems to fit the defendant. Finally McDevitt testified that he could name nobody in the world that looked as much like the defendant as the hatless stranger he saw that night.

Another witness, Lillie Lark, who resided in the neighborhood of Fell street, and apparently an unwilling witness, testified that she heard a shot on the night in question, and went to the front steps to see what had happened. She saw a man cut across the park almost opposite her residence, and when he got over to her side of the street she spoke to him, asking: "What is the matter?" The man replied that it seemed to be a hold-up. He had no hat on.

Although none of the residents of the burglarized house smoked, the police officer who examined the premises immediately after the homicide found a cigarette butt there, and an expert chemist called by the people testified that the tobacco found therein was similar to the tobacco found on the person of the defendant when he surrendered himself to the police authorities.

A police officer examined the Panhandle in the vicinity of where the three men crossed it a short time after their passage and found three sets of footprints not on any of the regular paths traversing it, and along the tracks thus made gathered up pieces of string and a pair of gloves identified as having been taken from the burglarized house. The hat was also found near these tracks. One set of these footprints was found to be about the size of the defendant's shoes. Three days after the murder the defendant voluntarily entered police headquarters and announced who he was. On being shown the brown hat he admitted it was his. He told the officers that on reading the newspapers containing some details surrounding the murder he be-

came excited, left his hotel on Saturday, December 19th, the day after its commission, rode to within a short distance of San Mateo, and stopped for the night in a small uninhabited shack; that on Sunday he went to San Mateo, and that night again returned to the shack; and that on Monday morning he walked to San Francisco, boarded a Mission street car near Silver avenue, and rode to police headquarters. The officers noticed at this time that the defendant's shoes were neither muddy nor wet, although it had been raining. The officers requested the defendant to take them to the shack described, but he refused to do so. In his voluntary statement he also told the police officers that he had discarded the old brown hat found in the Panhandle 10 days before the homicide, giving two different versions of how he disposed of it. His statement as to the time he disposed of this hat was contradicted by the manager of the hotel where he lived, who testified that the defendant wore the hat in question up to within 2 days of the murder. On being asked where he procured the hat he was wearing when he entered the police headquarters, the defendant replied that he had bought it "10 or 12 days ago for $2.50 at Wolff's hat store on Grant avenue," but was unable to locate the store within three or four blocks of its situation; and, when asked on which side of Grant avenue the store stood, he refused to reply. Wolff, the hatter, called as a witness, testified that he had not carried in stock a hat such as the defendant referred to for 6 months, and that he had never charged more than $1.50 for hats sold by him.

For the purpose doubtless of showing that the brown hat had not been lying in the Panhandle prior to the evening of December 18th, the prosecution called a witness who, without objection, qualified as an expert in such matters, and he testified that he could tell from an examination of the sweatband of the hat approximately how recently it had been worn, and that, on the 19th day of December, when he examined the hat found in the Panhandle, it had, in his opinion, been worn within 24 hours of that time. Finally on the cross-examination of the witnesses for the prosecution by the attorneys who at that time represented the defendant, it was shown that the defendant had theretofore been convicted of a felony, and that he was a user of morphine.

[2] From the evidence in the record it would appear that the man who was seen to come out of the Fell street side of the Panhandle was one of the three men who had been engaged in the burglary on Oak street, and that in passing through that part of the park he had lost his hat. That man and the defendant appeared to the witness McDevitt to be one and the same. It also appears that the hatless man was cool and collected. If connected with the homicide, by thus leaving the scene of the crime leisurely he adopted the best method for disarming suspicion, and showed himself an experienced criminal. The defendant in this case was an ex-convict. When the defendant read in the San Francisco newspapers that his hat had been found near the course taken by the escaping criminals, and learned that the police were looking for him, it may be that he did not go to San Mateo, for he was seen in San Francisco after the time that he said he left there, and he refused to point out to the police officers the shack in which, according to his account, he slept for two nights, and the condition of his shoes indicated that he had not, as claimed by him, walked from there into San Francisco. If, in fact, he did not go into San Mateo county, his narrative of his doings there may have been concocted for the purpose of protecting friends who were helping to conceal him, among whom may have been his associates of the night of the 18th. If, on the other hand, his statement that he visited San Mateo county be true, his going there may be regarded as flight from the scene of the crime, which the jury had the right to consider as evidence of guilt. In any event the defendant was aware that the police were searching for him, and probably realized that on account of his past record they were well equipped to capture him, and concluded that the best way to escape arrest and prosecution was by walking right into the police headquarters, admitting that the hat found was his, but to claim that he had thrown it away 10 days before the homicide. He told two different stories of how he had disposed of this hat, and he was contradicted by his landlady as to the time he had parted with its possession. There is also a conflict between him and the witness Wolff, the hatter, as to when he bought the new hat, and as to how much he paid for it. The tobacco in the cigarette left on the burglarized premises was like the tobacco found in the defendant's possession, and it was a kind of tobacco seldom used in cigarettes. It is also significant that in his statement to the police the defendant did not disclose his whereabouts on the night of the murder. The testimony upon which he was convicted was circumstantial; and, while we cannot say that a strong and convincing case was made out against him, we are equally unable to say that there is not evidence to sustain the verdict, in which event only would we be warranted in setting aside the judgment of conviction. People v. Meyers, 5 Cal. App. 674, 91 Pac. 167.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

29 Cal. App. 788

WILSON v. SHEA et al. (Civ. 1711.)

(District Court of Appeal, Second District, California. Feb. 28, 1916. Rehearing Denied March 23, 1916.)

1. CONTRACTS ⟸187(1) — PARTIES — BENEFIT OF THIRD PERSON.

Under Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him, in order to sustain an action by the third party, there must have been an intent clearly manifested by the contracting parties that the obligation should inure to his benefit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798, 799, 801–804, 806, 807; Dec. Dig. ⟸187(1).]

2. CONTRACTS ⟸186(1) — PARTIES — BENEFIT OF THIRD PERSON.

Where S., as agent, sold land and guaranteed title by a written contract, and thereafter C. and M., who shared in the commissions, agreed with S. to share in the responsibility of the guaranty in proportion to their shares of the commission, *held*, the latter agreement was solely for the benefit of S. and gave the purchaser no right of action against C. and M.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 790, 791; Dec. Dig. ⟸186(1).]

3. APPEAL AND ERROR ⟸1011(1)—REVIEW—QUESTIONS OF FACT.

The determination of a question of fact by the trial court upon conflicting evidence is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸1011(1).]

4. APPEAL AND ERROR ⟸414—NOTICE OF APPEAL—ADVERSE PARTIES.

Where plaintiff had judgment against one defendant for the full amount claimed, and against two other defendants for a portion of the claim, the former was not such an adverse party as to require service on him of the notice of appeal by the other two defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. ⟸414.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by E. Wilson against R. P. Shea, C. E. Cooper, and Robert Marsh. From a judgment for plaintiff and an order denying a new trial, defendants Cooper and Marsh appeal. Reversed.

O'Melveny, Stevens & Millikin, Walter K. Tuller, and Alex Macdonald, all of Los Angeles, for appellants. George E. Cryer, of Los Angeles, for respondent.

JAMES, J. Appeal taken by defendants C. E. Cooper and Robert Marsh from a judgment entered against them and from an order denying their motion for a new trial.

At a time anterior to the commencement of this action defendant R. P. Shea held contract rights in certain real property located in the city of Los Angeles. He exchanged these rights with one Vance for an automobile. At a later date Vance desired to dispose of the interest thus acquired in the real estate. Shea and Cooper at that time were both employed with Robert March & Co., realty brokers. Under their contract of employment commissions earned on property sold were divided as follows: Shea, 10 per cent.; Cooper, 50 per cent.; Robert Marsh, 40 per cent. Vance, being a friend of Shea's, and having purchased the contract rights in the lots from the latter, submitted to the firm mentioned his proposition to rid himself of his interest in the real estate. A purchaser was found in the person of one Mrs. Looney, the assignor of the plaintiff. The agent who represented Mrs. Looney, realizing that there might be a question regarding the title which it was possible to obtain under the contracts, insisted that a guaranty contract be given, which contract was furnished by defendant Shea. This contract guaranteed that a good title would be secured within one year, in default of which Shea agreed in writing that upon notice of the fact being furnished him he would pay to Mrs. Looney the sum of $1,318, and take back an assignment of Mrs. Looney's interest in the lots. There was a commission paid on the deal amounting to the sum of $560, which came into the hands of Robert Marsh & Co. to be divided among Shea, Cooper, and Marsh in the proportions hereinbefore mentioned. This commission was so divided. Some time after the execution and delivery of the guaranty contract signed by Shea a copy thereof was presented to Cooper and Marsh. Shea had added a postscript to which he secured the signatures of Cooper and Marsh, which postscript was worded as follows:

"It is hereby agreed that the responsibility of this guaranty is shared by Robert Marsh & Co. and C. E. Cooper with R. P. Shea; said responsibility being prorated in accordance with commission paid."

This addendum was not made upon the original guaranty; in fact, was not contemplated to be made at all by Mrs. Looney, and was not of any influence in furthering the deal as made with her. Mrs. Looney's agent testified with reference to the closing of the transaction as follows:

"In order to close this deal, I required Mr. Shea to give the written guaranty introduced in evidence here. I was satisfied to take the written guaranty of R. P. Shea solely and individually, and I did so, and I closed the deal upon that understanding."

This witness testified that it was several months after the closing of the transaction that he learned of the making of the addendum. However, at the end of the year Mrs. Looney was unable to secure good title to the lots purchased from Vance, and this suit was brought by her assignee against Shea on the guaranty; Cooper and Marsh being joined by reason of the alleged liability which accrued against them under the "postscript" contract. The trial judge entered judgment for the full amount of the guaranty, to wit, $1,318, against Shea, and against the appellants, Cooper and Marsh, in such proportions of the total amount of the guaranty as the

amounts of commission paid to them bore to such whole amount. No appeal was taken on the part of defendant Shea. The appellants here, Cooper and Marsh, contend that no right of action existed in favor of Mrs. Looney or her assignee as against them under the addendum contract, for the reason that they at no time contracted any liability in favor of Mrs. Looney. The judgment as against these appellants, if sustained, must be sustained wholly by reason of the provisions of section 1559 of the Civil Code. That section provides as follows:

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

[1] This section is but an expression of the rule established by the majority decisions of the courts of the United States permitting an action to be brought against a person by a party in whose benefit such person may have contracted with another. The rule of the decisions is clear to the point that, in order to sustain such an action, there must have been an intent clearly manifested on the part of the contracting parties to make the obligation inure to the benefit of the third party. As our Code declares, the contract must be one "made expressly for the benefit of a third person. * * *" A right in the third party to enforce a contract which may be of incidental benefit to him has never been admitted. Some of the decisions have gone so far as to declare that such third party must be the one solely and exclusively benefited by the contract. See Page on Contracts, vol. 3, § 1312, and cases cited thereunder. Our own Supreme Court, in the case of Chung Kee et al. v. Davidson et al., 73 Cal. 522, 15 Pac. 100, has adopted the rule of the New York decisions, and said:

"When two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other."

[2, 3] On the face of the writing which was signed by Cooper and Marsh it is not made to appear that the intent of these appellants was to assume responsibility to Mrs. Looney on account of the guaranty, but rather that their contract was one of a kind of indemnity given for the protection of Shea. If there is any doubt which a court might be left in respecting that matter, it would be one, we apprehend, which should be resolved against any claim of right in the plaintiff to sue these appellants. Attention has already been called to the fact, not disputed in evidence, that Mrs. Looney did not rely upon the guaranty of these appellants, and that she had no knowledge of the existence of the contract until months had elapsed after the closing of her deal. Shea, it appears, desired to be protected, and insisted upon the addendum being made, not for Mrs. Looney's benefit, but for his own security. His testimony to the effect that in his oral conversations with Cooper and Marsh they arrived at the agreement to share the liability in the proportions as the commissions were to the total amount mentioned in the main contract does not militate at all against the views which we have expressed as to the rights of Mrs. Looney or her assignee in the matter. The testimony offered on the part of the appellants, even upon that question, was directly in contradiction of Shea's assertion; the appellants insisting that their agreement was only to return to Shea the amount of the commission received by them in the event that he was compelled to make good on his guaranty with Mrs. Looney. In view of the fact that Shea had been the original owner of the contract rights in the lots, and that he was the person who sold them to Vance and received a consideration in that transaction, it would seem quite natural that Shea would have the largest interest in the transaction on account of his possible liability to Vance by reason of failure of title to the real estate. However, upon this branch of the case a conflict of evidence precludes us from taking issue with the determination made by the trial judge.

[4] It was not necessary that Shea be served with notice of the appeal taken in this action. Plaintiff has a judgment for the full amount of her claim against Shea, and this judgment will not be disturbed by granting a new trial as to these appellants. Defendant Shea therefore is not such an adverse party as to require service to be made upon him in order to effectuate the appeal. Robson v. Superior Court, 154 Pac. 8.

For the reasons first given, the judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

29 Cal. App. 646

WHITE v. STANDARD LUMBER & WRECKING CO. et al. (Civ. 1706.)

(District Court of Appeal, Second District, California. Feb. 11, 1916. On Amendment of Decision and Judgment, March 7, 1916.)

1. BILLS AND NOTES ⟸445—ACTION—TIME.

An action on notes dated May 17, 1911, due in five and six months after date, commenced October 25, 1913, was not prematurely brought, as the notes were due by their terms, notwithstanding the plaintiff had accepted an order in payment of the notes not payable until December 24, 1913.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1311–1329; Dec. Dig. ⟸445.]

2. BILLS AND NOTES ⟸429—PAYMENT—ORDER.

Such order in payment of the notes, accepted by plaintiff for payment more than one year later than the date of the order, upon which he recovered judgment against the acceptor, should have been credited on the notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1245–1250, 1262, 1263; Dec. Dig. ⟸429.]

3. BILLS AND NOTES ⊂488 — SUFFICIENCY — RECITALS IN CONTRACTS.

In an action on notes, where counts of a complaint in which, immediately following the copy of the note set forth, were the words, "indorsements as follows," followed by the names of three individual defendants, and by form of guaranty of payment and waiver of demand, etc., followed by the same names, stated no cause of action against such indorsers, as it was necessary, if the plaintiff desired to rely upon the waiver of demand as an excuse for failure to present and to give notice of dishonor, to allege the execution of such contract of guaranty or waiver, and as recitals in a contract incorporated in the complaint do not supply the want of essential averments of the pleading.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1584–1586; Dec. Dig. ⊂488.]

4. BILLS AND NOTES ⊂488 — RECITALS IN CONTRACTS—WAIVER OF DEMAND.

In such case the form of the indorsement of guaranty constituted no part of the notes in question, of which the defendant corporation was the maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1584–1586; Dec. Dig. ⊂488.]

5. BILLS AND NOTES ⊂467(2) — ACTION — PLEADING—INDORSEMENTS.

An allegation that thereafter certain named defendants had indorsed the note in suit, each by signing their names thereto, was sufficient as an allegation that they were indorsers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1481–1487, 1490, 1491; Dec. Dig. ⊂467(2).]

6. BILLS AND NOTES ⊂469—LIABILITY OF INDORSEMENT—PRESENTATION.

No cause of action arises against the indorsers of a note, without an allegation showing due presentation to the maker, dishonor, and notice to such indorsers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1494–1502; Dec. Dig. ⊂469.]

On Amendment of Decision and Judgment.

7. BILLS AND NOTES ⊂422(3)—INDORSEMENT —WAIVER.

Where notes stated on their face that the makers and indorsers waived diligence, demand, protest, and notice, the indorsement on the back of the notes constituted a waiver by the indorsers, without any separate statement thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1201; Dec. Dig. ⊂422(3).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by W. N. White against the Standard Lumber & Wrecking Company and others. Judgment for plaintiff, and from the judgment and order denying a motion for a new trial, defendants appeal. Judgment and order reversed.

Barstow, Beach & Rohe, of Los Angeles, for appellants. Edward Dietrich, of Los Angeles, for respondent.

CONREY, P. J. The defendants appeal from an order denying their motion for a new trial and from the judgment. The complaint is based upon two promissory notes dated May 17, 1911, due respectively five and six months after date, and each being for the principal sum of $749.41, with interest. These notes were executed by Standard Lumber & Wrecking Company, and made payable to the Westport Lumber Company, or order, and through subsequent assignments became the property of the plaintiff. The defendants by their answer alleged that the first note was fully paid, and denied "that no part of the principal or interest on the second note has been paid, except the interest credited thereon as shown by the complaint," and denied that the said principal sum and interest, as stated in the complaint, is wholly due and unpaid. The plaintiff was the only witness at the trial of the case. On cross-examination he said:

"I received the following order which was given as in payment of these notes: 'Los Angeles, Cal., Oct. 18, 1912. Mr. C. W. Rogers, City—Dear Sir: Please pay to the order of Mr. Dietrich, of the firm of Haas & Dunnigan, the sum of one thousand dollars ($1,000.00) and charge to my account. Yours truly, W. W. Wilcox'—which was accepted as follows: 'Accepted to be paid December 24, 1913. C. W. Rogers.' But the order was not paid."

The complaint in this action was filed October 25, 1913.

[1, 2] On these facts the appellants claim two defenses: First, that the action was prematurely brought; second, that the amount of the foregoing accepted order should have been credited by the court on account of said notes. The first of these defenses is not sustained. The notes were due by their terms and at the time of the commencement of this action the plaintiff was entitled to sue for any balance unpaid thereon. The other matter of defense above noted was established by the evidence. The plaintiff having received the order as in payment of the notes, on his own responsibility submitted to an acceptance for a date more than one year later than the date of the order. He admits that at some subsequent time he recovered judgment against Rogers on that order. Whether that judgment was paid is not shown and is not material to this case. It may perhaps be reasonably inferred from the testimony that in giving the order in question Wilcox was acting as president of the defendant corporation, although that fact is not definitely set forth.

[3, 4] On behalf of appellants Wilcox, Moran, and Lynn it is further insisted that the complaint does not state a cause of action against them. Immediately following the copy of the note set forth in each count of the complaint, we have the words, "Indorsements as follows," followed by the names of these three defendants. Then follows a form of guaranty of payment and waiver of demand, etc., with the same three names repeated; but there is not in the complaint, nor in any amendment thereof, any allegation of the execution of such contract of

guaranty or waiver. Such allegation was necessary if the plaintiff desired to rely upon waiver as an excuse for failure to make presentation and give notice of dishonor. "Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading." Hayt v. Bentel, 164 Cal. 681, 686, 130 Pac. 432. Here, however, it cannot be claimed that the form of indorsement of guaranty agreement constituted any part of the notes in question, of which defendant corporation was the maker.

[5, 6] The only amendment at all touching upon this matter is in these words:

"That thereafter the defendants, W. W. Wilcox, James Moran, and J. M. Lynn, indorsed the aforesaid note by signing their names thereto as follows: W. W. Wilcox, James Moran, and J. M. Lynn."

This was sufficient as an allegation showing that they were indorsers of the note, but no cause of action could arise against them as such indorsers without an allegation showing due presentation to the maker, dishonor, and notice to such indorsers. Navajo County Bank v. Dolson, 163 Cal. 485, 126 Pac. 153, 41 L. R. A. (N. S.) 787.

It appearing that the judgment is for an excessive amount, it is ordered that the judgment and the order denying a new trial be and they hereby are reversed.

We concur: JAMES, J.; SHAW, J.

On Amendment of Decision and Judgment.

CONREY, P. J. [7] A decision was filed herein on February 11, 1916. At that time in stating our conclusion that the complaint failed to state a cause of action against the defendants Wilcox, Moran, and Lynn, our attention was directed to the form of guaranty and waiver on the back of the notes, as to which we found that the complaint did not allege the execution of any such guaranty or waiver. We overlooked the fact that within the notes themselves it was stated that "the makers and indorsers of this note hereby waive diligence, demand, protest and notice." That language being contained in the notes, the indorsement by said defendants on the back of each note constituted a waiver without any separate statement thereof. Daniel on Negotiable Instruments (6th Ed.) § 1092.

The decision of this court herein is hereby modified by striking therefrom the final paragraph, which was as follows: "It appearing that the judgment against Standard Lumber & Wrecking Company is for an excessive amount and that no cause of action was stated against the other defendants, it is ordered that the judgment and order be and they hereby are reversed." In lieu thereof we substitute the following: "It appearing that the judgment is for an excessive amount, it is ordered that the judgment and the order denying a new trial be and they hereby are reversed."

Respondent's petition for a rehearing is denied.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 765

HULBERT v. ALL NIGHT AND DAY BANK et al. (Civ. 1707.)

(District Court of Appeal, Second District, California. Feb. 25, 1916.)

1. PARTNERSHIP ⟸21 — REPUDIATION OF AGREEMENT—EFFECT.

Where one of the parties to an agreement to form a partnership, who obligated himself to furnish a sum of money for the firm's capital, absconded and was not heard from for over three years, his conduct constituted a repudiation.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 6; Dec. Dig. ⟸21.]

2. APPEAL AND ERROR ⟸1170(1)—REVIEW—HARMLESS ERROR.

Where one member to an agreement to form a partnership absconded and did not pay in his part of the firm's capital, the failure to join him as a party in an action by the other partner to recover from a bank the amount he had paid in to the credit of the firm to be formed is harmless, and must be disregarded, under Const. art. 6, § 4½, declaring that no judgment shall be set aside for any error, unless it results in a miscarriage of justice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. ⟸1170(1).]

3. BANKS AND BANKING ⟸131—DEPOSITS—RIGHT OF DEPOSITOR.

While a bank, receiving a deposit of money, may not, in the absence of proper legal proceedings to impound it, dispute a depositor's ownership, or refuse to honor his checks, nevertheless the real owner may establish his right to the fund, and it should be paid to him when his right is established by unequivocal evidence.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 316–318, 333; Dec. Dig. ⟸131.]

4. JUDGMENT ⟸203 — RENDITION — SECOND JUDGMENT.

As there can be but one judgment in a judgment roll, the last judgment only will be considered, where it appeared that there was a prior judgment; it being presumed that the first judgment was vacated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 361, 984; Dec. Dig. ⟸203.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by D. F. Hulbert against the All Night and Day Bank, a corporation, and the Hellman Commercial Trust & Savings Bank, a corporation. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles (Arthur F. Coe, of Los Angeles, of counsel), for appellants. Fred W. Heatherly, of Los Angeles, for respondent.

SHAW, J. Some time prior to October 29, 1909, plaintiff and one Frank J. Rogers agreed that they would enter into a copart-

nership for conducting a business under the firm name "Pacific Buying Company"; it being further agreed that plaintiff should deposit with the defendant All Night and Day Bank, to the credit of the Pacific Buying Company, the sum of $1,000, and that Rogers should deposit the sum of $1,500 to the same account, and plaintiff the further sum of $500. In pursuance of this agreement so made with Rogers, plaintiff, on October 29, 1909, deposited $1,000 in the All Night and Day Bank to the credit of the Pacific Buying Company, subject to checks thereon signed "Pacific Buying Company, by D. F. Hulbert, by Frank J. Rogers." Rogers never at any time deposited any sum to the credit of said account, and the copartnership was never consummated. Some three years later, nothing having been done by Rogers towards carrying out the agreement, and he having, as appears from the record, long before disappeared, plaintiff made demand upon defendant Hellman Commercial Trust & Savings Bank, which had meanwhile assumed all liabilities of the All Night and Day Bank, for repayment of the sum so deposited by him in the name of the Pacific Buying Company, the checks against which account were, under the terms of the deposit so made, to be signed, as before stated, by both Rogers and himself. The bank refused to pay the same, whereupon this action was instituted for the recovery thereof. Judgment was rendered for plaintiff, from which, and a denial of a motion for a new trial, defendants appeal.

[1-3] It conclusively appears from the evidence that the money so deposited to the account of Pacific Buying Company was that of plaintiff; that Rogers contributed nothing whatsoever to it and had no interest therein; that the executory agreement to form a copartnership was never carried out; and no checks were ever drawn upon said fund, signed "Pacific Buying Company, by D. F. Hulbert, by Frank J. Rogers." Rogers, as stated, had absconded; his whereabouts being unknown to plaintiff. His disappearance, and his failure for more than three years to comply with his part of the executory agreement, should be deemed a repudiation on his part of the agreement to form a partnership. Defendant makes no claim to the money on deposit, and even though its contention that Rogers should have been made a party litigant be technically correct, nevertheless, under the circumstances, the case is one to which the provisions of section 4½ of article 6 of the Constitution should be applied. While it is true that a bank receiving a deposit of money may not, in the absence of proper legal proceedings to impound it, dispute a depositor's ownership thereof or refuse to honor his checks drawn thereon, nevertheless the real and true owner thereof may show his right to the fund. Hemphill v. Yerkes, 132 Pa. 545, 19 Atl. 342, 19 Am. St. Rep. 607; Patterson v. Marine National Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778. The evidence establishing such right should be clear and unequivocal (Nolting v. National Bank, 99 Va. 54, 37 S. E. 804), and in this case it, without contradiction, conclusively shows that plaintiff deposited the entire sum of $1,000 in the fictitious name of Pacific Buying Company, which was the name agreed upon in contemplation of the formation of a copartnership.

[4] It appears that prior to the making of findings a judgment was entered in favor of plaintiff; that thereafter findings were made by the court, regularly followed by the entry of another judgment. This fact is also assigned as error. In Colton L. & W. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878, it is said:

"There shall be but one judgment in a judgment roll. * * * If two are found therein, the last in point of time is the only one which can be considered as a part thereof. * * * If necessary, therefore, it will be assumed that the former judgment was vacated."

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 8

ORCHARDSON v. CHRISTIE. (Civ. 1930.)

(District Court of Appeal, Second District, California. Feb. 28, 1916.)

1. PLEADING ⊂=406(7) — REPLEVIN ⊂=59 — SUFFICIENCY OF COMPLAINT—WAIVER.

A complaint seeking recovery of paintings which definitely described a number thereof, and as to the others averred that they were not described because the subjects had escaped the memory of plaintiff and because defendant had denied him access to the property, states a cause of action, and any defects in description are waived by defendants answering without demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1367; Dec. Dig. ⊂=406(7); Replevin, Cent. Dig. §§ 215–218; Dec. Dig. ⊂= 59.]

2. REPLEVIN ⊂=107 — JUDGMENT — SUFFICIENCY.

Code Civ. Proc. § 667, declares that in an action to recover possession of personal property judgment for plaintiff may be for the possession or the value thereof in case a delivery cannot be had with damages for retention. In replevin, the judgment after ordering recovery by plaintiff of the property described, declared that plaintiff was entitled to judgment for a stated sum in event the property was not returned, but did not use the ordinary form that plaintiff "do have and recover." *Held*, that the judgment clearly showed that it was in the alternative, providing for recovery of a sum of money in case the property was not returned, and hence was sufficient under the statute.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 424–428; Dec. Dig. ⊂=107.]

3. REPLEVIN ⊂=107—JUDGMENT—VALIDITY.

While a judgment in a replevin suit should be in the alternative, either for the recovery of the property or its value, a judgment not in the alternative is not void, and whether it is erroneous depends upon the facts of the particular case.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 424–428; Dec. Dig. ⊂=107.]

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Charles Orchardson against Sheldon Christie. From a judgment for plaintiff, defendant appeals. Affirmed.

Kendrick & Ardis, of Los Angeles, for appellant. Andrew J. Copp, Jr., of Los Angeles, for respondent.

CONREY, P. J. This appeal is from the judgment and is presented on the judgment roll. The action was brought to recover possession of 110 oil paintings and other pictures, of which the plaintiff was the owner and entitled to their possession, and which were wrongfully detained from him by the defendant.

[1] Appellant's first point is that some of the pictures were not named in the complaint. The judgment purports to be for 105 of these pictures, and they are named in the judgment. Those which are not named in the complaint are definitely referred to as being pictures made by the plaintiff, and at that time held in possession by the defendant, and it is alleged that the subjects thereof are not named or described because the subjects have escaped the memory of the plaintiff, and that the defendant has denied him access to the property. This objection grounded on defects in description should have been raised by demurrer for uncertainty. The complaint stated a cause of action, and the defendant met the issues by answering, without demurrer. Kelly v. Murphy, 70 Cal. 560, 12 Pac. 467; Hawley v. Kocher, 123 Cal. 77, 55 Pac. 696.

[2] Appellant next contends that the judgment should be reversed because it does not provide an alternative recovery for the value of the property in case a delivery cannot be had. Section 667, Code Civ. Proc. The judgment, after ordering recovery by the plaintiff of the property therein described, states "that plaintiff is entitled to judgment for the sum of $12,500, in the event that said pictures are not returned to the plaintiff herein by said defendant," but does not use the ordinary form of "do have and recover," etc. If this amounts to a money judgment, it complies with the statute. If it does not amount to a money judgment, it is difficult to see how the defendant is injured thereby, or how he can claim that there has been any miscarriage of justice which would entitle him to a reversal. The phrase, "in the event that said pictures are not returned to the plaintiff herein by said defendant," is substantially the same as the statutory words, "in case a delivery cannot be had," when viewed in the light of the purpose of that provision in the statute. That purpose is indicated in Meads, Seaman & Co. v. Lasar, 92 Cal. 221, 225, 28 Pac. 935, as follows:

"The plaintiffs are not entitled to recover from the defendants the value of the property, unless they are unable to deliver it. The defendants are entitled to satisfy the plaintiffs' claim by a delivery of the property sued for, and can be compelled to pay its value only in case such delivery cannot be had."

[3] In Keiser v. Levering, 154 Pac. 281, decided by this court November 22, 1915, referring to the subject of form of judgment in actions to recover possession of personal property, we said:

"In the earlier cases it was held to be imperative that the judgment be in the alternative form, and such judgments for possession only, without providing for a recovery of the value thereof in case delivery could not be had, were reversed even at the instance of the defendant. Berson v. Nunan, 63 Cal. 550; Stewart v. Taylor, 68 Cal. 5 [8 Pac. 605], and other cases. But this rule was seriously questioned in Claudius v. Aguirre, 89 Cal. 506 [26 Pac. 1077], and Erreca v. Meyer, 142 Cal. 308, 310, 75 Pac. 826. The law seems to be that, while the judgment must ordinarily be in the alternative, yet 'a judgment that is not in the alternative is not, however, void, and whether or not such a judgment is even erroneous must depend upon the facts of the particular case.' These later decisions might be sufficient to support a complaint and judgment for mere possession of property without regard to the value thereof, if the case as a whole appeared to be within the jurisdiction of the court."

Upon the facts of this particular case, we are satisfied that the judgment contains no defect of form that can be of advantage to the defendant upon this appeal.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

30 Cal. App. 3

SAN DIMAS QUARRY CO. v. AMERICAN SURETY CO. OF NEW YORK.

(Civ. 1656.)

(District Court of Appeal, Second District, California. Feb. 28, 1916.)

1. MUNICIPAL CORPORATIONS ⊂⊃347(2) — PUBLIC IMPROVEMENTS—NOTICE.

Under Vrooman Act (St. 1899, p. 23) § 6½, declaring that any materialman or person furnishing materials to be used for a street improvement, whose claim has not been paid by the contractor, may within 30 days from the time the improvement is completed file with the superintendent of streets a verified statement of his claim, together with a statement that the same has not been paid, and at any time within 90 days may commence an action on the contractor's bond for recovery of the amount claimed, notice of claim, entitled "To the Superintendent of Streets and Board of Trustees," which was mailed to the city clerk, with a letter that the claim was filed with the board of trustees of the city, and which was never filed with the superintendent of streets, is no compliance with the statute, and will not support suit on the bond.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 877; Dec. Dig. ⊂⊃ 347(2).]

2. MUNICIPAL CORPORATIONS ⊂⊃347(2)—PUBLIC IMPROVEMENTS—STATUTES—FILING OF CLAIMS.

St. 1897, p. 201, entitled "An act to secure the payment of claims of materialmen, mechanics, or laborers, employed by contractors upon public work," provides that a claimant seeking to recover upon the contractor's bond shall,

within 30 days from the time such work is completed, file with the commissioners, managers, trustees, officers, and board of supervisors a verified statement of his claim. Vrooman Act, § 6½, adopted in 1899, requires the statement of claim against a contractor for street improvements to be filed within 30 days with the superintendent of streets as a condition to maintaining suit on the contractor's bond. *Held* that, where a street improvement was to be paid for by local assessments as provided for by the Vrooman Act, that act was alone applicable, and compliance therewith is necessary to the maintenance of a suit on the contractor's bond.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 877; Dec. Dig. ⇐ 347(2).]

3. MUNICIPAL CORPORATIONS ⇐347(2) — BONDS—ACTIONS—LIABILITY.

A bond given by a contractor constructing street improvements to comply with the Vrooman Act cannot be treated as a common-law obligation, to allow recovery thereon against the contractor by a claimant who did not comply with the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 877; Dec. Dig. ⇐ 347(2).]

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by the San Dimas Quarry Company, a corporation, against the American Surety Company of New York, a corporation. From a judgment for defendant, and an order denying new trial, plaintiff appeals. Affirmed.

Flint, Gray & Barker, Gray, Barker & Bowen, and William A. Bowen, all of Los Angeles, for appellant. A. J. Sherer, Arthur G. Baker, and W. M. Walker, all of Los Angeles, for respondent.

CONREY, P. J. The plaintiff appeals from the judgment entered in this action in favor of defendant American Surety Company of New York, and also appeals from an order denying plaintiff's motion for a new trial.

On April 8, 1911, one L. H. McGowan, as contractor, entered into a contract with the street superintendent of the city of Covina for certain street improvement work. The contract was authorized and the work done in accordance with the street work act of 1885, commonly known as the Vrooman Act, and the amendments thereto. In connection with the act of entering into this contract, and on the same date, the contractor, as principal, and the defendant American Surety Company of New York, as surety, executed a bond to the city of Covina, payable in the event that said principal should fail to pay for any materials furnished for the work of improvement described in the contract, or for any work or labor done thereon of any kind, and the bond by its terms was made for the benefit of any and all persons, companies, or corporations performing labor on or furnishing material to be used in said work of improvement. The plaintiff having furnished materials for that work and the principal having failed to pay therefor, this action was prosecuted to recover on the bond.

Section 6½ of the Vrooman Act was adopted in 1899 and requires the contractor to give a bond such as was given in this case. That section further provides:

"Any materialman, person, company, or corporation, furnishing materials to be used in the performance of said work specified in said contract, * * * whose claim has not been paid by the said contractor, company, or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim, the person, company, or corporation, filing the same, or their assigns, may commence an action on said bond for the recovery of the amount due on said claim. * * *"

The court found, and the evidence shows, that appellant did not, within 30 days after said improvement was completed, or at all, file with the superintendent of streets any statement of its claim. It did, within said period of 30 days, prepare a statement of claim in due form and send it with a letter addressed to the board of trustees of the city of Covina. This letter, signed by an attorney of the plaintiff, stated that:

"We herewith file said claim with the board of trustees of the city of Covina."

The statement of claim was received by the city clerk, who opened it and placed it in the city's safe, to which the president of the board of trustees and the clerk had access. The evidence shows that the statement of claim was not delivered to the superintendent of streets or filed in his office, that it was never in his possession or under his control, and that he did not even know of its existence until at least 6 months after it was received by the clerk.

There is another statute, approved March 27, 1897, entitled:

"An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work." Stats. 1897, p. 201.

This act provides that:

"Every contractor, person, company, or corporation, to whom is awarded a contract for the execution or performance of any building, excavating, or other mechanical work, for this state, or by any county, city and county, city, town, or district therein, shall, before entering upon the performance of such work," file a bond as described in said act.

The required provisions of the bond under this act, and the purposes of the bond and the requirement as to giving of notice of claim prior to the commencement of any action thereon, are stated in terms almost identical with the language used in section 6½ of the Vrooman Act, but with one important difference. The act of 1897 (as in force when the bond sued on herein was made) required that a claimant, seeking to recover upon such bond, "shall, within 30 days from the time such work is completed, file with the commis-

sioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom such contract was awarded, a verified statement," etc.; whereas section 6½ (enacted in 1899) of the Vrooman Act requires that the statement of claim be filed *with the superintendent of streets.*

[1] Although the notice of claim in this case begins with the words "To the Superintendent of Streets and Board of Trustees of the City of Covina, State of California," we cannot agree that the act of the plaintiff in filing it or sending it to be filed with the board of trustees was in any sense a compliance with the requirement of section 6½ that the claim be filed with the superintendent of streets. If section 6½ constitutes the law applicable to this case, it must be concluded that the plaintiff has failed to perform a necessary condition precedent to its right to recover against the surety on the bond.

[2] Although the act of 1897 is quite general in its terms, it is at least doubtful whether it ever was intended to apply to contracts awarded under the terms of the Vrooman Act. Although contracts under the Vrooman Act are awarded by the city authorities and entered into by the superintendent of streets, the funds for payment of the contractor are obtained by special assessments levied against the property fronting upon the street, and are not paid out of the city treasury. French v. Powell, 135 Cal. 636, 68 Pac. 92, relied upon by appellant as an instance where a bond given to secure payment of claims arising out of the construction of a tunnel was held to be a bond given under the act of 1897, is not in point. The contract in that case was not made under the Vrooman Act, but was made by the city on its own behalf and the work was paid for out of the general funds of the city. But even if it be conceded that the act of 1897 at the time of its enactment was applicable to the case of street work done under the Vrooman Act, then we are of the opinion that the adoption of said section 6½, approved February 21, 1899 (Stats. 1899, p. 23), repealed the act of 1897, in so far as that act could be said to be applicable to work which came within the scope of section 6½. If such street work was included in the act of 1897, it was a special class of work distinct in character from work under contracts made and paid for directly by the state or any of its subdivisions. It was competent for the Legislature to enact legislation particularly applying to this class of work. In so doing the Legislature, no doubt for sufficient reasons, determined that a claimant under the bond should file his claim with the superintendent of streets. Under this provision the surety on the bond, if it desired to know whether any claims had been filed under which it would be liable, would be entitled to examine the records of the office of the superintendent of streets at the expiration of 30 days from the time of completion of the improvement, to ascertain whether any claims had been filed. If it found no claims filed there, no duty devolved upon it to extend its inquiry to other city offices, and it might safely neglect to concern itself further with regard to the contract or bond, or with regard to the responsibility or solvency of its principal. To hold otherwise would be contrary to the plain purpose of enactment of section 6½.

[3] Finally, counsel for appellant insist that it is entitled to recover upon the bond as a common-law bond, in which event it was not required to file notice of claim with any city officer. Upon this matter there was a conflict of authority which had not been settled when appellant's briefs were filed in this case. Since that time, however, the cases upon which it relies have been overruled. We refer to Miles v. Baley, 149 Pac. 45, decided by the Supreme Court of California on May 11, 1915. The bond in that case was given under the act of 1897 and in connection with a contract for the erection of a high school building. Referring to Union Sheet Metal Works v. Dodge, 129 Cal. 390, 62 Pac. 41, and People's Lumber Co. v. Gillard, 136 Cal. 55, 68 Pac. 576, the court conceded that the opinions in those cases do tend to sustain the position that an instrument like the one there under consideration might be upheld as a good common-law bond without regard to the statute requiring the giving of a bond, and then, after discussing certain other decisions and the reasons therefor, definitely concluded that Union Sheet Metal Works v. Dodge and People's Lumber Co. v. Gillard should, as to this particular question, be regarded as overruled. In Miles v. Baley, supra, it was distinctly stated that:

"If the instrument is a statutory bond, it was manifestly essential for the plaintiff to show that all the requisites of the statute, vital to the support of an action upon the bond by materialmen, etc., had been observed by his assignors, and that the silence of the complaint respecting that vital matter amounts to a total failure to state a cause of action upon the bond in favor of the plaintiff or his assignors."

The rule so stated is applicable in the case at bar. The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

30 Cal. App. 71

WILLIAMS v. PARKER et al. (Civ. 1709.)

(District Court of Appeal, Second District, California. March 4, 1916.)

1. CORPORATIONS ⇐123(24)—PLEDGES—SALE—WAIVER OF NOTICE—CONSTRUCTION.

A note secured by the deposit of shares of stock with the payee company, giving the payee the right to call for additional security, and providing that on a failure to respond thereto the obligation should become immediately payable and that upon nonperformance of the promise

the payee might sell the securities without demand, advertisement, or notice, such demand, etc., being expressly waived, the waiver was not limited to the condition which might arise upon the pledgor's failure to furnish additional security, but extended to the condition arising upon the nonperformance of the promise.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 509; Dec. Dig. ⟸123(24); Pledges, Cent. Dig. § 157.]

2. Corporations ⟸123(24) — Pledges—Notice of Sale—Waiver—Effect.

Where the pledgor of stock to secure a note expressly waived notice, its sale at public auction in accordance with the Code requirements, without actual notice to the pledgor, was valid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 509; Dec. Dig. ⟸123(24); Pledges, Cent. Dig. § 157.]

3. Pledges ⟸56(5)—Sale—Good Faith.

Where collateral is pledged as security for the payment of a debt, with the power of sale in case of default, the power must be exercised in good faith; but where the pledgee sells as provided by law and in accordance with the conditions of the contract, and it is not shown that he did anything to prevent a fair sale, the pledgor cannot complain, and the pledgee may take the market as he finds it, and execute his power of sale accordingly.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 161; Dec. Dig. ⟸56(5).]

4. Corporations ⟸123(24)—Pledges—Sale—Estoppel.

Where plaintiff executed a note to a company, secured by a deposit with the payee company of shares of its stock, the fact that stockholders and proposed directors in the payee company individually favored corporate action by it to control the action of another company to whom it had transferred the note in payment for the latter company's stock, in the absence of any showing that the promisor was able, willing, and ready to pay the note, did not establish an equitable estoppel sufficient to prevent recovery on the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 509; Dec. Dig. ⟸123(24); Pledges, Cent. Dig. § 157.]

5. Bills and Notes ⟸444—Action—Application of Security.

The owner of a note has the legal right to sue on it, without any attempt to realize on its collateral security.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1287–1293; Dec. Dig. ⟸444.]

6. Corporations ⟸123(24)—Pledges—Bills and Notes—Forbearance to Sue—Consideration.

Though the board of directors of the company, to whom plaintiff's note, secured by collateral, had been transferred, formally resolved not to sue thereon, it would have been no defense to an action thereon by its assignee, since there was no consideration for such forbearance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 509; Dec. Dig. ⟸123(24); Pledges, Cent. Dig. § 157.]

7. Pledges ⟸31(4)—Sale of Collateral—Conversion.

Upon a wrongful sale of the collateral securing defendant's note, the damage accruing would be as for a conversion, and would have existed in favor of the maker alone, and not in favor of the indorser guaranteeing payment of the note.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 86, 87; Dec. Dig. ⟸31(4).]

8. Pleading ⟸139—Set-Off and Counterclaim.

Facts constituting the basis for a counterclaim must be pleaded as such, or it will not be available to the defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 287; Dec. Dig. ⟸139.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Gara Williams against Phebe A. Parker and another. Judgment for plaintiff, and, from the judgment and from an order denying a motion for a new trial, defendants appeal. Judgment and order affirmed.

Henry W. Nisbet and Harriman, Ryckman & Tuttle, all of Los Angeles, for appellants. Slosson & Mitchell, of Los Angeles, for respondent.

CONREY, P. J. The defendants appeal from the judgment and from an order denying their motion for a new trial.

On July 1, 1908, defendant Parker executed in favor of the Merchants' & Insurers' Reporting Company, a corporation, a so-called promissory note for the principal sum of $1,000, bearing interest and payable on or before five years after date. The note recited the fact of deposit with the payee of 100 shares of stock in said corporation as security for the payment of the obligation. It was further provided therein:

"That the Merchants' & Insurers' Reporting Company has the right to call for such additional security as it may deem proper, and on failure to respond forthwith to such call, the obligation shall immediately thereon become due and payable; or on the nonperformance of this promise, the said payee, its president, or secretary, or assigns, is and are hereby given full power and authority to sell, assign and deliver, or collect the whole or any part of the abovenamed securities, or any substitute therefor, or any addition thereto, at public or private sale, at any time or times hereafter, without demand, advertisement or notice, such demand, advertisement or notice being hereby expressly waived."

The defendant Youtz guaranteed the payment of said note by the following indorsement thereon:

"Each of the undersigned hereby guarantee payment of the within note, waiving demand, presentment for payment, protest and notice of protest. J. E. Youtz."

This note was assigned by the payee to the Bankers' Fire Insurance Company, a corporation, and was thereafter assigned by that corporation to the plaintiff. The assignment to plaintiff was not for a valuable consideration, and was merely for the purpose of collection. After the note became due, and on the 15th day of October, 1913, the pledged shares of stock were by the plaintiff sold at public auction, after notice by publication as required by section 3005 of the Civil Code, and without actual notice to the defendants. At that sale the shares of stock were purchased by an attorney of the plaintiff as trustee for the Bankers' Fire Insurance Compa-

ny, paying therefor the sum of $1, which was less than the expenses of the sale, and resulted in no payment of any part of the principal or interest due on the note. Immediately after the completion of said sale, notice thereof was served upon each of the defendants, with demand for payment of said sum of $1,000 with the accrued interest thereon, less $45 interest paid on April 1, 1909. The note was not paid, and this action was commenced on the following day.

The answer pleads full payment of the note, and also alleges that the sale of pledged stock was not in good faith, but was made with the intent, on the part of plaintiff and the Bankers' Fire Insurance Company and the purchaser, of defrauding defendants and depriving them of the stock and the value thereof, which value they alleged was $2,000 in the open market. No evidence was produced by the defendants on the subject of the value of the pledged stock, and the court's finding that the sale was made in good faith and for the true value thereof is sufficiently shown by the evidence proving the manner in which the sale was made.

[1, 2] The claim of appellants that the sale was illegal for want of actual notice to the pledgor is met by the waiver of such notice which we have quoted from the note. We do not agree with them that the waiver as stated was limited to the condition which might arise upon failure of the pledgor to furnish additional security if called for. Notice having been waived, the sale at public auction in accordance with the Code requirements was a valid sale.

[3] It is true that the relation existing between parties to a transaction, where collateral is placed in the hands of the pledgee as security for the payment of a debt, with power of sale in case of default, is in the nature of a trust relation, and that the power must be exercised in good faith. But where the pledgee makes the sale in the manner provided by law and in accordance with the conditions of the contract, and it is not shown that he did or caused to be done anything for the purpose of preventing a fair sale, the pledgor has no right to complain. Under such circumstances the pledgee may take the market as he finds it, and exercise his power of sale accordingly. Hudgens v. Chamberlain, 161 Cal. 710, 715, 716, 120 Pac. 422.

[4-6] The Bankers' Fire Insurance Company was organized under the laws of the state of Arizona. All of its stock, except 3 or 4 shares, was purchased by the Merchants' & Insurers' Reporting Company for the sum of $200,000, of which $5,000 was paid in cash and $195,000 was paid by transferring to the Bankers' Fire Insurance Company notes in that aggregate amount, which had been executed to the Merchants' & Insurers' Reporting Company in consideration of purchases of its stock, the note in suit being included among them. On the 12th day of July, 1913, a few days after this note became due, there was held an adjourned session of an annual meeting of stockholders of the Merchants' & Insurers' Reporting Company. There were present at that meeting two of the three directors of the Bankers' Fire Insurance Company, and there was some discussion relating to both corporations, in the course of which the two directors of the Arizona corporation and a stockholder of the Merchants' & Insurers' Reporting Company, who at that time was about to be elected as a director of the last-named corporation, expressed views favorable to the making of some arrangement by which both corporations would be dissolved. One of the directors elected at that time stated that if so elected he would pledge himself to bring about the dissolution of these two corporations, and not undertake to enforce the collection of the notes maturing on July 1, 1913. This fact is stated in the testimony of defendant Parker, and is not contradicted. Neither is her statement, "that the other directors elected at that time practically agreed to the same thing," contradicted by anything in the record. Defendant Parker testified that from those statements and what occurred at that meeting she believed that no attempt or effort would be made to collect her note, and that she therefore took no steps to protect herself on the note or her stock pledged as security therefor; that she had no knowledge that payment of her note was desired by the holder until after her stock was sold, and had no knowledge that it was to be sold.

Upon the foregoing facts it is urged that the defendants have established an equitable estoppel which should be sufficient to prevent any recovery on the note in this action. For various reasons, there is no merit in this defense. As we have shown, the value of the shares of stock, so far as proved herein, was trivial. The owner of the note had the legal right to sue on it, even without any attempt to realize on the security. If the board of directors of the Bankers' Fire Insurance Company had formally resolved that it would not bring suit on this note, that would not have been a defense to the action, since there was no consideration passing to it for its forbearance. Peachy v. Witter, 131 Cal. 316, 63 Pac. 468. Much less can the right of action be denied merely because stockholders and proposed directors in the Merchants' & Insurers' Reporting Company, and directors of the Bankers' Fire Insurance Company, speaking individually for themselves, favored corporate action to be taken by the former corporation for the purpose of controlling the action of the Bankers' Fire Insurance Company in the matter of collection of notes owned by the latter company. There is no evidence that the defendants were able, ready or willing to pay this note under any circumstances or at all.

[7, 8] Even if it should be conceded that

under the circumstances the sale was wrongful, the damage accruing would be as for a conversion, which should have been pleaded by way of counterclaim, and such right of counterclaim would have existed in favor of defendant Parker alone, the defendant Youtz being not concerned therein. Facts constituting the basis for a counterclaim must be pleaded as a counterclaim, or the counterclaim will not be available to the defendant. Cohn v. Kelly, 132 Cal. 468, 64 Pac. 709; Ann. Cas. 1913A, 1079, note.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

29 Cal. App. 668

Ex parte HOWELL. (Cr. 462.)

(District Court of Appeal, Second District, California. Feb. 14, 1916.)

CRIMINAL LAW ⊂=1083 — APPEAL — COMMITMENT BY JUSTICE COURT—JURISDICTION.

Pen. Code § 1466 et seq., provide for appeals to the superior court from a judgment of a justice's court in like cases and for like cause as appeals may be taken to the supreme court, and that the appeal to the superior court shall be heard upon a statement of the case settled by the justice to be filed and settled by the court within ten days after the filing of notice of appeal. *Held*, that section 1468 was complete as to appeals from justices' courts, and that the filing of the notice of appeal and the furnishing of bail in an amount fixed by the justice without proceeding to prepare a record for use in the appellate court ousted the jurisdiction of the justice court to act further, and removed the cause to the superior court, so that, notwithstanding the appeal might be dismissed for lack of a sufficient record to present any available question, the justice could not thereafter lawfully issue a jail commitment until some order had been made by the superior court disposing of the appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2732; Dec. Dig. ⊂=1083.]

Petition by Percy Howell for a writ of habeas corpus requiring that petitioner be discharged from the custody of the sheriff of the county of Los Angeles. Ordered that upon production to the sheriff of a certificate of the justice showing the receipt by him of the amount of $1,000 fixed as bail upon appeal petitioner be discharged from custody.

Wm. J. Hanlon and Walter T. Casey, both of Los Angeles, for petitioner. Thomas Lee Woolwine, Dist. Atty., and W. C. Doran, Deputy Dist. Atty., both of Los Angeles, for respondent.

JAMES, J. Application upon habeas corpus for an order requiring that petitioner be discharged from the custody of the sheriff of the county of Los Angeles. The return admits the facts stated in the petition. It appears that, after trial upon a charge amounting to a misdemeanor, had in the justices' court of San Jose township, in the county of Los Angeles, petitioner was sentenced to pay a fine of $500, or be imprisoned in the county jail until that fine be satisfied, and judgment of further imprisonment for a period of six months was imposed. The validity of that judgment is not here in question. After sentence, and within the time allowed by law, the defendant gave notice of appeal and deposited the sum of $1,000 as bail upon appeal; that amount being fixed by the justice. More than 15 days thereafter, no statement on appeal having been prepared, and no further proceedings having been taken or notices given on the part of the appellant, the justice, of his own motion, attempted to release the bond, and issued a commitment, declining to retain the money given as bail pending appeal, which the defendant still offered and tendered to him. Under the commitment defendant was taken into custody, and is now confined in the county jail. There is some uncertainty in the statement in the petition as to the conditions concerning the release of the cash bond; but, as no point is made touching that matter by respondent, we will consider briefly the principal question presented. The position of respondent is, as represented by the district attorney, that the giving of the notice of appeal and the bail on appeal in the amount fixed by the justice were not sufficient to effectuate an appeal unless other proceedings were taken to prepare a record to be used in the appellate court. It is claimed that the sections found in title 9 of part 2 of the Penal Code, which relate particularly to appeals to the Supreme Court, and wherein certain proceedings are required of the appellant in the way of giving notice for the preparation of his record, etc., are applicable. Section 1466 et seq. of the Penal Code provide particularly for appeals to be taken to the superior court. Section 1466 reads as follows:

"Either party may appeal to the superior court of the county from a judgment of a justice's or police court, in like cases and for like cause, as appeals may be taken to the Supreme Court."

Section 1468 provides that the appeal to the superior court from such judgment of a justice's or police court is to be heard upon a statement of the case settled by the justice or police judge, which statement must be filed and settled by the court within ten days after the filing of notice of appeal. The provision contained in section 1466 that parties may appeal from justices' judgments "in like cases and for like cause, as appeals may be taken to the Supreme Court," we think, does not by necessary effect make applicable all of the provisions respecting the preparation of the record to be used on appeal as the same are outlined in title 9 referred to. Section 1466 states merely that the appeals are to be taken in like cases and for like cause, but nowhere does its provisions carry the inference that the procedure in the preparation of the appeal is to be the same as where the appeal is taken from a judgment of the

superior court. Added force is given to this conclusion when we refer to the terms of section 1468, which expressly provides that the appeal is to be heard upon a statement of the case settled by the justice. If the appeal is to be so heard, then surely the general sections relating to appeals touching the manner of preparation and kind of record to be used, cannot apply. Section 1468 is complete and exclusive in its relation to appeals from justice's and police courts. The filing of the notice of appeal and furnishing the required bail in an amount as fixed by the justice had the effect of ousting the jurisdiction of the justice's court to act further, and removed the cause to the superior court; this notwithstanding that it might follow that the appeal should be dismissed for lack of a sufficient record upon which to present any available question. Upon this application, however, that question is of no materiality. If the defendant's case was by the appeal taken transferred to the superior court, the justice of the peace could not lawfully issue a jail commitment until some order had been made by the superior court disposing of the appeal.

It is ordered that, upon production to the sheriff of a certificate of the justice showing the receipt by him of the amount of $1,000, heretofore fixed as bail upon appeal, petitioner be discharged from custody.

We concur: CONREY, P. J.; SHAW, J.

29 Cal. App. 755

LUCHINI v. ROUX et al. (Civ. 1573.)

(District Court of Appeal, First District, California. Feb. 24, 1916.)

1. FOOD ⟸26 — STATUTES — RIGHTS OF ACTION.

The dairy act (St. 1911, p. 959) requires every person operating any dairy where more than four cows are milked to register the same with the secretary of the state dairy bureau, and makes a failure to register a misdemeanor. Other sections prohibit the sale of milk not of a certain standard. *Held* that, where milk sold by the owner of an unregistered dairy complied with the standard fixed by the act, the fact that he was guilty of a misdemeanor will not preclude recovery of price.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 19; Dec. Dig. ⟸26.]

2. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS.

A finding of the trial court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988, 3990–3992; Dec. Dig. ⟸1011(1).]

3. TRIAL ⟸395(2)—FINDINGS—SUFFICIENCY.

In an action for milk sold, where defendants contended plaintiff had no legal capacity to sue, in that he had not complied with the provisions of the dairy act (Sts. 1911, p. 959) requiring the registration of his dairy, and that the sale was a wrongful sale, findings that the sale was not a wrongful sale or a violation of the statute sufficiently disposed of the issues raised.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 928; Dec. Dig. ⟸395(2).]

4. APPEAL AND ERROR ⟸1033(7)—REVIEW—HARMLESS ERROR.

Defendants cannot complain that the court made no findings as to issues raised on one count of the complaint, where the court found in defendants' favor as to that count.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4059; Dec. Dig. ⟸1033(7); Trial, Cent. Dig. § 587.]

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by John Luchini against A. Roux and Frank Gonthier, copartners, etc. From a judgment for plaintiff and an order denying new trial, defendants appeal. Affirmed.

Jas. F. Brennan and John A. McGee, both of San Francisco, for appellants. Martinelli & Greer, of San Rafael, for respondent.

KERRIGAN, J. This action was brought by plaintiff, who was a dairyman, upon two causes of action for the recovery of the sum of $1,609.55. The first was for the sum of $1,339.49 upon an account stated, and was based upon the sale of milk, wood, horses, hogs, and hay. The second was for milk delivered to the defendants by plaintiff at an agreed price of $270.06.

Defendants, who were cheese manufacturers, in answer to the first cause of action, denied that an account was ever stated or that they ever promised to pay the plaintiff any balance due, and further denied that there was due from them any sum whatever upon the second cause of action. As a separate and distinct defense to both counts defendants alleged that the plaintiff had no legal capacity to sue upon or maintain the alleged cause of action, for the reason that he had failed to comply with the provisions of sections 6 and 16 of the so-called dairy act, requiring those engaged in the dairy business to register as provided by the act, and that the sales, in so far as the milk was concerned, were wrongful within the meaning of the act, and that no recovery could be had therefor.

The court found that the milk respecting which an account was stated was not adulterated, and that the sale was not wrongful within the meaning of the act, and rendered judgment in favor of the plaintiff and against defendants in the sum of $1,339.49, the full amount alleged to be due upon the account stated. It further decreed that plaintiff take nothing upon his second cause of action. Defendants appeal from such judgment, and from the order denying a new trial.

The main contention upon which the defendants rely for the reversal of the judgment and order is that plaintiff is not entitled to recover the amount of the account stated, for the reason that he did not register his dairy with the state dairy bureau as provided by the dairy act (Stats. 1911, p.

959). The sections involved as a defense are as follows:

"Sec. 6. Every person, firm or corporation operating any dairy, where more than four cows are milked, and every creamery, cheese factory, receiving station, skimming station, ice cream or ice milk manufacturer, or milk condensary, shall on or before the first day of November of each year, cause to be registered with the secretary of the state dairy bureau a statement showing the full name and address of such person, firm or corporation so operating the same, and also the full name and address of the owner or owners of the business so being operated, in case the person operating the same is not the owner, together with a statement of the class of such business carried on by such person or corporation, and the number of cows then being milked, in case of a dairy."

"Sec. 16. No action can be maintained on account of any sale or other contract made in violation of, or with intent to violate, this act, by or through any person, who was knowingly a party to such wrongful sale or other contract."

"Sec. 29. Milk and the products of milk enumerated in this section, shall be deemed adulterated within the meaning of this act if it or they shall not conform to the following definitions and standards:

"(1) Milk is the fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows, properly fed or kept, excluding that obtained within fifteen days before and five (5) days after calving, and contains not less than three (3) per cent. of milk fat, and not less than eight and five-tenths (8.5) per cent. of solids, not fat."

"Sec. 41. Whoever shall violate any of the provisions of this act other than sections 9 to 35, both inclusive, and section 37 (the punishment for which is provided in sections 39 and 40 hereof) shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than two hundred dollars, or by imprisonment in the county jail for a period of not less than * * * one hundred days, or by both such fine and imprisonment."

In addition to the above-enumerated sections there are provisions in the act prohibiting the sale of impure, unclean, or unwholesome milk, or milk produced in an unsanitary dairy. An unsanitary dairy is also defined at length. Other provisions of the act deal with the manufactured products of milk, their preparation for the market, the character of packages in which they may be offered for sale, and the labels that may be placed thereon. Still other provisions of the act require substitutes for butter and cheese to be branded. In short, the act contains comprehensive regulations having to do with the production of milk, its sale, the manufacture of products therefrom, and their method of marketing and sale to the public; the whole being designed to protect the public health and promote its well-being in so far as they depend upon the purity and wholesomeness of the important articles of consumption dealt with by the act. We also find in the act various sections similar to section 41, above set forth, making violations of the act misdemeanors, and affixing punishments to them in the shape of fines and terms of imprisonment of various amounts and durations; and, finally, we have section 16 of the act, also set out above, providing that no action can be maintained on account of any sale made in violation of the act.

[1] The contention of the appellants that the contract in this case is void is not based upon the character of the milk delivered under it, but is squarely founded upon the fact that the plaintiff had not complied with section 6 of the statute, requiring registration. So far as this branch of the appellant's argument is concerned, the milk sold by the plaintiff might have been of the most wholesome character and unexcelled by any to be obtained anywhere; their contention simply is that, coming as it did from an unregistered dairy, a contract for its sale was a violation of the act.

We are unable to agree with this contention. We find nowhere in the act any prohibition of the sale of milk from an unregistered dairy as such. If it is impure or unwholesome or produced in an unsanitary dairy, then its sale is prohibited along with that of milk of the same character produced in a registered dairy, and a contract for its sale would come within the terms of section 16 of the act. The violation of the statute by the failure of the owner or operator of a dairy where more than four cows are milked to register is by section 41 thereof made a misdemeanor punishable by fine and imprisonment; and nowhere in the statute is the sale of its products forbidden if pure and wholesome. The proposition that, if an act is prohibited by law, a contract for its performance is invalid, is undoubtedly correct; but in applying this principle to the case at bar the appellants are confounding plaintiff's failure to register (made a misdemeanor and punishable as such) with the contract he entered into for the sale of his milk. They seek to draw the inference that because plaintiff was guilty of a misdemeanor in failing to comply with the terms of the act requiring registration a contract for the sale of his milk was a violation of the statute. We think no such inference can be drawn. A specific penalty is annexed to the failure to register by the owner or operator of a dairy of the character here involved, and this court cannot by inference annex an additional punishment for such failure. The sale under consideration not being a violation of the act, the plaintiff was not inhibited from maintaining this action.

The cases cited by the appellants on this question are not in point. In each case the sale itself was by the statute in terms made invalid, except in the case of Miller v. Post, 1 Allen (Mass.) 434, which was a case arising under a statute which made it a misdemeanor to use an unsealed can in the sale of milk. The court held that such an enactment was equivalent to making the sale of the milk itself in an unsealed can unlawful; but that case does not go to the extent claimed by the defendants.

[2] It is next contended in support of the appeal that the finding of the trial court of an account stated between the parties is not supported by the evidence. An examination of the record discloses a conflict of testimony upon this subject, in view of which this court is required to uphold the judgment of the trial court.

[3] The appellants next urge that the court erred in failing to find upon material issues raised by the answer to the first cause of action. The issues referred to were raised by allegations of the amended answer to the effect:

"That the plaintiff had no legal capacity to sue, * * * in this: That the plaintiff has not complied with the provisions of section 6 and 16 of an act of the Legislature," etc. (reciting the statute under consideration), and "that the sale of milk * * * was a wrongful sale within the meaning, and in violation of section 16 and section 20 and section 6 of an act of the Legislature," etc. (reciting the same act).

Finding 4 as made by the court is:

"That the sale of milk * * * was not a wrongful sale within the meaning, or in violation of, section 16, or of section 29, or of section 6, or of any section whatever of the act of the Legislature," etc.

This finding was clearly intended to, and, we think, does, cover the issues now referred to.

[4] Appellants finally complain that the court failed to find upon the issues raised by their answer to the second cause of action; but, as the judgment of the court is that the plaintiff take nothing by this cause of action, and the decree recites that the plaintiff waived in writing any findings of fact thereon, we fail to see how the appellants are aggrieved by the absence of findings upon this count.

This disposes of the points urged by appellants in support of the appeal.

For the reasons given, the judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(29 Cal. App. 623)

VAWTER v. PURDY et al. (Civ. 1728.)

(District Court of Appeal, Second District, California. Feb. 9, 1916.)

1. APPEAL AND ERROR ⇐877(4) — REVIEW — FAILURE TO URGE OBJECTIONS — JUDGMENT.
Where, in an action at law, judgment was entered for one defendant as against other defendants, although no cross-complaint was filed, the judgment against the plaintiff being supported by the evidence, in the absence of an objection from the defendants against whom judgment was entered, it is without the province of the court on plaintiff's appeal to make any order affecting the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3567; Dec. Dig. ⇐877(4).]

2. INSURANCE ⇐780 — MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY.
A member of a mutual benefit insurance association has the right in the absence of restrictive provisions of the charter, by-laws, or rules under which the association operates, to revoke his designation of a beneficiary and substitute a different one.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1946; Dec. Dig. ⇐780.]

3. INSURANCE ⇐783—MUTUAL BENEFIT INSURANCE—BENEFICIARIES—VESTED INTEREST.
The beneficiary of a policy of insurance in a mutual benefit company is possessed of but an expectancy, and acquires no vested interest in the benefit funds until the death of the member.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1949; Dec. Dig. ⇐783.]

4. INSURANCE ⇐769—MUTUAL BENEFIT INSURANCE—INSURABLE INTEREST OF BENEFICIARY.
Where the deceased applied for insurance in a mutual benefit association in his own behalf and paid his obligations as a member of the fund, his contract specifically permitting him to select as a beneficiary any friend, in the absence of statute, the person named as beneficiary by him was eligible, although not sustaining any blood relationship to him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1932, 1937, 1938; Dec. Dig. ⇐769.]

5. INSURANCE ⇐773 — INSURABLE INTEREST.
In the absence of any statute or contract restricting the right of the insured as to classes of persons from whom he may select his beneficiary, the utmost freedom of choice in that regard exists.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1939; Dec. Dig. ⇐773.]

Appeal from Superior Court, Los Angeles County; Curtis C. Legerton, Judge.

Action by Isabelle L. Vawter against F. T. Purdy and others. From a judgment for the defendant Mary C. Bassett as against the other defendants, the plaintiff appeals. Affirmed.

E. J. Fleming and B. F. Woodard, both of Los Angeles, for appellant. Hahn & Hahn and W. R. Hervey, all of Los Angeles, for respondents.

JAMES, J. [1] Plaintiff, the widow of E. J. Vawter, brought this action against defendants Purdy and Flint as trustees of a benefit fund which had been provided by an association of the nature of a fraternal organization. Upon the death of plaintiff's husband claim was made against the trustees for the sum of $758, to which it was alleged the plaintiff was entitled. Defendant Bassett claimed to be entitled to the same money by reason of having been substituted by the deceased Vawter in place of the original beneficiary, the plaintiff. Defendants Purdy and Flint answered, affirming that Vawter had requested them as trustees to pay the benefit fund to defendant Bassett, and averring that they were mere stakeholders, and held the money, and would continue to hold the same to be paid pursuant to the judgment of the court. The findings of the court were against the plaintiff, and an affirmative judgment was entered in favor of the defendant Bassett as against the trustees mentioned. The

appeal is taken from that judgment. This being an action at law, and the fund not being in court and physically subject to judicial disposition, we are at a loss to see by what authority an affirmative judgment was entered in favor of one defendant as against other defendants, where no cross-complaint was filed. However, if it is to be determined that the judgment against the plaintiff herein was supported by the evidence, then, as the trustee defendants are not complaining, it will be without the province of this court to make any order affecting that judgment. And we think that the judgment determining that the plaintiff was not entitled to collect the money should be sustained.

[2, 3] Under the facts as stipulated, it appears that a mutual benefit association was organized for the purpose of providing a death benefit fund which would be paid to a beneficiary selected by a member. The total sum required to be paid in the first instance by each person, in order to secure membership, was $2.20. Thereafter, upon the death of any member, an assessment of $1.10 would be levied against each member of the association, and all of the fund so raised, except for a deduction of 10 cents for each member, would be the amount paid to the beneficiary. Therefore it appears that the amount of the benefit would be variable, depending altogether on the total of the membership at the time of the death of a member. It is not shown that the organization was incorporated, or that it had any by-laws or set of rules, beyond those which were set forth in the circular issued to invite members and which was accompanied by an application blank to be signed by the applicant. The only qualification required was that the applicant should be a member in good standing of a certain fraternal order, and that he should be not over 60 years of age and in good general health. While the fund was designated as the "widow's benefit fund," the circular issued informed the prospective members that the protection would be extended to either "wife, children, mother, sister, or friend." The word "friend," of course, quite plainly was intended to include any person whatsoever, in addition to those mentioned as being in certain relationship with the member. The deceased, E. J. Vawter, at the time he became a member of the association, designated his wife, the plaintiff herein, as the person who should receive the benefit in the event of his death. Thereafter he notified the association of a change of beneficiary, then designating E. J. Vawter, Jr., as trustee for two persons named. About two years later he wrote to the secretary of the association as follows:

"I now desire to change the beneficiary named therein and to make my friend, Mary C. Bassett, Ocean Park, California, the person to whom the payment shall be made at my decease. In no case is payment to be made to Isabelle L. Vawter, the beneficiary heretofore named in my application No. 653."

In response to this letter the secretary wrote to Vawter informing him that his instructions with regard to the last change of beneficiary had been complied with. The question involved, and the only question entitled to consideration, is as to whether Vawter had the right to make the change of a beneficiary so as to give to the defendant Bassett the death benefits. As to this question, notwithstanding the argument for appellant to the contrary, we think that the authorities preponderate to the effect that a member of such an association as that described has the right, in the absence of restrictive provisions of the charter, by-laws, or rules under which the association operates, to revoke his designation of a beneficiary and substitute a different one. It would seem to serve no good purpose to multiply citation of authorities to that point. The courts sustaining the general rule have held that, while under what may be termed ordinary life insurance policies, no right to change the beneficiary exists, the legal relation of a member of a mutual benefit association is different, and that with respect to the benefits to accrue in the latter organizations the beneficiaries are possessed of but an expectancy, as against a vested interest which accrues under the ordinary life policies. The law is stated, and a large number of authorities are collected by the two text-writers whose works we have examined. Bacon on Benefit Societies and Life Insurance (3d Ed.) § 306, where the writer says:

"The accepted doctrine, now generally approved by all the authorities, is that the beneficiary may be changed if the laws of the order so provide, or if, when such transfer is not prohibited by the laws of the society, the certificate or policy has not been delivered to the beneficiary."

In Niblack on Benefit Societies and Accident Insurance, at section 212, page 405, this statement is made:

"So far as outward appearances may indicate, there is little difference between an ordinary policy of life insurance and a contract of mutual benefit insurance. But it has been held with substantial unanimity, whenever the question has arisen, that, in mutual benefit societies, the contract of insurance is between the society and the member, that the beneficiary acquires no vested right in the benefit fund which is to accrue upon the death of the member, until the death takes place, and that, during his life, therefore, the member may change his beneficiary without other limitations or restrictions than such as are imposed by the organic law, the articles of incorporation, the by-laws, or the certificates of the society."

The authorities cited in the latter textbook, under the section to which we have referred, are in the main those which find place in the briefs of counsel. Those authorities mentioned below, which are cited to the additional point raised by counsel, are in line with the general current of authority.

[4, 5] The point is made that Mary C. Bassett, not sustaining any blood relationship toward the deceased, was not eligible to be named as a beneficiary by him. This is not a case illustrating the law that a person, in

order to take out insurance upon the life of another, must possess what is called an "insurable interest" in the life of the person insured. The facts shown here were that Vawter made application for the insurance in his own behalf and paid whatever sums of money were required to be paid in discharge of his obligations as a member of the fund. The contract expressly permitted him to select as a beneficiary persons other than those standing in blood relationship with him. In the absence of any statute or contract restricting the right of the insured as to the classes of persons from whom he may select his beneficiary, the utmost freedom of choice in that regard exists. Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213; Overbeck v. Overbeck, 155 Pa. 5, 25 Atl. 646; Sabin v. Phinney et al., 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

29 Cal. App. 689

DEAN v. HAWES. (Civ. 1638.)

(District Court of Appeal, First District, California. Feb. 15, 1916.)

1. VENDOR AND PURCHASER ⊂=84—CONTRACT TO REPURCHASE — ACTION FOR DAMAGES—FINDING.

In an action for damages for the breach of a contract to repurchase land conveyed to the plaintiff, evidence *held* to sustain a finding that defendant refused to accept plaintiff's offer to reconvey the property to defendant upon his payment to plaintiff of the sum of $800.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 140; Dec. Dig. ⊂=84.]

2. VENDOR AND PURCHASER ⊂=84 — CONSTRUCTION OF CONTRACT — INTEREST — "INVESTMENT."

In an agreement made and delivered to plaintiff contemporaneously with defendant's conveyance of a one-half interest in certain property, providing that, if plaintiff desired, the defendant would take the land back, allowing her 10 per cent. on the investment, at any time after one year and within two years from date, the word "investment" meant the putting out of money on interest in some form more or less permanent so as to yield an income, so that the agreement was to pay annual interest at the rate stated, and not to arbitrarily augment the sum received for the land, and where the purchase price was $800, plaintiff at the end of the first year was entitled to demand $880, and at the end of the second year $960.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 140; Dec. Dig. ⊂=84.

For other definitions, see Words and Phrases, First and Second Series, Investment.]

3. VENDOR AND PURCHASER ⊂=84—CONTRACT TO TAKE BACK LAND—ACTION FOR BREACH —FINDING—"VALUE."

In an action for damages for defendant's breach of his contract to take back land sold to plaintiff, allowing interest on her investment, a finding that the value of the land did not at any time after the conveyance exceed the sum of $500 was not vitally defective in failing to state that the value so found was the market value, as the word "value," when applied to property without qualification, means the price which it would command in the open market, or its market value.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 140; Dec. Dig. ⊂=84.

For other definitions, see Words and Phrases, First and Second Series, Value.]

4. VENDOR AND PURCHASER ⊂=84—CONTRACT TO REPURCHASE — ACTION FOR DAMAGES—FINDINGS.

In such action such finding would not support the further finding that plaintiff was damaged by defendant's breach in the sum of $600, where the difference between $500 and the sum of $960, which the court found to be ultimately due from the defendant, as the plaintiff's damage could not exceed $460.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 140; Dec. Dig. ⊂=84.]

5. APPEAL AND ERROR ⊂=1058(2)—HARMLESS ERROR—CURE BY SUBSEQUENT ADMISSION.

In such action, error, if any, in excluding the opinion of the defendant's witness as to the value of the land, was cured when the witness, without objection, was afterwards permitted to give his opinion as to its value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. ⊂=1058(2).]

6. EVIDENCE ⊂=142(1)—ADMISSIBILITY—SIMILAR FACTS—VALUE.

In such action, there was no error in excluding the testimony as to the sum for which other property sold, when such other property was not shown to be similar in character and situation to the land in controversy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416, 417, 423; Dec. Dig. ⊂=142(1).]

Appeal from Superior Court, Santa Cruz County; B. V. Sargent, Judge.

Action by Henrietta S. Dean against George W. Hawes. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

See, also, 21 Cal. App. 350, 131 Pac. 885.

George W. Hawes and Daniel W. Burbank, of San Francisco, for appellant. Charles B. Younger, of Santa Cruz, for respondent.

LENNON, P. J. For the second time this case comes to this court upon appeal by the defendant from a judgment in favor of the plaintiff. The action was for damages for the alleged breach of a contract to purchase real estate. Upon the first appeal the judgment was reversed, because the plaintiff failed to show that she had been damaged by the alleged breach of the contract in the sum sued for, or in any other sum. The plaintiff's cause of action rests upon allegations of fact which are substantially as follows:

The defendant, in consideration of the sum of $800, executed to plaintiff a deed dated October 31, 1908, purporting to convey to plaintiff the defendant's undivided one-half interest in certain real property situate in the county of Santa Cruz. The plaintiff has ever since been the owner in fee of the interest so conveyed to her free and clear of all incumbrances. Contemporaneously with the execution of the deed referred to the defend-

ant made and delivered to plaintiff the following memorandum of agreement:

"Santa Cruz, Cal., October 31, 1908.

"This is to certify that I have this day sold to Henrietta S. Dean a one-half interest in a certain tract of land: Now, therefore, should she so desire, I hereby agree to take the land back, allowing her 10 per cent. on the investment, at any time after one year and within two years from this date. The party owning the other half interest is W. H. Lamb; the amount is six acres.

"[Signed] George W. Hawes."

On November 1, 1909, the plaintiff accepted the option of reconveying to the defendant the land described in the defendant's deed and memorandum of agreement of October 31, 1908, by so informing the defendant, and at the same time offered to make a deed to the property to the defendant upon the payment of the sum of $880, which it was alleged was the aggregate of the original purchase price, plus interest for one year at the rate of 10 per cent. per annum.

[1] Upon the second trial of the case the court below among other things found as follows:

"That after one year from the execution of said deed and of the instrument set forth in paragraph IV of the amended complaint herein, and on or about November 1, 1909, said plaintiff notified said defendant that she was desirous of accepting, and did accept, the option or agreement to reconvey to said defendant the premises hereinbefore described, and offered in good faith to said defendant to execute to him a deed to the undivided half of said premises upon payment or tender to said plaintiff by said defendant of the sum of $880, and that said plaintiff then and there offered to convey said premises to said defendant upon the payment by said defendant to said plaintiff the sum of $880, and said plaintiff then and there demanded that said defendant pay to said plaintiff said sum of $800 together with the sum of $80 interest thereon; that thereafter and from time to time said plaintiff offered to execute such deed to said defendant, and demanded of him that he repay to said plaintiff said sum of $800, together with interest thereon. That defendant declined and refused to accept the offer of said plaintiff, or to pay said plaintiff the sum of $800, or any part or portion thereof, or any interest thereon, and declined and refused the offer of said plaintiff to reconvey said premises to said defendant."

This finding is assailed upon the ground that it is not supported by the evidence, but is contrary thereto in the particular that it finds that the defendant refused to accept the plaintiff's offer to reconvey the property in question to the defendant upon the payment by him to the plaintiff of the sum of $880; whereas the evidence, it is claimed, shows that the plaintiff offered to reconvey only upon the condition that the defendant pay to the plaintiff the sum of $960 which, it is insisted, was $80 in excess of the sum called for by the terms of the agreement in the event that the plaintiff accepted the option contained therein.

The record contains some evidence to the effect that at or about the expiration of one year from the making of the agreement, and upon several occasions shortly thereafter, the plaintiff notified the defendant orally and in writing that she accepted the option to reconvey, and upon each occasion offered to execute a deed conveying to him the said lands upon the payment to her of the sum of $880, which aggregated the original purchase price of $800 and interest thereon for one year at 10 per cent., and that the defendant upon each occasion refused to accept the plaintiff's offer, and finally repudiated any obligation on his part under the agreement.

This evidence, we think, fully sustains the finding of the trial court; and the fact that subsequent to the defendant's repudiation of the agreement, and at or about the time of the expiration of the two years provided in the agreement the plaintiff through her agent tendered to the defendant a deed to the property, coupled with a demand for $960, will not, under our construction of the agreement in question, avail to overthrow the findings made upon the theory that the sum finally demanded was $80 in excess of the sum required to be paid by the defendant upon the plaintiff's acceptance of the option provided for therein.

[2] The word "investment," as commonly employed, has been judicially defined to mean the putting out of money on interest in some form more or less permanent, so as to yield an income. Sav. Bank, etc., v. Barrett, 126 Cal. 413, 58 Pac. 914. Consequently the agreement of the defendant to pay to the plaintiff under certain contingencies "10 per cent. upon the investment," if the idea suggested by the word "investment" is to be carried out, must be construed as an undertaking to pay annual interest at the rate named, and not a mere arbitrary augmentation in the sum received for the land. If the latter construction were followed the plaintiff would receive no more upon an "investment" covering a period of two years than upon one extending over only half that length of time—a construction which appears to us to be at variance with the language used. The sum of $960 ultimately demanded from the defendant upon the tender of the deed was the aggregate of the original purchase price and the stipulated interest thereon for two years, and was therefore not in excess of the terms of the defendant's agreement.

[3] The finding of the trial court that the value of the land did not at any time after the conveyance thereof exceed the sum of $500 was not vitally defective in failing to state that the value so found was the market value. The word "value," when applied to property, and no qualification is expressed, means the price which the property would command in the open market, and therefore the word as used in the finding must be held to mean market value. In re McGhee's Estate, 105 Iowa, 9, 74 N. W. 695; Little Rock, etc., Ry. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51.

[4] The finding last referred to, however, does not fully support the further finding

that the plaintiff was damaged by the defendant's breach of his agreement in the sum of $600. If the land had a market value of $500, then the measure of the plaintiff's damage would be the difference between that sum and the sum of $960, which the court in effect found was ultimately due from the defendant. Dean v. Hawes, 21 Cal. App. 350, 131 Pac. 885. So measured, the plaintiff's damage under the facts found should not have exceeded the sum of $460, and therefore the findings will not support a judgment in any greater amount.

[5] The error, if any, in the trial court's ruling sustaining an objection to the opinion of the defendant's witness Archibald concerning the value of the land, was subsequently cured when the witness without objection was permitted to give his opinion of the value.

[6] There was no error in the ruling of the trial court refusing to permit the defendant's witness Williams to give in evidence the sum for which the Wise property sold. The objection that this particular property was not shown to be similar in character and situation to the land in controversy was well taken and rightfully sustained.

This disposes of all the points made in support of the appeal which we deem worthy of discussion.

For the reasons stated, the judgment appealed from is modified, by striking therefrom all in excess of the sum of $460, and, as so modified, it will stand affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(30 Cal. App. 792)

Ex parte JOHNSON. (Cr. 473.)

(District Court of Appeal, Second District, California. March 7, 1916.)

HOLIDAYS ⊂=5 — SENTENCE — TIME OF PRONOUNCING.

Evidence examined, and *held* to show that sentence was not void as having been pronounced after 12 o'clock noon on Saturday.

[Ed. Note.—For other cases, see Holidays, Cent. Dig. §§ 2–5; Dec. Dig. ⊂=5.]

Application by Effie Johnson for a writ of habeas corpus. Petitioner remanded to custody.

William Durham, of Los Angeles, for petitioner. Warren L. Williams, City Prosecutor, and Erwin W. Widney, Deputy City Prosecutor, both of Los Angeles, for respondent.

PER CURIAM. The application of petitioner to be released from custody by the chief of police of the city of Los Angeles upon the ground that judgment of imprisonment was pronounced by the police court after 12 o'clock noon on Saturday is denied, for the reason that we find the preponderance of the evidence contained in affidavits filed touching the question shows that sentence was pronounced before noon on said day.

It is therefore ordered that petitioner be remanded to custody.

(29 Cal. App. 662)

CROFFORD v. CROFFORD. (Civ. 1786.)

(District Court of Appeal, Second District, California. Feb. 14, 1916.)

1. APPEAL AND ERROR ⊂=1011(1)—REVIEW—FINDING.

Where the evidence is sharply in conflict, but there is evidence of a substantial nature tending to support the trial court's finding, its judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⊂= 1011(1).]

2. APPEAL AND ERROR ⊂=1005(3), 1015(2)—REVIEW — WEIGHT OF EVIDENCE — NEW TRIAL.

The weight of conflicting evidence will not be considered on appeal from an order granting or refusing a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876, 3949; Dec. Dig. ⊂=1005(3), 1015(2).]

3. HUSBAND AND WIFE ⊂=49½(8)—GIFT TO WIFE—UNDUE INFLUENCE.

Upon a gift from a husband to his wife, undue influence of the wife over the husband is not presumed from the mere existence of the relation between them.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. ⊂=49½(8).]

4. APPEAL AND ERROR ⊂=616(2)—RECORD—AFFIDAVIT SUPPORTING MOTION FOR NEW TRIAL.

Affidavits in support of a motion for a new trial on the ground of newly discovered evidence contained in the printed transcript, but in no manner authenticated as part of the record on appeal, cannot be considered by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2715; Dec. Dig. ⊂=616(2).]

5. NEW TRIAL ⊂=153—NOTICE—AFFIDAVITS—STATUTE.

Under Code Civ. Proc. § 659, touching notice of motion for a new trial, affidavit supporting such motion on the ground of newly discovered evidence, not served until more than ten days after the service and filing of plaintiff's notice of intention to move for a new trial, no extension of time therefor having been granted, could not be considered on the hearing of the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 283, 288; Dec. Dig. ⊂=153.]

6. APPEAL AND ERROR ⊂=1005(1)—REVIEW—DETERMINATION ON MOTION FOR NEW TRIAL.

The appellate court will not disturb the conclusion of the trial court that the facts in affidavits supporting motion for new trial on the ground of newly discovered evidence, directed to a probative fact not conclusive upon the merits of the case, were not sufficient to warrant the granting of a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876, 3948; Dec. Dig. ⊂=1005(1).]

7. COSTS ⟸263—FRIVOLOUS APPEAL—PENALTY.

Where the appeal is both groundless and frivolous, and apparently made for the purpose of delay, it will be ordered that respondent recover damages in the sum of $50 in addition to the costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1001; Dec. Dig. ⟸263.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Ellie Barr Crofford against George Crofford. From a judgment for defendant and an order denying plaintiff's motion for new trial, plaintiff appeals. Judgment and order affirmed.

Ben S. Hunter and Emmett W. Miller, both of Los Angeles, for appellant. Fred N. Arnoldy, of Los Angeles, for respondent.

CONREY, P. J. This is an action wherein the plaintiff demanded judgment for possession of an automobile, or the value thereof in case delivery could not be had. She appeals from the judgment against her and from an order denying her motion for a new trial.

[1, 2] Under her specifications of insufficiency of the evidence to justify the decision, appellant's claim goes only to the point that the weight of evidence is in favor of the proposition that plaintiff acquired the automobile by gift from her husband, Dr. Thomas J. Crofford, and that since the time of such gift she has been the owner and entitled to possession thereof. The said Dr. Thomas J. Crofford is now deceased, and the defendant is administrator with the will annexed of his estate, and, as such administrator, was by the court found to be in possession and entitled to the possession of said property. There is a sharp conflict in the evidence, but there is evidence of a substantial nature tending to support the finding of the court. The argument on behalf of appellant is based upon the notion, refuted in almost every volume of the reports, that the weight of conflicting evidence will be considered on appeal from an order granting or refusing a new trial.

[3] The second proposition of appellant is that upon a gift from a husband to his wife undue influence of the wife over the husband is not presumed from the mere relation of husband and wife. As admitted by her counsel, it does not appear from the findings that the court below disagreed with him respecting this doctrine; and at all events the matter was merely incidental to the determination of the ultimate fact as to whether there was or was not a gift made by Dr. Crofford to the plaintiff.

[4-6] Finally, appellant claims that a new trial should have been granted on the ground of newly discovered evidence, as shown by affidavits. These affidavits, although contained in the printed transcript, are not in any manner authenticated as a part of the record on appeal, and therefore they cannot be considered by this court. Skinner v. Horn, 144 Cal. 278, 77 Pac. 904. If they could be considered as a part of the record, it would be found that they were not served until more than ten days after the service and filing of plaintiff's notice of intention to move for a new trial, and that no extension of time therefor was granted. This was sufficient to exclude them from the consideration of the court at the hearing of the motion. Code Civ. Proc. § 659. Furthermore, if the affidavits had been served in time, and, if we were authorized to consider them as a part of the record on appeal, we would find that they were directed to a probative fact not conclusive upon the merits of the case. Even if the lower court considered these affidavits as having been filed in due time, it was within the discretionary right of that court to determine that the facts therein stated were not sufficient to warrant the granting of a new trial; and under the circumstances its conclusion would not be disturbed by this court.

[7] The appeal is both groundless and frivolous, and apparently must have been made for purposes of delay. The judgment and order are affirmed, and it is ordered that the respondent recover damages in the sum of $50 in addition to his costs.

We concur: JAMES, J.; SHAW, J.

30 Cal. App. 41

UNITED MOTOR SAN FRANCISCO CO. v. CALLANDER et al. (Civ. 1371.)

(District Court of Appeal, Third District, California. March 2, 1916. Rehearing Denied April 3, 1916. Denied by Supreme Court May 1, 1916.)

1. SALES ⟸113 — RESCISSION — CONDITION PRECEDENT.

Under Civ. Code, § 1691, subd. 2, providing that a party seeking rescission of a contract must return to the other party everything of value received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or refuses to do so, the fact that the plaintiff has sold to a third party and cannot restore to the defendant a Flanders car, a part of the consideration for a Sampson car delivered to defendant, defendant's knowledge that plaintiff intended to sell it, not being a part of the inducement of the contract, will not affect the defendant's right to rescind by returning the Sampson car, as plaintiff cannot avoid its duty by itself creating disability.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 286, 287; Dec. Dig. ⟸113.]

2. CANCELLATION OF INSTRUMENTS ⟸58—RESCISSION—STATU QUO—DAMAGES.

In such a case the plaintiff must make good in damages the value of that part of the property it received and cannot restore, and this it may be required to do in an action for rescission.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 118, 120; Dec. Dig. ⟸58.]

3. SALES ⟸113 — RESCISSION — CONDITIONS PRECEDENT.

Under Civ. Code, § 3408, providing that, on adjudging rescission of the contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require, where plaintiff fraudulently represented the Sampson car sold to defendant to be a new car, not being entitled to reciprocal and compensatory relief, he may not require a return of a Flanders car, a part of the consideration, which he immediately sold to a third party, before rescission is granted to defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 286, 287; Dec. Dig. ⟸113.]

4. SALES ⟸126(1)—RESCISSION—LACHES.

Under Civ. Code, § 1691, subd. 1, providing that the party rescinding a contract must do so promptly upon discovering the facts, where defendant received an automobile under a warranty that it was new, and as a part of the transaction whereby he was to become an agent, and, having no reason to be suspicious, did not discover that it was a used car until obliged to make repairs, lapse of time alone not being of itself conclusive of laches, and attempt to rescind, evidence *held* sufficient to warrant a finding that a delay of nearly a month was not fatal to recovery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313, 315; Dec. Dig. ⟸126(1).]

5. SALES ⟸178(1)—RESCISSION—DEFENSE.

The defendant, in taking off the wheels of an automobile and detaching other parts, to be used as exhibits at the trial, without the consent of the plaintiff, while the car was in the custody of the sheriff under an attachment, it not being injured or its value impaired, and the defendant not being prevented thereby from delivering the car to the plaintiff, did not exercise acts of ownership over the automobile so inconsistent with his claim that he was holding it subject to the plaintiff's order as to preclude him from asserting his right to rescind.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 451; Dec. Dig. ⟸178(1).]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by United Motor San Francisco Company against W. C. Callander and another, in which defendants filed cross-complaint. Judgment for the defendants, and plaintiff appeals. Affirmed.

Wm. M. Cannon, of San Francisco, for appellant. J. W. Hawkins, of Modesto, for respondents.

CHIPMAN, P. J. Plaintiff brought the action to recover upon a promissory note executed by defendants at the town of Manteca, San Joaquin county, December 23, 1911, for the sum of $600, with interest at 7 per cent. per annum, principal due 30 days after date. Where in this opinion we use the singular number for one of the defendants, reference will be to defendant W. C. Callander. In their answer defendants admit the execution of the promissory note and as defense thereto alleged that: "On or about December 23, 1911, plaintiff and defendant W. C. Callander entered into a contract, whereby the plaintiff promised to sell and deliver to said defendant one new, 1912, model, Sampson, 35-horse power, five passenger, fore-door touring car in consideration of said defendant delivering to the plaintiff one Flanders runabout, $350.00 in cash, and his promissory note for $600.00 signed by said defendant and his wife, Mrs. W. C. Callander"; that, pursuant to said contract, defendant paid plaintiff $350.00, delivered said Flanders runabout and executed said promissory note, signed as aforesaid, all of which was upon the agreement that plaintiff would deliver said Sampson car of the description above given; that plaintiff failed and refused to deliver to defendant the car so promised by plaintiff, but did deliver a car of the description mentioned, except that it was not a new car; that it was an old, used car "and had become worn, and the parts thereof had become weakened, crystallized, broken, and worn, * * * and had been repainted by plaintiff for the purpose of concealing the fact from defendant that said touring car was an old car, * * * and defendant was unable, at the date of the delivery of said car to him, to ascertain or perceive the worn, weakened, crystallized, and broken condition of said car by reason" of its being so painted and varnished; that, on January 20, 1912, defendant discovered that said car was not when delivered a new car, and was in the condition above described, and thereupon defendant notified plaintiff that said car was not new, but was an old car, and defendant "offered and tendered to plaintiff the return of said car, and demanded that plaintiff return to defendant said Flanders runabout, the said note and $300.00"; that said demand was in writing and by mistake $300 was demanded instead of $350, "and in said demand the said defendant rescinded the contract had by and between the said plaintiff and the said defendant"; that plaintiff refused, and still refuses, to comply with either of said demands "or deliver up or cancel said promissory note." "By way of cross-complaint and for affirmative relief," defendants set up substantially the foregoing facts. It is also alleged that defendants have been at all times ready and willing, and are now ready and willing and able, to deliver to plaintiff and do tender to plaintiff the said Sampson car; that there was no consideration for said promissory note, the consideration therefor having failed. A second cross-complaint is pleaded by defendant W. C. Callander alone which contains the same averments as are found in the first cross-complaint of defendants. The prayer is that plaintiff take nothing by its action; that plaintiff be required to deliver up the said Flanders runabout to defendant and be required to pay the defendant the sum of $350 and to surrender up and cancel said promissory note, and that defendant recover damages in the sum of $500.00 and for general relief. The cause was tried without the in-

tervention of a jury. The findings of fact were in favor of defendants, and were substantially as alleged in the answer and cross-complaint. As conclusions of law, the court found "that defendants are entitled to judgment against plaintiff on their cross-complaint for the sum of $350 cash paid by them at the time of the delivery of said Sampson automobile, to wit, December 23, 1911," with interest from that date, "for the delivery of said Flanders runabout, and if that cannot be returned in substantially as good condition as when delivered for the sum of $350, its value at the time of delivery"; also for the cancellation of said note for $600 and for their costs of suit; that plaintiff take nothing; and "that defendants shall return and deliver up to the plaintiff at Manteca, Cal., the said Sampson automobile." Judgment was accordingly entered, from which and from the order denying its motion for a new trial plaintiff appeals.

While protesting that the evidence by a "vast preponderance" was in favor of plaintiff, counsel say in their brief that:

"Although we shall, under compulsion of the well-known rule of appellate practice, assume the car to have been an old one, we must nevertheless insist that it is an assumption contrary to the fact, and that this court for this reason should look with kindlier favor upon the equitable rules of laches, estoppel, and statu quo upon which we here rely in denial of the correctness of the court's finding that a rescission was established."

This concession renders it unnecessary to state the evidence in support of the findings that plaintiff willfully concealed the fact upon which defendants relied that the car was a new one, and fraudulently obtained the promissory note, the subject of the action.

[1] Plaintiff's first point is that the evidence does not support the finding that a rescission was established for the reason "that the transaction was a tripartite one, involving a barter with a third person not a party to the action." The sale was made for plaintiff by its agent, Hastings, who delivered the car to defendant at Manteca. On his cross-examination as a witness defendant testified:

"I know that that Flanders car was sold the same day I turned it over to the plaintiff. It was sold that same day in Manteca to Mr. Hooper. I knew that as soon as Mr. Hastings took the Flanders from me, he was to take it right around and sell it to Mr. Hooper. It was all part of the same transaction, and Mr. Hastings was to get a Reo runabout from Mr. Hooper."

Plaintiff relies upon Bailey v. Fox, 78 Cal. 389, 397, 20 Pac. 868, which was an action for rescission of a contract for the sale by defendant to plaintiff of a one-third interest in a stock of hardware and agricultural implements. At the same time defendant sold a like interest to one Meinke, and each then became owner of one-third interest in the stock of goods, and, as part of the agreement, the three formed a copartnership to carry on the business, which by the agreement was to continue for three years. An inventory was taken, and in November the partners entered upon the business and conducted it together until the following May, selling the old stock and replenishing by purchase of new, when plaintiff claimed to have discovered that the representations made to him and on which he acted were false and sought rescission. Said the court:

"The tender was not of the goods purchased, as a great part of them had been sold. The offer was to deliver the goods on hand, and pay the amount realized from the sale of those disposed of. This was not sufficient. Upon rescission, the defendant, before paying back the purchase money and delivering up the notes, was entitled to receive the identical things sold. He was not bound to take the price at which they were sold. That might, so far as we know, have been less than their value. But whether it was or not, the rule is well settled that where the party complaining has parted with the thing purchased, he cannot rescind, but must resort to damages."

It was also pointed out that, when the offer to rescind was made:

"It had become impossible, by the act of the plaintiff himself, or jointly with the other active partner, to place the defendant in statu quo. As a result of the sale, a partnership had been formed, as we have stated, and the whole stock had become partnership property, in which Meinke, who was not made a party to this action, had an interest. A large part of the stock had been sold, and new stock purchased on credit, for which the defendant, as well as the other partners, were personally liable. This being the situation of affairs, it was utterly impossible to place any of the parties in statu quo. It is well settled that under such circumstances there can be no rescission of the contract."

[2] In the case here defendant is in position to tender, and he has tendered, all the property he received from plaintiff. The case we have just been considering furnishes no support to the proposition that because plaintiff sold the Flanders car and cannot restore it, the defendant has lost his right of rescission. Plaintiff received this car, as it did the cash and the promissory note, in part consideration of the sale of the Sampson car. That defendant knew plaintiff intended to and did sell the Flanders car was no part of the inducement to defendant in purchasing the Sampson car, and formed no part of the contract. In rescinding defendant "must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Civil Code, § 1691, subd. 2. Plaintiff not only is unable, but has positively refused, to restore all or any part it received. But it cannot avoid its duty by itself creating this disability. In such a case it must make good in damages the value of the part of the property it received, and cannot restore and this it may be required to do in the action for rescission.

[3] Section 3408 of the same Code provides:

"On adjudging the rescission of a contract, the court may require the party to whom such

relief is granted to make any compensation to the other which justice may require."

Plaintiff has asked for no reciprocal or compensatory relief, nor in equity could it reasonably seek it, inasmuch as it, though protestingly, feels itself compelled to submit to the finding that it fraudulently misrepresented its car to be a new one, and thereby induced defendant to purchase it. Plaintiff cannot complain that it is not placed in statu quo in respect of the Flanders car, because by its voluntary act it sold that car and received the money for it, and by its own act made it impossible for defendant to restore it to plaintiff. Furthermore, defendant is no more required to restore that car to plaintiff than he is required to pay plaintiff the purchase money, for the Flanders car was delivered and received, like the money, as part consideration for the Sampson car.

It is further contended that defendants did not attempt to rescind within a reasonable time. It was said, in Hammond v. Wallace, 85 Cal. 531, 24 Pac. 837, 20 Am. St. Rep. 239, that the first requisite in rescission is prompt action; and it was held, in Marten v. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107, that subdivision 1, section 1691, of the Civil Code, which provides that the party rescinding must do so "promptly upon discovering the facts," etc., is mandatory as to the promptitude required, except as to the cases therein enumerated (i. e., where there is duress, undue influence or disability, and the party is aware of his right to rescind), and others where a sufficient showing is made in excuse of the delay. The promissory note was dated December 23, 1911, and became due January 22, 1912, and the written notice of rescission was given January 20, 1912. Plaintiff cites Gamble v. Tripp, 99 Cal. 223, 33 Pac. 851, in which the defendant pleaded rescission on the ground of fraud. In that case 4½ months elapsed after discovery of the fraud, and not until the action was brought upon a long past due promissory note did defendant offer to rescind. Said the court:

"This, in the absence of some excuse * * * for the delay, was certainly not the prompt action required by the Code, and therefore cannot be availed of."

Bailey v. Fox, 78 Cal. 389, 20 Pac. 868, cited by plaintiff, was the case of alleged fraud in a contract of partnership where the delay in offering to rescind was four months after discovery of the fraud, which was held fatal to the claim. It is contended that defendant was silent after discovering the alleged fraud, and continued to treat the property as his own and is therefore bound by the contract and will not be permitted to rescind (citing Grymes v. Sanders, 93 U. S. 55, 62, 23 L. Ed. 798). Furthermore, that, after knowledge of the alleged discovered defects in the car, defendant affirmed the contract by asking an extension of time to pay the note and the privilege of reselling the machine in order to meet the note. Defendant was at the time engaged in running a garage at the town of Manteca, which is 13 miles from Stockton and 17 miles from Modesto. In his business he carried passengers by automobile to nearby towns. In purchasing the car from plaintiff it was understood that he was to have the agency for the sale of the Sampson car. The car was brought by its own power from San Francisco by plaintiff's agent, Hastings, and arrived in the morning about 9 o'clock, Hastings having stayed overnight at Tracy. Defendant testified that passengers were there anxious to catch a train at Stockton, and Hastings drove the car there for defendant, who made no examination of the car at that time. On his return he found:

"One of the (front) tires was worn through the fiber, the thread was worn out down to the fiber on one wheel, and the other was worn flat considerably, and the fender on the right-hand side of the machine at the back was broken."

He wrote to plaintiff, and the tire was replaced about a week later. He took off the radiator, which was leaking, "and found that it had been patched." He used the car some time and drove it on a trip to Modesto, "and one of the front springs came in two and separated." This, he testified, was about three weeks after he got the car. About a week later he drove the car again to Modesto and broke the other spring. He then started to dismantle the car, and for the first time examined its parts and became satisfied that it was an old car, as other witnesses who examined it testified was the fact. This was 2 or 3 days before the note became due. He testified that he used the car carefully, and that the roads were in fair condition, and that he had not driven the car more than 200 miles in all. He testified that on January 20th, on his return from his second trip to Modesto, he telephoned to plaintiff, and on January 22d he wrote plaintiff, in which he informed plaintiff that "the car was secondhanded and was secondhanded when I bought same from you," and calling upon plaintiff "to send and get the car," and that he "refused to accept the car and pay for it according to contract." On January 6th, plaintiff wrote defendant, reminding him of the note, to which defendant replied, January 8th, expressing disappointment in getting money and, in closing, said:

"I would rather you would take the car back, if terms satisfactory to both parties can be arranged. I would do my best to sell it for you here."

Plaintiff replied, of date January 9th, suggesting part payment, and that the balance could be carried "for a reasonable length of time. We assure you we want to do everything possible to help you out, and sincerely trust that in the near future you will be able to send us several orders for cars." On January 15th, defendant wrote plaintiff, making a proposition that if plaintiff would accept $300 cash and a note for 90 days he would

"send same by return mail." He speaks also of having tried to make sales, and one party proposed to exchange real estate as payment. "They like the car fine, but have no cash to put in a car just now." He testified that he meant that the party "liked the appearance of the car." January 16th plaintiff replied, making a counter proposition to accept $300 and a note for 90 days for balance. No further correspondence appears except defendant's letter of January 22d and a more formal letter of like tenor, of date January 26th, written by defendant's attorney to plaintiff. Defendant testified:

"The first time my suspicions were aroused that the car was a secondhand car was when I came home from Modesto, when that spring was broken. That is the spring marked 'Defendants' Exhibit A' That is a part that fits over the center part of the spring, and covers up the place where the spring is broken. Yes, it is a clip. These bolts and the clips fasten the spring to the axle. That could not be seen until the spring came apart."

Upon a careful examination of parts not theretofore noticed particularly, evidences of wear were discovered, indicating, as witnesses testified, previous use of the car to considerable extent.

[4] It might seem strange that defendant had this car in use nearly a month before discovering that it was a used car when delivered. The correspondence is much dwelt upon by counsel as tending to show, and we think the inference a reasonable one, that, as late as January 15th (the car was delivered December 23d), defendant had no thought of rescinding. Indeed, defendant testified that his suspicions were first aroused that the car was not a new one after returning from Modesto on January 20th. This was 5 days after his letter of the 15th was written. Lapse of time alone is not of itself conclusive of laches. The circumstances under which the car was received and the conduct of the purchaser in using it are of more consequence. Defendant received the car under warranty that it was new. He was about to become the agent for the sale of this type of car, and the evidence shows that he made efforts to carry out the objects of his agency. Dealing with a reputable firm and having no cause for distrusting its members, and being about to engage in business with them, he would naturally and might, we think, justifiably accept their statements at face value. The circumstance that he did not rescind until 2 days before his note became due, and the fact that presumably he was satisfied with the car as late as January 15th, were matters placed before the court and, as we must presume, were given full weight in determining the question whether the delay in rescinding the contract was fatal to recovery. All the facts and circumstances being considered, we cannot say that the court reached its conclusion unsupported by sufficient evidence.

Plaintiff cites Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899, in support of its claim that defendant affirmed the contract after discovering the defects in the car. It is true he did discover some defects prior to January 15th, but not enough to arouse his suspicion. But it was after this date that other facts came to his notice which led to a careful examination of the car and the discovery that it was not a new one.

It was contended that defendant exercised acts of ownership over the automobile inconsistent with his claim that he was holding it subject to plaintiff's order. It appeared incidentally in the case that the car was under attachment, at whose instance does not appear, and was in the custody of the sheriff at and before the time of the trial. While in the sheriff's custody and with his consent, but without the consent of plaintiff, defendant took off the wheels and detached some other parts and brought them into court as exhibits at the trial.

Plaintiff cites Cream City Glass Co. v. Friedlander, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895; Klock v. Newbury, 66 Wash. 153, 114 Pac. 1032; Noble v. Brewing Co., 64 Wash. 461, 117 Pac. 241. In the first of these cases a vendee claimed a shipment of soda ash was not suitable for the purpose intended, and so notified the vendor. Thereafter he used six tierces out of 63 shipped, and then attempted to rescind the contract of sale and recover the purchase price which he had paid. The judgment in favor of the vendee was reversed on appeal. The Supreme Court said:

"Now, in this case the plaintiff's officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need a test. They took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection if they proposed to insist upon their right to reject. They must do no act which they would have no right to do, unless they were the owners of the goods. Benjamin on Sales (6th Ed.) § 703. Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property, if such rejection was rightful. Plaintiff had no right to use any part of it. It is claimed that the use was simply for the purpose of providing evidence of unfitness for the purposes of the trial of this case; but one has no right to use his opponent's property for the purpose of making evidence. The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected, and was owned by defendant."

The second of the cases cited was rescission of a contract for the sale of an automobile warranted to be a 60 horse power car. The vendee had expended $49.90 in an attempt to put the car in order. His action was to recover the purchase price, the amount spent for repairs, and $50 damages for time lost in attempting to operate the

car. Among other defenses it was urged that in expending $49.90 in repairs plaintiff was estopped from claiming the right to rescind. Holding that this contention was untenable, the court stated the rule as follows:

"Voluntary acts on the part of the purchaser of a chattel under a warranty of condition which will operate as an estoppel of the right to rescind must be such as affect the seller, and cause a change in his situation with reference to the property, making it inequitable to enforce the remedy."

The third of the cases cited was rescission of a contract for the sale of material for barrels. Defendant notified the seller that the quality was inferior, and requested a reduction which was refused. Correspondence ensued, the defendant meantime continuing the use of the material "much more than was necessary to ascertain its quality." Referring to the two cases above noted, the court held that:

"By using an excessive and unnecessary percentage of the goods respondent not only accepted them but also waived its right to rescind."

[5] It does not appear that the car was injured or its value impaired by temporarily removing some of its parts to be used as evidence at the trial, or that defendant was prevented thereby from delivering the car to plaintiff as the court directed he should on compliance by plaintiff on its part with the judgment of the court. In the case of the Cream City Glass Co. v. Friedlander, supra, where the court said the plaintiff had no right to use the defendant's property for the purpose of manufacturing evidence against its opponent, the statement must be read in connection with the facts. The glass company used a considerable quantity of the soda ash for its own purposes, much more, as the court found, than necessary to test its quality. The claim that it was done to obtain evidence might well have called for the statement that the company had no right to do this. The decisive fact was that the company had used an excessive quantity and received the benefit of it, and would not be permitted to take cover under the pretense that it was to obtain evidence. Here the facts were quite different. Defendant made no personal use of the car after his notice of rescission, nor did he exercise any acts of ownership over it. It would have been more orderly to have first obtained the order of the court or consent of plaintiff for what he did, but we cannot see that the rules laid down in the cases cited by plaintiff were so far violated by defendant as to preclude him from asserting his right to rescind.

We discover no prejudicial error in the record, and the judgment and order are therefore affirmed.

We concur: HART, J.; BURNETT, J.

29 Cal. App. 671

JUDD v. SUPERIOR COURT OF HUMBOLDT COUNTY. (Civ. 1494.)

(District Court of Appeal, Third District, California. Feb. 14, 1916.)

1. JUSTICES OF THE PEACE ⟸159(10) — APPEAL—UNDERTAKING—TIME FOR FILING.

Under Code Civ. Proc. § 978a, as added by St. 1909, p. 1065, requiring filing of undertaking on appeal from a justice within five days after filing of notice of appeal, the five days for filing the undertaking begin to run from the filing of notice of appeal, and it is of no moment that notice of appeal has been served upon respondent seven days before it was actually filed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 557–561, 570–572; Dec. Dig. ⟸159(10).]

2. JUSTICES OF THE PEACE ⟸159(9)—APPEAL—UNDERTAKING—FORM.

Where in form the undertaking constitutes a bond on appeal as well as an attempted undertaking to stay execution, if it is sufficient as an appeal bond the superior court acquires jurisdiction of the cause, regardless of the sufficiency of the undertaking to stay execution.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 565–569; Dec. Dig. ⟸159(9).]

3. PROHIBITION ⟸11—ERRORS AND IRREGULARITIES.

An error, not involving a question of jurisdiction, is not to be corrected by prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 36; Dec. Dig. ⟸11.]

4. JUSTICES OF THE PEACE ⟸163—APPEAL AND ERROR—EFFECT OF TRANSFER OF CAUSE.

An appeal to a superior court on questions of law and fact operates to vacate and set aside a justice court judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 606; Dec. Dig. ⟸163.]

5. APPEAL AND ERROR ⟸1074(3)—HARMLESS ERROR—NOT PREJUDICIAL.

On appeal from justice court on questions of law and fact, for the superior court to allow to be filed in that court an undertaking to stay execution, if it is error, is error without prejudice, as the appeal operated to vacate and set aside the judgment rendered in the justice court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4252; Dec. Dig. ⟸1074(3).]

6. JUSTICES OF THE PEACE ⟸160(3)—APPEAL—NOTICE OF APPEAL—DEFECTS.

Where it appeared that only one judgment was rendered in the case, a notice of appeal incorrectly stating the date of the judgment, but otherwise correctly describing it, was sufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 586–588; Dec. Dig. ⟸160(3).]

7. JUSTICES OF THE PEACE ⟸159(9)—APPEAL—UNDERTAKING—DEFECTS.

That the undertaking incorrectly stated the date of the judgment did not invalidate the undertaking; the judgment being otherwise correctly described therein.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 565–569; Dec. Dig. ⟸159(9).]

8. JUSTICES OF THE PEACE ⟸159(6)—APPEAL—UNDERTAKING — SIGNING BY ANOTHER SURETY UPON JUSTIFICATION.

Where the body of an undertaking on appeal from a justice did not contain the names of the sureties, but stated that "we, the under-

signed" undertake, and, in response to a requirement to justify, a third person appeared with one of the sureties and was permitted to sign as surety, both he and the original surety justifying, the undertaking was sufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. ⟸159 (6).]

C. D. Judd petitions for writ of prohibition against the Superior Court of Humboldt County. Denied.

S. R. Beloathe, of San Diego, and N. J. Nelson and Arthur J. Thatcher, both of Eureka, for petitioner. T. H. Selvage, of Eureka, for respondent.

BURNETT, J. Petitioner seeks to prohibit the superior court from trying an action originally tried in the justice court of Bucksport township of said county. The facts are stipulated and need not be set out at length. In said superior court a motion was made by petitioner herein to dismiss the appeal upon the ground that the court was without jurisdiction, but it was denied. The reasons for the claim of want of jurisdiction are stated as follows:

"First, that the notice of appeal was not sufficient because it did not recite the correct date of the judgment; second, that the notice of appeal was served more than five days prior to the filing of the undertaking; third, the undertaking was defective in this, that the date of entry of judgment was incorrectly stated; fourth, that the undertaking on appeal was defective in this, that the justice of the peace permitted a new surety to sign the undertaking and to justify in the place of one of the original sureties; and, fifth, that the undertaking to stay execution was not in double the amount of the judgment including costs, and that the court had no right to permit the appellant to give a new bond to stay execution."

[1] To these points, however, petitioner seems to attach little importance, except to the second. This he argues earnestly and at considerable length, though it is apparently as destitute of merit as any of the others. The statute itself and the decision of the Supreme Court in Rigby v. Superior Court, 162 Cal. 334, 122 Pac. 958, as we understand them, are directly opposed to petitioner's contention that the five days within which the undertaking must be filed must date from the time of service of the notice of appeal.

Section 978a of the Code of Civil Procedure, as added in 1909, provides:

"The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent."

The Supreme Court, in said decision, points out the changes that have been made in the law in respect of the procedure in taking appeals and, among other things, says:

"The time for filing the undertaking does not begin to run, as before it was construed to begin, at the time of the rendition of the judgment. Another event, the filing of the notice of appeal, now fixes the beginning of the period."

As to the fact herein, the stipulation is:

"That on the 19th day of July, 1915, said Stouder filed or caused to be filed in said justice's court and with the justice of said court, the said notice of appeal, * * * and on the same day filed with said justice's court and with the justice of said court an undertaking. * * * That on the 21st day of July, 1915, the said Chas. H. Stouder served upon petitioner herein a notice of filing notice of appeal and undertaking on appeal," etc.

It thus appears that the notice of appeal and the undertaking were filed the same day, and two days thereafter notice was given of the filing of the same. Thus was said statute strictly complied with and it is of no moment that said notice of appeal had been served upon petitioner seven days before it was actually filed.

[2-5] As to the form of the undertaking it is apparent that it constituted a bond on appeal as well as an attempted undertaking to stay execution. But its sufficiency to perform the latter function is not a jurisdictional question and is not involved in this proceeding. If the undertaking was sufficient as an appeal bond the superior court acquired jurisdiction of the cause, regardless of the sufficiency of said bond to stay execution. And it may be said, also, that it is a matter of no moment here whether the superior court was justified in allowing an undertaking to stay execution to be filed in that court. At most, it was an error not involving a question of jurisdiction and not to be corrected in this proceeding. Besides, the appeal on questions of law and fact operated to vacate and set aside the judgment rendered in the justice court, and thus if error was committed in allowing said undertaking to be filed it was without prejudice.

In Bullard v. McArdle, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176, it is said:

"By perfecting the appeal from the justice's court the case was entirely removed from that court, and only the superior court had thereafter jurisdiction in the matter. The judgment in the justice's court was not merely superseded, but by the removal of the record was vacated and set aside. * * * When the effect of an appeal is to transfer the entire record to the appellate court, and to cause the action to be retried in that court as if originally brought therein, as is the case when appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and is not thereafter available for any purpose."

The points made by petitioner are, indeed, clearly and correctly answered in the opinion of Hon. George D. Murray, judge of said superior court, filed in denying said motion to dismiss said appeal, as follows:

"This is a motion to dismiss an appeal taken by the defendant on questions of both law and fact from a judgment rendered against him in the above-entitled action by the justice's court of Bucksport township.

[6] "In the notice of appeal the date of the rendition of the judgment rendered by the justice's court is incorrectly stated, but otherwise the notice correctly describes the judgment.

"It is conceded that only one judgment was rendered by the justice in the case, and it will be noted that the section of the Code providing for the notice of appeal does not require the date of rendition of the judgment to be stated in the notice. Under such circumstances the notice of

appeal in question sufficiently describes the judgment rendered in the action as the one appealed from, although the date of its rendition is incorrectly stated. It is a sufficient notice of appeal.

"In Sherman v. Rolberg, 9 Cal. 17, the court had under consideration an appeal from a justice's court in which the notice of appeal stated that the judgment appealed from was rendered July 4, 1857, whereas as a matter of fact it was rendered July 2, 1857. Concerning that notice the Supreme Court said: 'The mistake in the date of the judgment, as stated in the notice of appeal which was served on respondent, was not material. The notice was sufficient.'

[7] "The fact that in the recital of the rendition of the judgment in the undertaking accompanying the notice of appeal, the date of such rendition is incorrectly stated, is not material and does not invalidate the undertaking, for the same reasons that the incorrect recital did not invalidate the notice of appeal.

"The undertaking filed with the justice at the same time the notice of appeal was filed contains an undertaking on the part of the sureties in the sum of $100 for the payment of costs on appeal, and also an undertaking on their part in the sum of $330 to stay execution on the judgment appealed from. The undertaking on appeal may be in the same instrument with the other undertaking to stay execution. And it may be sufficient as an undertaking on appeal and insufficient to stay execution on the judgment. Hayne on New Trial and Appeal (1st Ed.) § 214.

"The undertaking on appeal contained in said instrument is in the following form: 'Now, therefore, in consideration of the premises and of such appeal, we the undersigned residents of said county and state do hereby undertake, jointly and severally, in the sum of $100, and promise on the part of appellant to pay all costs which may be awarded against the appellant on said appeal,' etc.

"The undertaking staying execution contained in said instrument is in the following form: 'And whereas, the appellant claims a stay of proceedings and is desirous of staying execution of said judgment so appealed from, we do further in consideration thereof, and of such stay,' etc.

"The instrument was subscribed by Peter Delaney and E. Swanson at the time it was filed with the justice. The sufficiency of the sureties was excepted to and the sureties were notified to appear before the justice and justify. At the appointed time, or the time to which the matter was continued, Peter Delaney was out of the county, but E. Swanson appeared and with him W. H. Bowersox. Over the objection of the plaintiff W. H. Bowersox was permitted to sign (subscribe) the instrument. Both E. Swanson and W. H. Bowersox then justified and the justice of the peace approved the undertaking.

[8] "As I read the opinion of the Supreme Court of this state in Bennett v. Superior Court, 113 Cal. 440 [45 Pac. 808], that decision is by implication an authority for the procedure followed in the case before us. That case involved an appeal from a judgment of a justice's court in San Diego county. The undertaking on appeal was in the following form: 'Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, E. W. Newkirk and E. W. Chase, of the county of San Diego, aforesaid, do hereby jointly and severally undertake in the sum of $100 that the appellants will pay all costs which may be awarded against them on the said appeal,' etc. The undertaking was signed by Newkirk and Chase. The respondent excepted to the sufficiency of the sureties and on the day appointed for the sureties to justify Newkirk did not appear and did not justify. But Chase appeared and with him one Gassen. Gassen was permitted over objection to sign the undertaking already on file, and then he and Chase justified and the undertaking was approved by the justice. The Supreme Court said, in the course of its opinion: 'In this case Newkirk, one of the sureties, failed to appear and justify, and if the proceedings had been left in that situation the appeal would necessarily fail, as provided by the law we have quoted. Did the appearance of Gassen in the case cure the trouble? It did not. As the undertaking is presented to us, we are clear that Gassen could not be held liable if a recovery were sought upon it.' * * * It appears that Gassen does not agree to do anything. He makes no promises. He does not acknowledge himself to be bound in any amount or upon any conditions. His name is simply attached to an undertaking which, upon its face, shows that he is not a party to it. * * * Here the names of the two purported sureties are inserted in the body of the bond, and Gassen's name is not one of them; the insertion of these two other names results in the necessary exclusion of his name. It cannot be assumed that his name was intended to be placed there, for there is no room for it; the space which it should occupy is already taken; in effect, his name is expressly excluded. Without an agreement of some kind upon his part to be bound no obligation rests upon him, and here there is no agreement. Newkirk having failed to justify, and Gassen not being bound by the undertaking, the appeal must fail as lacking in the essential requisite of a valid undertaking.'

"The Supreme Court did not criticize the procedure of permitting Gassen to sign the undertaking at the time of the justification and we assume from such omission that such procedure is not objectionable. The sole criticism was that it did not become Gassen's bond, and that conclusion came from the fact that the peculiar wording of the body of the bond, to wit: 'We, the undersigned, E. W. Newkirk and F. E. Chase,' expressly excluded Gassen, and every one else except Newkirk and Chase. The inference is that if the undertaking had not so excluded Gassen, he would have become bound by his signing it, and that under such circumstances the undertaking would have been sufficient. Chief Justice Beatty dissented from the majority decision in the Bennett Case, saying that 'Gassen by signing the bond became a party to and was bound by it.'

"In the case before us, the names of the sureties were not inserted in the body of the instrument. It is 'we the undersigned' who are bound. The name of Bowersox was not excluded from the list of sureties to be bound, and in my opinion he became bound upon the undertaking and the undertaking thereby became a sufficient undertaking in the sum of $100 for the payment of costs upon this appeal.

"The undertaking on this appeal was filed with the justice within five days after the filing of the notice of appeal and both were filed within thirty days after the rendition of the judgment. In fact, the new surety, Bowersox, had signed the undertaking, and both he and the other surety, Swanson, had justified within five days after filing the notice of appeal, and within thirty days after the rendition of the judgment. Both the notice and the undertaking were in time."

The order to show cause is discharged, and the writ is denied.

We concur: CHIPMAN, P. J.; HART, J.

29 Cal. App. 696

HEALY v. OBEAR. (Civ. 1554.)

(District Court of Appeal, First District, California. Feb. 16, 1916. Rehearing Denied March 10, 1916. Denied by Supreme Court April 13, 1916.)

1. APPEAL AND ERROR ⇐1133 — AUTHENTICATED RECORD—NECESSITY.

Where, upon appeal from an order, no properly authenticated record upon which it can be reviewed is brought to the appellate court, the action of the court below will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4450–4453; Dec. Dig. ⇐1133.]

2. APPEAL AND ERROR ⇐1005(3) — DISCRETION OF TRIAL COURT — CONFLICTING EVIDENCE—DISMISSAL.

Where motion for new trial is dismissed by an order made after hearing conflicting evidence, the action of the lower court will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876, 3949; Dec. Dig. ⇐1005(3).]

3. APPEAL AND ERROR ⇐864—TIME OF APPEAL—EFFECT OF DELAY.

Where an appeal from a judgment was not taken within 60 days after its entry, the appellate court was confined to an examination of the judgment roll.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765–1767, 3456–3461; Dec. Dig. ⇐864.]

4. FRAUDS, STATUTE OF ⇐152(1)—PLEADING STATUTE—NECESSITY.

One seeking the protection of the statute of frauds must specially plead it.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 363, 364, 371, 372; Dec. Dig. ⇐152(1).]

Appeal from Superior Court, City and County of San Francisco; Stanley H. Smith, Judge.

Action by D. L. Healy against W. H. Obear. From a judgment for plaintiff and from an order dismissing his motion for a new trial, defendant appeals. Affirmed.

Rehearing denied in Supreme Court, 157 Pac. 570.

Harold Ide Cruzan, of San Francisco (Vincent Surr, of San Francisco, of counsel), for appellant. James G. Maguire, E. T. Barrett, and E. A. Clausen, all of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendant from a judgment against him and from an order dismissing his motion for a new trial. The action is to recover for services rendered by plaintiff to defendant as a real estate broker.

[1, 2] Through the neglect of the attorney who was representing the defendant when the appeal was taken, the record is not in such form as to present the points relied upon. In one aspect of the case the defendant seems to be attempting to appeal from an order denying his motion for a new trial. No such order was ever made in the case; consequently no such appeal is before us. The motion for a new trial was dismissed upon the ground of lack of prosecution. Defendant appeals from that order, but has not brought to this court any properly authenticated record upon which it can be reviewed. Moreover, it is apparent from the record which the defendant has presented that the order dismissing the motion was made after a hearing in which the evidence presented by the parties was conflicting, which furnishes an additional reason why this court cannot disturb the action of the court below.

[3, 4] Turning to the appeal from the judgment, it was not taken within 60 days after its entry, the consequence of which is that in its consideration we are necessarily confined to an examination of the judgment roll. It is claimed by the appellant that at least one point is presented thereby upon which this court should reverse the judgment, viz., that the description of the property (for the sale of which the plaintiff recovered his compensation) is insufficient under the statute of frauds; such defect appearing from the contract as pleaded in the answer to the complaint and as set forth in the findings of the court. We do not think that the contract is void for the reason assigned by appellant; but however that may be, we are satisfied that he is in no position, in view of the condition of the pleadings, to avail himself of that point. The answer did not specially plead the statute of frauds; and it is the accepted rule in this state that one seeking the protection of that statute must specially insist upon it in his pleadings. The reason for the rule is obvious. A parol agreement is neither illegal nor void; and the statute of frauds requiring a contract to be in writing is simply a weapon of defense, which the party entitled thereto may or may not use. 9 Am. & Eng. Enc. of P. & P. 705. If the defendant in his answer had denied the contract on which plaintiff relies, then the question of its validity under the statute would perhaps have been raised. Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162. This he did not do, but on the contrary, set up the contract in his answer, and alleged that it was the agreement entered into by the parties. Not having claimed the benefit of the statute he must be considered "as waiving its protection and as furnishing by his answer the very proof which the statute requires." Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Jamison v. Hyde, 141 Cal. 109, 112, 74 Pac. 695.

Judgment and order affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

29 Cal. App. 696

HEALY v. OBEAR. (S. F. 7797.)

(Supreme Court of California. April 13, 1916.)

FRAUDS, STATUTE OF ⟸152(1) — PLEADING STATUTE AS A DEFENSE—SUFFICIENCY.

One seeking the protection of the statute of frauds against the enforcement of a contract need not specially insist upon the statute in his pleadings further than to deny the execution of the contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 363, 364, 371, 372; Dec. Dig. ⟸152(1).]

In Bank. Appeal from Superior Court, City and County of San Francisco; Stanley H. Smith, Judge.

Action by D. L. Healy against W. H. Obear. Judgment for plaintiff was affirmed by the District Court of Appeal, and defendant applies for hearing in the Supreme Court. Denied.

For opinion in Court of Appeals, see 157 Pac. 569.

Harold Ide Cruzan, of San Francisco (Vincent Surr, of San Francisco, of counsel), for appellant. James G. Maguire, E. T. Barrett, and E. A. Clausen, all of San Francisco, for respondent.

PER CURIAM. In denying the application for a hearing in this court after decision of the District Court of Appeal of the first district we deem it proper to say that we do not understand that it is essential that one seeking the protection of the statute of frauds must specially insist upon it in his pleadings further than to deny the execution of the contract. The District Court of Appeal opinion concedes that had the defendant in his answer denied the contract on which plaintiff relies, the question of its validity under the statute would have been raised. Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162.

The application for a hearing in this court is denied.

29 Cal. App. 616

PEOPLE v. STEPHENS. (Cr. 456.)

(District Court of Appeal, Second District, California. Feb. 9, 1916. Rehearing Denied by Supreme Court April 6, 1916.)

1. CRIMINAL LAW ⟸742(1) — PROVINCE OF JURY.

The truth of testimony in support of an alibi is a question solely for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1719; Dec. Dig. ⟸742(1).]

2. CRIMINAL LAW ⟸742(1) — PROVINCE OF JURY—CREDIBILITY OF WITNESSES.

Under Const. art. 6, § 19, the jury are the exclusive judges of the credibility of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1719; Dec. Dig. ⟸742(1).]

3. CRIMINAL LAW ⟸1159(2) — PROVINCE OF JURY—CONFLICTING TESTIMONY.

Where the evidence against the defendant, considered by itself, is sufficient to support the verdict, without regard to conflicting evidence, the question is one of fact for the jury, and its verdict will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. ⟸1159(2).]

4. CRIMINAL LAW ⟸1169(1), 1170(1) — APPEAL AND ERROR—NONPREJUDICIAL ERROR.

Errors in the admission or rejection of testimony relating to trivial matters, and not prejudicing the substantial rights of the accused, are not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137, 3145, 3149–3152; Dec. Dig. ⟸1169(1), 1170(1).]

5. CRIMINAL LAW ⟸1168(4) — APPEAL AND ERROR—NONPREJUDICIAL ERROR.

Error in refusing to strike testimony that the witness after examining a revolver concluded that one chamber had been fired *held* not prejudicial, where other witnesses had described the condition and appearance of the cylinder as to dust and rust in all but one chamber.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3144; Dec. Dig. ⟸1168(4).]

6. CRIMINAL LAW ⟸814(13) — TRIAL — INSTRUCTIONS.

In a prosecution for assault with intent to commit murder, the fact that a defense is based upon an alibi does not render improper the instruction that a person is presumed to intend the natural and probable consequences of his voluntary and willful acts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. ⟸814(13).]

7. CRIMINAL LAW ⟸858(4)—TRIAL—INSTRUCTION—ERASURE.

Instructions which the court had modified by erasing certain parts were taken to the jury room. *Held* not prejudicial as acquainting the jury with the parts stricken out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2059; Dec. Dig. ⟸858(4).]

8. CRIMINAL LAW ⟸829(1) — TRIAL — REQUESTED INSTRUCTION.

Refusal to give requested instructions the substance of which is fully and fairly covered by other instructions is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⟸829(1).]

9. CRIMINAL LAW ⟸1163(1) — APPEAL AND ERROR—PRESUMPTION OF PREJUDICE.

Prejudice to the substantial rights of the accused is not presumed from mere error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090, 3091, 3099; Dec. Dig. ⟸1163(1).]

10. CRIMINAL LAW ⟸1186(4)—APPEAL AND ERROR—NONPREJUDICIAL ERROR.

Const. art. 6, § 4½, prohibits the reversal of a judgment unless the error complained of has resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3215; Dec. Dig. ⟸1186(4).]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

John Stephens was convicted of assault with a deadly weapon, and he appeals. Affirmed. Rehearing denied in Supreme Court, 157 Pac. 572.

O. V. Willson, of El Centro, and W. F. Frazier, of Calexico, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Roberto B. Camarillo, for the People.

SHAW, J. Upon an information charging him with the crime of assault with intent

to commit murder, defendant was convicted of the crime of assault with a deadly weapon. He appeals from the judgment pronounced that he be punished by imprisonment in the state prison for the term of one year and required to pay a fine of $1,000.

Numerous errors are assigned upon which appellant asks for a reversal, chief among which it is contended that there was no evidence to support the verdict. It appears that Mr. Bosworth, the owner of an apricot orchard within the city limits of El Centro, having discovered that some one was stealing his fruit at night, employed one Bernard Fox to guard the orchard in an effort to apprehend the person engaged in pilfering. After dark on the evening of June 2d, Fox, who was armed with a shotgun, and while on duty as such guard, saw a person enter the orchard and proceed to pick fruit from the trees; whereupon he approached him, and, while engaged in conversation, the party started to cross the fence inclosing the orchard, at which time Bosworth came upon the scene, and, using a flashlight, looked at the person so apprehended by Fox. Bosworth accompanied Fox and his prisoner to a certain point on the boundary of the orchard, and instructed Fox to take the man to the jail, distant a half mile or more, and deliver him in custody of the officers. Fox proceeded with his prisoner, who walked some eight or ten feet in front of him to a point described in the record as the corner of Sixth and Olive streets, when the man so arrested turned and with a revolver shot Fox through the body. Defendant was arrested charged with the offense, and upon trial based his defense upon an alibi supported solely by his own testimony. In addition to the fact that Bosworth, who had used the flashlight in looking at the man, positively identified defendant as the one found in the orchard and apprehended by Fox, the latter testified unequivocally that he was the man who at Sixth and Olive streets shot him while proceeding on the way to the jail. Other than this direct testimony identifying defendant as the man who did the shooting was evidence of circumstances the existence of which, if by the jury deemed established, rendered it difficult, if not impossible, to reconcile the same upon any theory other than as pointing to defendant as the perpetrator of the crime.

[1, 2] Had defendant offered no evidence in support of the alleged alibi, no question could arise as to the sufficiency of the evidence offered on behalf of the prosecution to convict. Since he offered evidence tending to support such defense, it became solely a question for the jury to weigh the same and determine the truth thereof. Under section 19 of article 6 of the Constitution, the credibility of witnesses and all questions of fact are matters exclusively for the determination of the jury, which, as we have repeatedly said, are the exclusive judges of the credibility of witnesses and the effect and value of the evidence addressed to them.

[3] In People v. Emerson, 130 Cal. 562, 62 Pac. 1069, it is said:

"If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive."

Conceding that defendant's own story exculpates him, nevertheless it was for the jury to say whether or not that story should be believed, as against the testimony of witnesses whom it was sought to impeach. People v. Rongo, 169 Cal. 71, 145 Pac. 1017. It is apparent from the verdict rendered that the jury did not believe the testimony of defendant. The fact, as stated, that the jury deliberated 23 hours, and that much evidence was introduced tending to show the good character of defendant (presumably the jury gave full consideration to such evidence), have no bearing upon the question presented. Many instances are on record where men of previous good character, as shown by the evidence, have been convicted of the commission of crimes where the jury have deliberated a much longer time.

[4] Numerous assignments of error are predicated upon rulings of the court upon the admission and rejection of evidence, nearly all of which relate to trivial matters, and, even should the rulings be considered erroneous, under no possible theory could the substantial rights of appellant have been prejudiced thereby. Illustrative of this is the fact that in searching defendant's room therefor the officers making the arrest found a gun, the ownership of which was admitted by defendant. The testimony showed that when found all of the chambers were loaded, in which condition it was produced before the jury. The court ordered the cartridges to be removed therefrom, which being done, it was offered and received in evidence over defendant's objection that it was not in the condition in which it was when found. Another instance: A witness, testifying to the fact that she saw only one person pass along the sidewalk in front of her house at a given time, was asked: "If more than one passed, you would have seen him?" To which, the objection interposed being overruled, she answered: "I would think so. I was looking right out on the sidewalk to see who might come by." Several witnesses testified to the appearance of the chambers of the gun when it was first found; such testimony being to effect that all but one chamber were rusty and full of dust, the other showing it has been freshly used and emitted an odor of the explosion of fresh powder. Another witness, the city marshal, testified that he found the gun fully loaded, and came to the conclusion from examining the gun that it

had been fired recently; one chamber had been fired. There was no objection to this question; whereupon he was asked upon what he based his conclusion, to which he replied, without objection: "Upon the appearance of the cylinder and the inside of the cylinder compared with the others." Whereupon a motion made to strike out the answer as being a conclusion was denied. Conceding it to have been a conclusion, how could it, in view of the fact that the condition and appearance of the chambers as to dust and rust in all but one chamber was fully shown by other witnesses, have affected the verdict?

[5, 6] Appellant next insists that the court erred in the giving of instructions, and likewise erred in refusing instructions requested by defendant. The court instructed the jury that one must be presumed to intend to do that which he voluntarily and willfully does, and intend the natural and probable consequences of his acts, and hence when one person assails another violently with a dangerous weapon likely to kill, and which does, in fact, injure the party assailed, the natural presumption is that such assailant intended death or great bodily harm, and, in the absence of evidence to the contrary, such presumption must prevail. There was no error in so doing. The fact that the defense was based upon an alibi did not render the instruction improper for the reason that, if the alibi was not sustained, the corpus delicti being established, the jury should in arriving at its verdict, if they found that defendant fired the shot, take into consideration the intent with which the act was committed.

[7] The court modified some of the instructions requested by defendant by erasing certain parts thereof. These instructions, it appears, were taken to the jury room for reference in considering their verdict. Appellant claims that such act was prejudicial to his rights, since it acquainted the jury with the parts stricken out by the court. The contention is without merit; there being nothing in the changes made in the instructions given which could possibly have affected the minds of the jurors in reaching a verdict. It is likewise insisted that the court erred in refusing to give certain instructions requested by defendant.

[8] The subject of the instructions so refused, however, appears to have been fully and fairly covered by instructions elsewhere given.

[9, 10] Counsel for appellant in presenting his case have apparently labored under the belief, not only that it is the function of this court on appeal to determine the credibility of witnesses and weigh their testimony, but also that the rule prevailing in some jurisdictions, namely, that prejudice must be presumed upon the showing of error, applies in this state. Such, however, is not the case. Prejudice to the substantial rights of one on trial does not necessarily follow from the mere commission of error. Sections 1404, 1258, and 960, Pen. Code. And to this must be added the effect of section 4½ of article 6 of the Constitution, which prohibits the court from reversing a judgment, etc., unless the error complained of has resulted in a miscarriage of justice. If attorneys representing defendants would bear these facts in mind, no doubt, it would be the means of restricting appeals to cases possessing other merit than the stereotyped objection that the evidence (though shown to be sharply conflicting) is insufficient to justify the verdict; thereby saving both to themselves and the court much unnecessary labor.

The trial of the case was conducted in a manner calculated to protect defendant in every right to which he was justly entitled. The instructions given to the jury were clear, full, and absolutely fair to him, and the jury, notwithstanding the evidence was ample to show that defendant had made an assault with the intent to kill, considerately rendered a verdict for the lesser offense, accompanied with a recommendation for mercy, which action, upon the record, we conclude must have been due to the testimony of numerous witnesses to the previous good character of defendant, coupled with the trivial value of the subject for the taking of which he was apprehended by his victim.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

29 Cal. App. 616

PEOPLE v. STEPHENS. (Cr. 2014.)

(Supreme Court of California. April 6, 1916.)

1. HOMICIDE ⇐86—ASSAULT TO KILL—INTENT.

Intent is an essential element in a prosecution for assault to commit murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 112; Dec. Dig. ⇐86.]

2. HOMICIDE ⇐286(1)—INTENT TO KILL—INSTRUCTIONS.

In a prosecution for assault to commit murder, an instruction that, in the absence of evidence to the contrary, the natural presumption "must prevail" that one who violently assails and injures another with a dangerous weapon likely to kill intended death or great bodily harm, is error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 586; Dec. Dig. ⇐286(1).]

3. HOMICIDE ⇐340(4)—INTENT TO KILL—INSTRUCTIONS.

But such error is not prejudicial where the defendant was convicted of the lesser offense of assault with a deadly weapon, which involves no specific intent.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 720; Dec. Dig. ⇐340(4).]

In Bank. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

On rehearing. Application denied.

For former opinion, see 157 Pac. 570.

O. V. Willson, of El Centro, and W. F. Frazier, of Calexico, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Roberto B. Camarillo, for the People.

ANGELLOTTI, C. J. In denying the application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, we deem it proper to say that we are not prepared to give our assent to the statement that there was no error in giving an instruction to the effect that, in the absence of evidence to the contrary, the "natural presumption" that one who assails another violently with a dangerous weapon likely to kill, and which does, in fact, injure the party assailed, intended death or great bodily harm must prevail.

[1, 2] The charge here was assault with intent to commit murder, a charge as to which a specific intent to kill was an essential element. The existence of such intent was a matter to be proved by the prosecution, and, while the jury were at liberty to infer such intent from such facts and circumstances as were stated in the instruction, it cannot be held to be a correct proposition of law to say substantially that they must so infer.

[3] But defendant was convicted of the lesser offense of assault with a deadly weapon, an offense involving no specific intent to kill or to do great bodily harm. Section 245, Pen. Code; People v. Turner, 65 Cal. 540, 4 Pac. 553; People v. Mize, 80 Cal. 41, 22 Pac. 80. Under these circumstances, it cannot be held that defendant was prejudiced by the instruction. See People v. Gordon, 88 Cal. 422, 26 Pac. 502.

We concur: SLOSS, J.; MELVIN, J.; LAWLOR, J.; SHAW, J.

172 Cal. 538

WEISER v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 7833.)

(Supreme Court of California. May 4, 1916.)

MASTER AND SERVANT ⊂391 — WORKMEN'S COMPENSATION ACT — PROCEEDINGS AND AWARD.

Under Workmen's Compensation Act (St. 1913, p. 297) § 34, as amended by St. 1915, p. 1095, providing that if, at the time of the accident, the employer was insured by an authorized insurer against liability for the full amount of compensation payable under the act, and if the employer has served the claimant and the carrier with notice that the insurer has assumed to pay compensation for which the employer may be liable, the employer shall be relieved from liability, and the insurer shall be substituted, that the insurer is, subsequent to the injury, deprived of its right to transact business in the state, cannot deprive the employer of the right to make any service of notice upon it that is essential to compliance with the statute, and, where there was such notice, an award against the employer was unauthorized.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊂391.]

In Bank. Proceeding under the Workmen's Compensation Act by Alina Waara, widow of Arthur Waara, for compensation for his death, opposed by J. H. Weiser, employer, and the Commonwealth Bonding & Casualty Insurance Company, insurer. Compensation was awarded by the Industrial Accident Commission of the State of California against the employer and the insurer, and the employer brings certiorari to annul the award. Award annulled as to the employer.

Walter H. Linforth, of San Francisco, for petitioner. C. M. Bradley, of San Francisco, for respondents.

ANGELLOTTI, C. J. This was a proceeding in certiorari to annul an award of the Industrial Accident Commission in favor of one Alina Waara against both petitioner and the Commonwealth Bonding & Casualty Insurance Company on account of the death of her husband, Arthur Waara, in so far as said award was against petitioner. After oral argument the court from the bench gave its judgment annulling the award against petitioner, orally stating the grounds of the decision. That such grounds may remain of record, this opinion is filed.

Said Arthur Waara was killed on August 26, 1915, by reason of an accident in the course of his employment by petitioner. At the time of such accident and death the petitioner was insured by the Commonwealth Bonding & Casualty Insurance Company, a company then authorized to transact such business in this state, against liability for the full amount of compensation payable or that might become payable under the terms of the Industrial Compensation Act to his widow, Alina Waara, or any other person claiming compensation. In the findings of fact the Industrial Accident Commission found that said insurance company was at the time of said accident and death the insurance carrier for petitioner and had insured him against liability for compensation for such death. The act provides (section 34) that under such circumstances the employer may serve on any person claiming compensation and upon the insurance carrier a notice that the carrier, has in its policy contract or otherwise assumed and agreed to pay the compensation, if any, for which the employer is liable, and may file a copy of such notice with the Commission. It is then provided:

"If it shall thereafter appear to the satisfaction of the Commission that the insurance carrier has, through the issuance of its contract of insurance or otherwise, assumed such liability for compensation, such employer shall thereupon be relieved from liability for compensation to such claimant and the insurance carrier shall, after notice, be substituted in place of the employer in any proceeding theretofore or thereafter instituted by such person to recover such compensation, and the employer shall be dismissed therefrom."

The proceeding before the Commission was instituted by Alina Waara against both petitioner and the insurance carrier. In his answer to the application of said Alina Waara, petitioner set up the fact of such insurance, and alleged the serving of the notice referred to in section 34 on her and on the carrier, and the filing of a copy of said notice with the Commission. No finding was made as to the alleged service and filing by the Commission, but it was conceded here that the evidence showed that the notice was served on Alina Waara as alleged, and a copy of the notice filed with the Industrial Commission as alleged. The notice was also served on the insurance carrier at the same time, in October, 1915, but it is claimed that such notice could not then be legally served on the insurance carrier, for the reason that its right to do such business in the state had been revoked. We are satisfied that this fact cannot be held to affect the rights of petitioner. The law clearly requires that the employer shall be relieved from all liability for compensation "if at the time of the suffering of" the injury for which compensation is claimed he is insured against liability for the full amount of compensation payable, or that may become payable, by an insurance carrier then authorized to so insure him under the laws of the state. It is the situation at the time of the suffering of the injury that controls as to relief from liability. Assuming for the purposes of this decision that the notice must be served and filed by the employer in all respects as provided in section 34 of the act before exemption from liability can be claimed, it is clear that the fact that the insurance carrier is subsequent to the suffering of the injury deprived of its right to further transact such insurance business in the state, cannot be held to deprive the employer of the right to make any service of

notice upon it that is essential to full compliance with the terms of the section.

Upon the showing made the Industrial Commission was bound to relieve petitioner from liability for compensation to the claimant and dismiss him from the proceedings. It had no power, in view of the law, to make any award against him for such compensation. For this reason the award of the Commission was annulled in so far as the petitioner, Weiser, is concerned, thus leaving the same as an award against the insurance carrier only.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

(172 Cal. 510)

PYTHIAN CASTLE ASS'N OF SACRAMENTO v. DAROUX et al.

(Sac. 2202.)

(Supreme Court of California. May 1, 1916.)

COVENANTS ⇐30—CONSTRUCTION—PERSONS LIABLE—BUILDING RESTRICTIONS.

Where the deed of the seller of a city lot read in part that the grantor covenanted and agreed that he would never erect any structure within 5 feet of the land conveyed, and that, if he had any bona fide offer to purchase adjacent land, he would give his grantee the preference to purchase at such bona fide offer, such deed bound nobody but the grantor; the covenant not running with the land, and not placing any sort of compulsion upon buyers of adjacent land from the grantor relative to their right to build.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 30; Dec. Dig. ⇐30.]

In Bank. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by the Pythian Castle Association of Sacramento against Nora Daroux and another. From judgment sustaining demurrer to the complaint and from an order dissolving a temporary restraining order, plaintiff appeals. Judgment and order affirmed.

O. G. Hopkins, of Sacramento, for appellant. Butler & Swisler, of Sacramento, for respondents.

MELVIN, J. The demurrer of respondents to appellant's complaint was sustained and a temporary restraining order by which the former had been forbidden and enjoined from building upon a portion of their property was dissolved. The appeals of plaintiff are from the judgment and from the order dissolving the temporary injunction.

The facts are simple and undisputed. M. Graf was the owner of lot 5 in the block bounded by H, Eighth, I, and Ninth streets, in the city of Sacramento. He conveyed by deed on April 21, 1888, the south 90 feet of the east 40 feet of his lot to Knights of Pythias Hall Association of Sacramento, plaintiff's predecessor in interest. The deed, in which the grantor was designated as "party of the first part" and the grantee as "party of the second part," contained the following language:

"And said party of the first part hereby covenants and agrees, and this deed is given and accepted upon the express understanding and agreement, that he will never himself erect any structure upon the south ninety feet of the west forty feet of said lot 5 within five feet of the land hereby conveyed, and that in case he has any bona fide offer to purchase of him said south ninety feet of the west forty feet of said lot 5 he will give said second party the preference to purchase the same at said bona fide offer."

Defendants by mesne conveyances and after the death of M. Graf became the owners of the south 90 feet of the west 40 feet of said lot 5, and they served upon plaintiff notice of their intention to excavate and build thereon. Appellant thereupon commenced this action to enjoin them from placing any structure on the easterly 5 feet of their lot. The only question involved in the case therefore relates to the meaning and force of the quoted language.

There is no ambiguity in the words of the deed. The paragraph upon which appellant relies is a purely personal covenant which does not purport to bind any one but the grantor, M. Graf. It does not run with the land, and does not place any sort of compulsion upon the present owners. By it M. Graf merely agreed to forbear from building any structure upon the easterly 5 feet of his remaining portion of lot 5 during his ownership, and to give a preference to his grantee of the south 90 feet of the east 40 feet to purchase the adjoining land in the event of a bona fide offer being made therefor by some intending purchaser. By no twisting or turning of the quoted language may any other meaning be derived from it. There is abundant authority to support the view of the trial court that the covenant pleaded is merely a personal one, and not enforceable against respondents, but we need merely cite Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 Pac. 677, 37 L. R. A. (N. S.) 5, Los Angeles Terminal Land Co. v. Southern Pacific R. R. Co., 136 Cal. 36, 68 Pac. 308, and the cases therein cited and discussed, in every one of which language much stronger than that used in the deed now under consideration has been held to be insufficient to create an easement or other similar burden upon the property to which litigants have sought to apply it.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

172 Cal. 491

THOMPSON v. DAVIS. (L. A. 3613.)

(Supreme Court of California. April 19, 1916.)

1. HUSBAND AND WIFE ⟸201—WIFE'S SEPARATE PROPERTY—CONVEYANCE.

Where a husband, suing as an incompetent by his wife as guardian ad litem, had no interest in the property sought to be recovered as community property, he had no standing to question the validity of a conveyance made by her; the fact that she was his guardian ad litem having no bearing on the situation as the husband was the only party plaintiff.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 735; Dec. Dig. ⟸201.]

2. HUSBAND AND WIFE ⟸264—COMMUNITY PROPERTY—PRESUMPTION—STATUTE.

The provision of Civ. Code, § 164, that a deed to a wife raises the presumption that the title is thereby vested in her as her separate property, makes the presumption itself evidence but not conclusive, and it may be overcome by evidence sufficient to satisfy the court that the property, although conveyed to the wife, was in fact community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. ⟸264.]

3. HUSBAND AND WIFE ⟸264—COMMUNITY PROPERTY—BURDEN OF PROOF.

Evidence in a husband's action to recover an interest in property conveyed by his wife on the ground that it was community property, *held* not as a matter of law to overcome the presumption that property conveyed to her was her separate property, or to show that it had been paid for with community funds.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. ⟸264.]

4. HUSBAND AND WIFE ⟸262(1)—COMMUNITY PROPERTY—PRESUMPTION.

There is no presumption that a wife applied her separate property rather than community property to the living expenses of herself and husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 913; Dec. Dig. ⟸262(1).]

5. APPEAL AND ERROR ⟸1011(1)—FINDING—CONCLUSIVENESS.

A finding on conflicting evidence that property conveyed by a married woman to defendant was not community property, was not reviewable by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸1011(1).]

6. APPEAL AND ERROR ⟸1057(1)—HARMLESS ERROR—EVIDENCE.

In a husband's action to recover his alleged community rights in property conveyed by his wife to defendant, the refusal to allow the wife to testify that she and her husband did not intend that the various parcels held during the marriage should be her separate property, was not so prejudicial as to justify a reversal, where her testimony clearly showed that she claimed to have taken title to the various properties as the agent and business manager of her husband.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194–4196; Dec. Dig. ⟸1057(1).]

7. APPEAL AND ERROR ⟸1050(1)—HARMLESS ERROR—EVIDENCE.

In such action, the admission of a will made by the wife containing declarations that certain property was her separate estate, but not describing any particular property, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⟸1050(1).]

8. WITNESSES ⟸392(1) — IMPEACHMENT — DOCUMENTARY EVIDENCE.

In such action where the wife, on direct, had testified that the property did not belong to her separately, a will made by her containing her declarations that certain property was her separate property was admissible by way of impeachment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249–1251; Dec. Dig. ⟸392(1).]

9. EVIDENCE ⟸155(10) — ADMISSIBILITY BY REASON OF ADMISSION OF SIMILAR EVIDENCE.

In such action, where the wife had already been asked to testify to all the conversations had with the defendant, evidence of a conversation in which she had quoted her husband's statements that she could do as she pleased with the property, was relevant and admissible; the defendant, under the express provision of Code Civ. Proc. § 1854, having the right in response to give his version of the conversation, and to state all of it regarding the same subject-matter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 455; Dec. Dig. ⟸155(10).]

Department 1. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Abraham Thompson, by Christine Thompson, his guardian ad litem, against Le Compte Davis. Judgment for defendant, motion for new trial denied, and plaintiff appeals. Judgment and order affirmed.

Carter, Kirby & Henderson and E. W. Sargent, all of Los Angeles, for appellant. Edwin A. Meserve, Henry T. Gage, and W. I. Foley, all of Los Angeles, for respondent.

SLOSS, J. This action involves the ownership of a tract of land in Tulare county, containing about 300 acres, together with the personal property thereon. On October 22, 1908, Christine Thompson, the wife of the plaintiff, executed a deed conveying said land and personalty to the defendant. In the complaint the plaintiff, suing as an incompetent by his guardian ad litem, averred that the property in question had been acquired by him on August 3, 1906; that it was community property, but that title thereto had been taken in the name of his wife, Christine, for purposes of convenience. He alleged, further, that the defendant, who was the attorney of said Christine, had obtained the deed from her by means of false and fraudulent representations and through the improper use of the confidence reposed in him as her attorney. The complaint prayed for a decree of reconveyance and for an accounting. The answer denied the community character of the property, alleging on the contrary that it was the separate property of the wife, and denied, further, the charges of fraud and undue influence.

On all the material issues the court found in favor of the defendant. It found that the property in question was bought by Christine Thompson as her separate property with funds belonging to her separately, and that the plaintiff Abraham Thompson never had any right, title, or interest in or to said property. It also found against the allegations of fraud and undue influence. The plaintiff appeals from the judgment and from an order denying his motion for a new trial. He assails the sufficiency of the evidence to sustain the findings with respect to the separate character of the property, and also those touching the alleged improper conduct of the defendant in obtaining the deed. Of course, if the finding that the property belonged to the wife is sustained by the evidence, there is no occasion to inquire into the propriety of the other findings.

[1] The plaintiff in the case is Abraham Thompson. If he had no interest in the property, but the same was the sole and separate property of his wife, he has no standing to question the validity of any transfers made by her. The fact that she happens to be his guardian ad litem has no bearing on the situation. The action is instituted and maintained on behalf of the ward, who is the only party plaintiff. Fox v. Minor, 32 Cal. 111, 91 Am. Dec. 566.

[2] Notwithstanding the appellant's elaborate argument to the contrary, there is no good ground for questioning the sufficiency of the evidence to sustain the finding that the property conveyed to Davis was the separate estate of the plaintiff's wife, Christine Thompson. The property had been acquired on August 3, 1906. By a deed then executed, one Jepson had conveyed the property to Christine Thompson. Under the express provision of section 164 of the Civil Code, as that section has read since the year 1897, such deed to the wife raised the presumption that the title was thereby vested in her as her separate property. This presumption is, to be sure, not conclusive. "It may be overcome by evidence sufficient to satisfy the court that the property in question, although conveyed to the wife, was in fact community property." Pabst v. Shearer, 156 Pac. 466. But the presumption, "although disputable, is itself evidence, and * * * it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose." Id.

[3-5] Here the plaintiff undertook to overthrow the presumption by introducing evidence covering the business and property transactions of the husband and wife from the date of their marriage, which took place in 1888. At that time the plaintiff was the owner of some real property in the city of Los Angeles. This he had acquired by descent from his father, whose estate was then in the course of administration. The wife, Christine, held a contract for the purchase of a tract of land at Verdugo, in Los Angeles county. She had paid $3,000 on this purchase, and $3,000 was still due. This balance was paid by the husband after the marriage, and a conveyance was taken in his name in June, 1889. In 1891 the plaintiff conveyed a parcel of land in the city of Los Angeles to his wife. In the same year the husband and wife conveyed the Verdugo property in exchange for other property, the deed of the latter running to the wife alone. It does not appear that the husband or the wife then owned any real estate other than the two pieces last referred to. Both of these were, under the rule of section 164 of the Civil Code, presumptively the separate property of the wife. Thereafter there were numerous transactions involving the purchase and sale of over 60 city lots and other real estate. In every instance the deed for property purchased or taken in exchange ran to the wife. During all this time the husband was not engaged in any business, and the evidence points strongly to the conclusion that he was not capable of transacting any. He contends that in the various transactions which were had the wife was acting in his behalf, and that all purchases and sales were made by her and in her name because of his incapacity. Granting that this theory has the support of some evidence, it is opposed to the presumptions arising, not only from the deed conveying the property here in question to the wife, but from the many deeds conveying various other parcels to her. In addition, the testimony of the wife, who was an important witness for the plaintiff, was weakened by plaintiff's own introduction of a will made by the wife, in which she had assumed to dispose of the property as her own. It was, of course, for the trial court to determine how far, if at all, this circumstance affected the weight and value of her testimony.

To overcome the presumption declared by section 164, the plaintiff was required to establish, to the satisfaction of the court below, that the property in dispute, although deeded to the wife, had been paid for with community funds. The evidence offered in this behalf was far from conclusive. It rested upon a series of inferences and deductions which may have been permissible, but were by no means necessary. It must certainly be conceded that in the early days of the married life of Thompson and his wife, some part at least of their holdings could properly have been found by the court to be the separate estate of the wife. It is sought by the appellant to trace the property holdings through their various mutations, and to show thereby that the purchase price of the Tulare property consisted of earnings of the community. But the evidence fails to establish this. Much is made of the fact that for several years the wife earned money in the conduct of a hotel. Such earnings no doubt constituted community property. But the evidence of their amount is very unsatisfac-

tory. Even if it had been shown that they were enough to have covered the purchase price of the Tulare property, it was not satisfactorily established that they were used for that purpose. For all that the record shows, they may have been exhausted in paying the living expenses of the husband and wife. There is no presumption that the wife applied her separate property, rather than that of the community, for this purpose. Estate of Cudworth, 133 Cal. 462, 65 Pac. 1041. On the whole case, the most that can be said is that the evidence leaves it doubtful whether the purchase price of the Tulare property was community or separate estate. Under these circumstances the presumption arising from the face of the deed was not, as matter of law, overthrown. The case is the very usual one of a conflict of evidence. The conclusion of the trial court on that conflict is beyond the reach of review here.

[6] Certain rulings in the course of the trial are assigned as error. The court refused to allow Mrs. Thompson to testify that she and her husband did not intend that the various parcels held during the marriage should be the wife's separate property. Assuming that the proffered testimony, or some of it, was competent (see Fanning v. Green, 156 Cal. 285, 104 Pac. 308), we think its rejection was not prejudicial to such extent as to justify a reversal. The testimony actually given by Mrs. Thompson showed very clearly that she claimed to have taken title to the various properties as the agent and business manager of her husband.

[7, 8] Over the objection of the appellant, the court admitted in evidence a will made by the wife. This is not the will to which we have already referred. It is argued that the declarations made in a will by a wife that certain property is her separate estate are not admissible against her husband. Rowe v. Hibernia S. B., 134 Cal. 403, 407, 66 Pac. 569. But the will in question did not describe any particular property. Its admission in evidence could not, therefore, have been prejudicial. But even if its execution could be regarded as conflicting with the theory that the property belonged to the community, it was admissible on other grounds. It was offered as a part of the cross-examination of the wife. She had, in her direct testimony, given evidence tending to show that the property did not belong to her separately. If a will made by her was opposed to this view it was proper by way of impeachment.

[9] The appellant moved to strike out as hearsay certain testimony of the defendant relating to a conversation between himself and Mrs. Thompson, in which the latter had quoted a statement of her husband to the effect that she could do as she pleased with the Los Angeles city property. In the introduction of the plaintiff's case Mrs. Thompson had already been asked to testify to all the conversations she had had with the defendant. This testimony was relevant to the issues framed. The defendant was authorized, in response, to give his version of these conversations and to state all of them regarding the same subject-matter. Code Civ. Proc. § 1854.

There is no other assignment of error affecting the judgment, so far as it rests on the finding that the property in question was the separate estate of the wife. There is therefore no occasion to review the evidence regarding the manner in which the conveyance to Davis was obtained by him. But since the defendant's character and reputation are involved in the charges made in the complaint, it is only just to say that we have reviewed the entire record and see no reason to doubt that the court was fully justified in finding that the defendant had, in his dealings with Mrs. Thompson, met every requirement of fairness and good faith.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

172 Cal. 504

BOSSERT et al. v. SOUTHERN PAC. CO. et al. (S. F. 6916.)

(Supreme Court of California. April 24, 1916.)

1. APPEAL AND ERROR ⇐⇒934(2) — GROUNDS FOR REVERSAL—PRIMA FACIE CASE.

That plaintiffs made out a prima facie case does not of necessity require reversal of a judgment for the defendants; it being presumed in the absence of any showing or claim to the contrary that the jury decided in accordance with the weight of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. ⇐⇒934(2).]

2. APPEAL AND ERROR ⇐⇒1046(5)—REVIEW—HARMLESS ERROR.

In an action for personal injuries that the court in the presence of the jury asked a witness who had given false testimony with regard to his qualifications as a physician if he understood an oath, telling him that he was old enough to know better, and that it would be his duty to call the attention of the grand jury to the testimony is not the ground for reversal where the witness admitted on cross-examination that this testimony was false.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134; Dec. Dig. ⇐⇒1046(5).]

3. EVIDENCE ⇐⇒546 — EXAMINATION AS TO COMPETENCY—EXPERT.

It is the province of the court to determine from the examination as to a witness' qualification whether he is competent to testify as an expert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. ⇐⇒546.]

4. TRIAL ⇐⇒252(8)—INSTRUCTIONS.

In an action for personal injuries, it appearing that the injured party had suffered serious injuries many years before, and the evidence tending to prove that she was still suffering from these injuries, and had received no injury on the occasion mentioned in the complaint, an instruction that if the jury believe she was not

injured at the time of the accident it was unimportant whether the accident was caused by the negligence of the defendant, and that "if you believe that any injury proved to have been sustained by the plaintiff was sustained by her at a time prior to September, 1910, and that none of the defendants were responsible for those injuries so sustained by her," they must find for the defendants, required the jury to find that she had not received any injury except such prior injury before rendering a verdict for the defendants, and was not misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. ⊂⊃252(8).]

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Henry Bossert and another against the Southern Pacific Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

John H. Leonard and H. R. Davids, both of Santa Cruz, for appellants. Chas. M. Cassin, of San Jose (James L. Atteridge, of San Jose, of counsel), for respondents.

SHAW, J. The plaintiffs appeal from the judgment. The record was prepared in the mode provided in sections 953a, 953b, and 953c of the Code of Civil Procedure, and is in typewriting.

[1] The first ground urged for reversal is "that plaintiffs made out a prima facie case." The plaintiffs do not print in their brief any statement which enables us to ascertain the nature of the action. We learn from the defendants' brief that it was an action to recover damages for bodily injuries alleged to have been caused to Effie Bossert by the negligence of the defendant. The fact that plaintiffs made out a prima facie case does not of necessity require a reversal. The proof of plaintiffs may have been overcome by that of the defense. In the absence of any showing or claim that it did not, we will presume that the jury decided for the defendants in accordance with the weight of the evidence.

[2] The plaintiffs called a witness to testify as a physician regarding the nature of the injuries claimed to have been inflicted. On the examination as to his qualifications as an expert witness, he first testified that he was a graduate of the medical college of Miami University, in Ohio. On cross-examination he confessed that this testimony was false, and that he was not a graduate of any medical college, or a regular practicing physician of any recognized school of medicine. The court refused to allow him to testify as an expert and struck out some testimony which he had given before his want of qualifications was disclosed. At the close of the examination regarding his qualifications, the judge asked him if he understood the nature of an oath, and further stated that it would be his duty to call the attention of the grand jury to his testimony, saying to him that he was old enough to know better than to testify in such a way and to attempt to deceive the court and jury. This conduct, it is claimed, was prejudicial to the plaintiffs. It clearly appeared that the witness had given false testimony. The remarks of the court to the witness were not without cause. They were addressed to the witness, not to the jury. It would have been better if the court had not spoken to him during the trial or in the presence of the jury. But the testimony of the witness was properly excluded because it was incompetent. The episode had no real bearing on the case and was no part of the evidence. The production of such a witness and his egregious failure to qualify may have had some effect to prejudice the jury against the plaintiffs. This, however, was caused by their failure to ascertain the character of their witness and the nature of his testimony before putting him on the stand. The remarks of the court could have added little, if anything, to the prejudice produced by the plaintiffs themselves. The error, if any, is not sufficient to warrant a reversal, especially in view of the failure of plaintiffs to point out wherein the verdict is unjust or unsupported by the evidence.

[3] It was the province of the court to determine, from the examination as to the witness' qualifications, whether he was competent to testify as an expert. The plaintiffs did not have the right to submit that matter to the jury for their consideration.

[4] In the course of the trial it appeared that Effie Bossert, who was the person injured, had suffered an injury to her spine and other organs many years before. There was evidence tending to prove that she was still suffering from these injuries, and that she had received no injury on the occasion mentioned in the complaint. In this connection the court instructed the jury that if they believed that she did not receive any injuries at the time of the accident to her, in 1910, as claimed in the complaint, then it was unimportant whether that accident was caused by the negligence of the defendant or not, and that, "if you believe that any injury proved to have been sustained by Effie Bossert was sustained by her at a time prior to September 17, 1910, and that none of the defendants were responsible for those injuries so sustained by her," they must find for the defendants. The plaintiffs contend that this instruction required the jury to find for the defendant, even if they believed that she had received the injury complained of, and that it was caused by the negligence of the defendant. We do not think the instruction is susceptible of this meaning. The phrase "if you believe any injury proved to have been sustained by Effie Bossert was sustained by her at a time prior to September 17, 1910," in the connection in which it was used, required the jury to find that she had not received any injury except such prior injury, before rendering a verdict for the defendants. These are the only points

presented in support of the appeal. We find none of them meritorious.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 512

PEOPLE v. KROMPHOLD. (Cr. 1990.)

(Supreme Court of California. May 1, 1916.)

1. CRIMINAL LAW ⇐137—VENUE—CHANGE—SUCCESSIVE APPLICATIONS.

Where affidavits and motion for change of venue are presented prior to commencement of trial, the trial court, if not satisfied that a fair trial cannot be had in that county, may deny the motion, with the right to defendant to renew the same after impaneling the jury has progressed to such point as to throw further light on the question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 253; Dec. Dig. ⇐137.]

2. CRIMINAL LAW ⇐121—CHANGE OF VENUE—DISCRETION OF COURT.

Under Pen. Code, §§ 1033, 1035, as to change of venue, application for change of venue is addressed to the reasonable discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 241; Dec. Dig. ⇐121.]

3. CRIMINAL LAW ⇐135—CHANGE OF VENUE—AFFIDAVITS AND OTHER PROOFS.

Under the terms of Pen. Code, §§ 1033, 1035, on application for change of venue because a fair trial cannot be had in the county, the proceedings in the impanelment of the jury, in so far as they throw light upon that question, may be taken into consideration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 253; Dec. Dig. ⇐135.]

4. CRIMINAL LAW ⇐134(4)—CHANGE OF VENUE—AFFIDAVITS AND OTHER PROOFS.

That deceased, a police officer, had been shot by accused while taking the latter into custody, provoking considerable public excitement and talk of lynching, but no actual effort was made to take accused from the custody of the officers, and there was no unusual difficulty in securing a fair and impartial jury, did not show an abuse of discretion of the trial judge in refusing change of venue under Pen. Code, §§ 1033, 1035.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 243; Dec. Dig. ⇐134(4).]

5. CRIMINAL LAW ⇐1166½(8)—APPEAL AND ERROR — HARMLESS ERROR — JURY CHALLENGES.

Where after disallowance of challenges for cause the objectionable jurors were peremptorily challenged, the disallowance is harmless, unless the use of the peremptory challenges compelled accused to accept a juror unsatisfactory to him, although he exhausted his peremptory challenges before the jury was selected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3117; Dec. Dig. ⇐1166½(8).]

6. WITNESSES ⇐240(2) — EXAMINATION — LEADING QUESTIONS.

Allowing leading questions is a matter almost entirely within the control of the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 795; Dec. Dig. ⇐240(2).]

7. WITNESSES ⇐240(8) — EXAMINATION — LEADING QUESTIONS.

In a murder trial, allowing the question to a boy who witnessed the shooting on redirect examination, "From where you were standing when you testified in direct examination, and the relation of the party when he brought the gun down, did you mean that, in your opinion, it looked to you like he had it pointed at Officer Sperbeck [the deceased]?" *held* not an abuse of trial court's discretion as to leading questions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 844; Dec. Dig. ⇐240(8).]

8. CRIMINAL LAW ⇐1170½(1)—HARMLESS ERROR—EXAMINATION OF WITNESSES.

Allowing a leading question is not error when it elicits testimony which is no more than a mere repetition of matter stated by the witness both on direct and cross examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3129; Dec. Dig. ⇐1170½(1).]

9. HOMICIDE ⇐308(2)—INSTRUCTIONS—DEGREE—INTENT AND PREMEDITATION.

An instruction that "in dividing murder into two degrees the Legislature intended to assign to the first, as deserving of greater punishment, all murders of a cruel and aggravated character, and to the second all other kinds of murders which are murders at common law," immediately followed by the words, "and to prescribe a test by which the degree of every case of murder may be readily ascertained," the court then proceeding to state the test clearly and accurately, making it plain that conviction for murder in the first degree cannot be had unless the killing was willful, deliberate, and premeditated, and stating further in terms: "The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder in the first degree. The intention to kill must be the result of deliberate premeditation"—is not erroneous as defining murder of the first degree as "including all murders of a cruel and aggravated character."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 643; Dec. Dig. ⇐308(2).]

10. CRIMINAL LAW ⇐1037(1)—APPEAL—OBJECTIONS IN COURT BELOW—MISCONDUCT OF COUNSEL.

Misconduct of prosecuting attorney in his argument to the jury not objected to or in any way called to the attention of the trial court will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2645; Dec. Dig. ⇐1037(1).]

11. CRIMINAL LAW ⇐722(2)—ARGUMENT—COMMENTS ON CHARACTER OF ACCUSED.

It is not beyond the bounds of proper argument to the jury for the district attorney to say: "Where, I say, where can you find sympathy or one drop of mercy for such a man, such a wicked man, and possessed with such a depraved heart as the man who sits in that chair right there?"

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1674; Dec. Dig. ⇐722(2).]

12. CRIMINAL LAW ⇐721(3)—ARGUMENT—COMMENT ON FAILURE OF ACCUSED TO TESTIFY.

Under Pen. Code, § 1323, providing that neglect or refusal of accused to be a witness cannot be used against him on the trial, it is improper for the prosecuting attorney to comment on the failure of accused to testify upon any subject connected with the trial, although accused may have testified on other subjects.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. ⇐721(3).]

13. CRIMINAL LAW ⟸1186(4)—APPEAL—REVERSAL—TECHNICAL ERROR—COMMENT ON FAILURE OF ACCUSED TO TESTIFY.

Where after comment by prosecuting attorney on failure of accused to testify the trial judge at once stated his disapproval thereof, and there was no further transgression on the part of the officer, and where the comment itself was merely that accused had not testified, and the evidence as to that matter was undenied, such conduct was not reversible error under Const. art. 6, § 4½, forbidding reversal except where error has resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3215; Dec. Dig. ⟸1186(4).]

14. CRIMINAL LAW ⟸957(1)—NEW TRIAL—VERDICT—AFFIDAVITS OF JURORS TO IMPEACH.

The affidavit of a juror cannot be received to impeach the verdict except where the verdict is the result of a resort to the determination of chance, nor can such impeachment be made by statements made by the juror to others.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2392; Dec. Dig. ⟸957(1).]

15. CRIMINAL LAW ⟸866—MANNER OF ARRIVING AT VERDICT.

Where eleven jurors voted for the death penalty, and one for life imprisonment, and the latter concluded that, if the others adhered to their vote on another ballot, he would change his vote to death, and he did so upon the following ballot being the same, there is no ground therein for vacating the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2063; Dec. Dig. ⟸866.]

In Bank. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Kosta Kromphold was convicted of murder, and appeals. Affirmed.

Chas. A. Wetmore and E. B. Stanwood, both of Marysville, for appellant. E. Ray Manwell, of Marysville, U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

ANGELLOTTI, C. J. Defendant was charged by information filed in the superior court of Yuba county on September 13, 1915, with the crime of murder, in the unlawful killing of one John B. Sperbeck on September 6, 1915. On his trial, which was commenced on October 13, 1915, he was found guilty of murder in the first degree, and was adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial.

[1] 1. The principal point made for reversal is that the court erred in refusing to grant defendant's motion for a change of place of trial, based on the ground that a fair and impartial trial could not be had in Yuba county. Sections 1033–1035, Pen. Code. The motion was made just prior to the commencement of the trial, and affidavits were presented in support thereof, and counter affidavits were presented by the state. The trial court expressed itself as not satisfied from the showing made that a fair and impartial trial could not be had in Yuba county, and, following a practice that has been approved by this court, denied the motion for the time being, with the right to the defendant to renew the same after the proceedings in the matter of impaneling a jury had progressed to such a point as to throw further light on the question. People v. Plummer, 9 Cal. 298, 309; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Fredericks, 106 Cal. 554, 39 Pac. 944; People v. Staples, 149 Cal. 412, 86 Pac. 886. Counsel for defendant state that the motion was twice renewed and denied. The record shows that just before the last juror was sworn to try the case, on October 15, 1915, the motion was formally renewed, counsel saying:

"Before the juror is sworn in, I would like to renew our motion for a change of venue in this case."

No showing in addition to that made at the commencement of the trial was attempted, and the court denied the motion. It is not claimed that on the previous renewal of the motion alleged to have been made any additional showing was presented. The formal renewals of the motion were made simply for the purpose of preserving defendant's rights on the showing made at the commencement of the trial; it having been held in the cases above cited that, where the original motion is denied with leave to renew, a failure to renew is a waiver of the motion. The learned judge said in finally denying the motion:

"I will state in denying the motion that it is apparent to the court from the testimony in the examination of the jurors that there has been no especial difficulty, no greater difficulty in securing this jury than is customary in other cases that come before the court, other criminal actions, and the court is satisfied that the jury obtained is an absolutely fair and impartial jury, and therefore there is no reason existing for the granting of a motion for a change of venue. * * * The court finds, as a matter of fact, that there has been no wide prejudice against the defendant that would preclude him from having a fair and impartial trial, and that is the reason for denying the motion for a change of venue. If the court had any doubt in the matter at all, it would grant the motion."

[2, 3] Section 1033 of the Penal Code provides that a criminal action may be removed from the court in which it is pending on application of the defendant, "on the ground that a fair and impartial trial cannot be had in the county." Section 1035 provides that, "if the court be satisfied that the representations of the applicant are true," such an order of removal must be made. It must be conceded, in view of the decisions, that such an application is addressed somewhat to the discretion of the trial court; such discretion, however, not being a mere arbitrary discretion, but one the exercise of which must be reasonable. The conclusion reached must be such as finds warrant "in the facts disclosed by the affidavits filed and in the circumstances made to appear in the record." See People v. Yoakum, 53 Cal. 566. In People v. Suesser, 132 Cal. 631, 64 Pac. 1095, it was said by the

learned writer of the opinion that he admitted that much discretion is left in this matter to the trial court." If the conclusion of the trial court finds reasonable support in the record, it must be sustained, even though an appellate court might feel better satisfied had the motion been granted. People v. Suesser, supra. And, of course, in view of the well-established rule that final action on such a motion may be deferred by the trial court pending efforts to obtain a fair and impartial jury, the proceedings in the impanelment of the jury, in so far as they throw light on the question whether a fair and impartial trial can be had in the county, may be taken into consideration.

[4] Certain facts are admitted. Yuba county is a small county, having only 10,042 inhabitants according to the last census. The deceased was a police officer of the city of Marysville. He had lived in Yuba county nearly all of his life. He had resided in different parts of the county, and had many relatives residing in various sections thereof. He had been a police officer in Marysville for five years, and was very popular both there and in the county. He was shot by defendant while he and Mr. Smith, city marshal of Marysville, were attempting to take defendant into custody as the probable perpetrator of a robbery that had just been committed in that city. The defendant was very shortly thereafter captured and placed in the city jail of Marysville. This occurred on September 6, 1915. There was naturally considerable excitement created in Marysville by the report of the shooting and consequent death of Sperbeck, and some manifestations of indignation, including expressions to the effect that defendant should be taken from the authorities and lynched. A large crowd of citizens assembled in the street in front of the jail, and many were there late into the night. The situation was such that it was deemed advisable by the authorities to place special policemen on guard at the jail during the night. The same night the city council, as a precautionary measure, ordered all saloons closed until the next afternoon at 5 o'clock. The two local papers of the next day contained reports of the affair, unfavorable, of course, to defendant, and one of these papers referred to defendant as an "assassin," confined awaiting arraignment "on a charge of committing the most dastardly, fiendish, and cowardly crime which has been perpetrated in this section in years." These papers in publications made September 11th and 12th also contained statements to the effect that public sentiment favored as early a trial as possible; that public feeling against defendant was strong in Marysville and vicinity; that some of the authorities felt there would be difficulty in getting a jury; and that the panel would probably have to be drawn from remote portions of the county.

Affidavits filed in support of the motion alleged threats of violence and lynching on the day of the occurrence, and also a threat by two persons who visited defendant in the jail on September 9th. One affiant, a nonresident of the county, who was in Marysville on September 6th, and again on September 16th, spoke of the excitement on the first day, "the general talk * * * to the effect that the defendant should be hung or lynched"; that he heard one man who had a rope say, "We will go into the jail and hang him," and others say, "We will lynch him;" that there were expressions of hatred, etc., all the evening; also that on September 16th he talked with numerous people and heard many statements, "which statements showed the universal prejudice, hatred, and bias held by the citizens of Yuba county toward the defendant"; and that he heard men say that defendant ought to be hung or lynched. Another nonresident of the county had visited various places therein on October 5th, 6th, and 7th, and had heard therein much discussion of the case, indicating on the part of people generally extreme feeling against defendant and a desire that he be hanged. One of the attorneys of the defendant deposed that the almost universal expression of opinion, so far as he had heard the matter discussed, and he had heard it discussed a great deal, was that defendant was guilty and should be hanged.

There were counter affidavits as to what occurred on September 6th lending support to the conclusion that, although there was considerable excitement on the street, expressions indicating any desire to lynch defendant were confined to two or three isolated cases. It does not appear that any attempt was actually made to take defendant from the custody of the officers, or that such an attempt was even seriously threatened. And it is not intimated that after the first day there was made apparent any desire to proceed otherwise than in accord with law. Counter affidavits filed further bore upon the question of the existence of such prejudice as would prevent a fair and impartial trial in Yuba county. The remarks of the learned trial judge in refusing to grant the motion when it was first submitted indicate so clearly his conclusion, which we believe to have been sufficiently sustained by the showing made, that we quote them in full. He said:

"A motion like this is addressed to the discretion of the court. If the court is satisfied with the showing made that the defendant in any case could not receive a fair and impartial trial, there would not be any hesitancy on the part of the court in granting the motion. On the contrary, if the showing is insufficient to grant the motion, the only thing to do is to proceed with the impanelment of the jury, and, if it should appear that the motion should be granted on the ground of bias and prejudice against the defendant in the community at large, as to prevent him from having a fair and impartial trial, the court would permit the motion to be renewed, and it should unhesitatingly grant the motion for a change of venue. I am not satisfied with the affidavits, but I am satisfied as to the state-

ments of facts in the affidavits as to the sporadic assertions on the street such as, 'We ought to take him out and hang him,' and 'If the jury doesn't convict him the death penalty will be inflicted; we ought to hang him.' The making of ill-considered remarks like that is not alone sufficient to satisfy the court that there is any such prejudice or bias shown throughout the county as should interfere with the defendant having a fair and impartial trial, because those things are of daily occurrence in almost every case where a killing has happened. The remarks of idle and thoughtless people do not serve as a true barometer of the public mind by any means. A man who says anything like that does not consider the effect of what he says, or that he is making a thoughtless remark, or, if he really and earnestly says it, he is not a good citizen; yet we know that those things are said every day. There was no actual effort made to take the defendant away from the custody of the officers. It is true quite a crowd congregated there, and there was probably some excited talk among the people; and in the affidavit filed this morning it is stated that some of the crowd had guns in their possession. That is quite a general statement. There is no statement that any particular individual carried a gun, or, if he did, that he had any intention of using it on any one. The opinions of Lynch and Moore as to what they saw—that the defendant could not have a fair and impartial trial in this case—their opinions are of very little assistance or value to the court. Neither one of them are men who have been here long enough to have been well acquainted with the public mind; and, while it is true that Mr. Lynch says in his travels around the county he heard ill-considered and foolish remarks and threatening language indulged in that would indicate bias and prejudice against the defendant as far as individual persons are concerned, yet I cannot accept those statements as an invariable index of the public mind. I have decided to deny the motion at this time, or at least postpone further consideration of the motion until after we have proceeded with the work of impanelling the jury. If it then becomes apparent that, owing to prejudice in the minds of the veniremen, there is, in fact, such a prejudice and bias against the defendant that he cannot have a fair and impartial trial, the court would have no hesitancy, if the motion is renewed, to grant him the motion for a change of venue."

The subsequent proceedings were destitute of anything indicating that defendant could not have a fair and impartial trial in Yuba county. One cannot read the record, in so far as it relates to the proceedings in obtaining a jury, without coming to the conclusion substantially stated by the trial judge that there had been no unusual difficulty in securing a jury, and "that the jury obtained is an absolutely fair and impartial jury." We feel after a full and careful consideration of the record that we are not warranted in holding that there was any abuse of the discretion committed to the trial judge in this matter. Each case must be determined according to its own peculiar facts and circumstances, and these vary so in different cases that little help can be obtained from decisions in other cases.

[5] 2. Complaint is made that the trial court erred in disallowing challenges for cause interposed to jurors on the ground of bias in three instances. It will not be necessary to determine whether such challenges or any of them should have been allowed. None of said jurors served as a juror in the case; each having been excused on a peremptory challenge interposed by defendant. While defendant exercised all of the 20 peremptory challenges allowed by the law, it was not made to appear that he desired to exercise any additional challenge, or that he had the slightest objection to any juror sworn to try the cause, or any disposition to have any such juror excused. The testimony on his voir dire of each of those who acted as jurors showed no ground for a conclusion that he would not be an absolutely fair and impartial juror. No challenge for cause was interposed by defendant as to any such juror. Under these circumstances the claim of defendant that the court erred in disallowing his challenge for cause to three jurors who did not serve on the trial is disposed of by People v. Schafer, 161 Cal. 573, 119 Pac. 920. In that case it was said:

"It is entirely consistent with the record that the twelve jurors who actually tried the case were absolutely satisfactory to defendant, and that he desired all of them to serve, and would not have excused any one of them if he had been given the opportunity. After judgment the contrary should not be presumed."

And, again, the court said substantially that the mere fact that defendant has exhausted his peremptory challenges does not preclude the application of the rule there declared, and that "the important thing is that it does not appear that an objectionable juror was forced upon the defendant." The rule so declared in People v. Schafer, supra, is clearly in line with section 4½ of article 6 of our Constitution.

[6-8] 3. But one ruling in the matter of the admission of evidence is complained of in the briefs. Floyd Plummer, a 13-year old boy, who witnessed the shooting, was asked on redirect examination, "Now, Floyd, from where you were standing when you testified in direct examination, and the relation of the party when he brought the gun down, did you mean that, in your opinion, it looked to you like he had it pointed at Officer Sperbeck?" and, before an objection could be interposed, answered, "Yes, sir." A motion to strike the answer out was made, on the ground that the question was leading and suggestive, and denied. The defendant's claim, as evidenced by his testimony, was that he never saw Sperbeck, that he saw only Officer Smith, and that he shot simply to frighten Smith. The witness had testified on direct examination that defendant "threw his gun around the corner at that time and leveled it like that at Mr. Sperbeck." The effort of defendant's counsel on cross-examination was to show that all the witness knew was that the bullet hit Sperbeck, and that his conclusion that it was pointed at Sperbeck was due solely to the fact that the bullet hit him. The witness did answer, "Yes, sir," to a question of defendant's counsel asking him if that was not the fact, but he did testify further on his cross-examination

substantially that he saw the gun "leveled"; that he could not see that it was leveled on any one else but Sperbeck; that he knew it was not leveled on him (the witness), because he was looking right at the defendant; that he was nearly on a line with Sperbeck and defendant; that the weapon was pointed in the direction that Sperbeck was in; and that he knew it was not pointed over Sperbeck's head because, if it was, "his gun would have been higher." The matter of allowing leading questions is one almost entirely within the control of the trial court, and we are not prepared to hold that there was any abuse by the trial court of the discretion committed to it in this case. It is also plain that the testimony here elicited was, in substance, no more than a mere repetition of matter stated by the witness both on direct and cross examination.

[9] 4. In the matter of instructions given to the jury complaint is made that one instruction in effect defines murder of the first degree as "including all murders of a cruel and aggravated character." We are unable to see that any such definition was given or could fairly be understood by the jury as given. The contention is based on the statement of the court in one instruction that "in dividing murder into two degrees the Legislature intended to assign to the first, as deserving of greater punishment, all murders of a cruel and aggravated character, and to the second all other kinds of murders which are murder at common law." This was immediately followed by the words, "and to prescribe a test by which the degree of every case of murder may be readily ascertained." The court then proceeded to state the test, and did so clearly and accurately, making it plain to the jury that in this case the defendant could not be convicted of murder in the first degree, unless the killing was willful, deliberate, and premeditated, and stating further in terms:

"The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intention to kill must be the result of deliberate premeditation."

There was nothing anywhere in the instructions in conflict with this. Complaint is made of the first sentence in the passage we have just quoted, as omitting the element of premeditation which was essential to a verdict of first degree murder under the circumstances of this case. But, as we have seen, this was only a part of the definition which the court was giving; and it was immediately followed by what the court said as to the essential element of premeditation. There is no basis for a conclusion that the jury could fairly conclude from anything said by the court in any part of its charge that a first degree verdict could be rendered in the absence of deliberate premeditation on the part of the defendant.

[10] 5. Misconduct on the part of the district attorney in his argument to the jury is urged. Several statements of that officer referred to in defendant's brief were not objected to at the trial, or assigned as misconduct, or in any way called to the attention of the trial court. Of course, objections on account thereof cannot be made here.

[11] The district attorney in the course of his argument said:

"Where, I say, where can you find sympathy or one drop of mercy for such a man, such a wicked man, and possessed with such a depraved heart as the man who sits in that chair right there"?

This was objected to and assigned as misconduct. It cannot be held to have been beyond the limits of proper argument. People v. Glaze, 139 Cal. 159, 72 Pac. 965.

We are utterly unable to see any force in the claim of defendant that the district attorney was guilty of anything in the nature of prejudicial misconduct in certain statements made by him in his opening argument to the jury as to the penalty to be awarded in the event that they found the defendant guilty of murder in the first degree.

[12, 13] In the course of his argument the district attorney said:

"Another circumstance in his story is this—a conflict in his testimony—is that they took him along through their examination as a witness, and they brought him along for some reason, from the time of his birth almost up to the time he committed this crime; but they do not go into the brush on the Feather river bottoms and let him explain his version of the affair that happened down there, whether or not he shot at Garcia, or what he did it for. That, gentlemen of the jury, is undenied; he did not say anything about that."

Defendant's counsel objected to the statement, and assigned it as misconduct, "his commenting upon matters to which the defendant did not testify." The court thereupon told the district attorney that he should not comment on the defendant's omission to testify to any particular fact, and suggested that he be extremely careful in that respect. Testimony had been given on the trial to the effect that after the shooting of deceased defendant ran away into the brush on the Feather river bottoms, and was there captured; that while being pursued in that section one Garcia, who was of those engaged in endeavoring to find him, found him, and he (defendant) had his pistol pointed at him and told him he had better turn around and go back; that he "grabbed for the gun," and defendant started to shoot at him; that he then shot at defendant twice, and defendant then dropped his weapon and surrendered; that defendant fired two shots at him, but that he was not hit by either shot. While defendant was a witness in his own behalf and testified as to the circumstances of the shooting of Sperbeck, he did not give any evidence as to what occurred after leaving the place where the homicide was committed.

In view of section 1323 of the Penal Code, it must be conceded that it is not proper for the district attorney to comment on the

failure of the defendant to testify upon any subject connected with the trial, although he may have been a witness and may have testified on other subjects. People v. Mead, 145 Cal. 506, 78 Pac. 1047. The section referred to provides that the neglect or refusal of a defendant "to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding." This court has held that it is a violation of the provisions of the section for a trial court to permit a district attorney to argue that the failure of a defendant to become a witness is a circumstance tending to prove guilt. People v. Tyler, 36 Cal. 522; People v. Brown, 53 Cal. 66. In each of these cases an objection to the argument was made, but the judge declined to interfere, and, in fact, indicated approval of the argument. In the case at bar the judge, as we have seen, at once stated his disapproval of any argument of this character, and substantially told the district attorney that he had no right to comment on defendant's omission to testify on any particular subject, and there was no further transgression on the part of that officer. Therefore we have here no approval or sanction by the trial court, but, in fact, expressed disapproval and an instruction to refrain from that line of argument. Then, too, we have nothing here but a mere statement on the part of the district attorney that Garcia's testimony was undenied, and that defendant said nothing about the matters testified to by Garcia, which was a fact concerning which the jurors already had full knowledge. While it was wrong for the district attorney to comment at all on the failure of defendant to testify upon this subject, it would be most unreasonable to assume, in the light of the attitude of the trial judge in the matter and the nature of the remarks, that the jury could have been influenced to the prejudice of the defendant by the statement complained of. See People v. Sansome, 98 Cal. 235, 33 Pac. 202. Certainly we cannot hold that this statement "has resulted in a miscarriage of justice." Section 4½, art. 6, Const.

[14, 15] 6. On the motion for a new trial an affidavit made by one of the counsel for defendant was read and filed reciting certain statements made to said counsel after the trial by one of the jurors. On this affidavit alone is based the claim of misconduct of the jury, and that the verdict has been decided by means other than a fair expression of opinion on the part of all the jurors. The trial court refused to consider the affidavit on two grounds, viz., that a juror cannot be allowed to impeach his own verdict, and that the affidavit here set forth matters purely of a hearsay nature, not being made by the juror, but by another who simply stated what the juror told him. It is definitely settled in this state both that the affidavit of a juror cannot be received to impeach the verdict, except where it is the result of a resort to the determination of chance (People v. Soap, 127 Cal. 408, 59 Pac. 771; People v. Azoff, 105 Cal. 632, 39 Pac. 59), and that the same policy that prohibits a juror from impeaching his verdict by his affidavit prevents such impeachment by statements made by the juror to others (People v. Azoff, supra; People v. Dobbins, 138 Cal. 694, 699, 72 Pac. 339). No resort to chance was shown by the affidavit here presented. The affidavit showed that from the commencement of their deliberations the jurors were unanimous in the conclusion that the defendant was guilty of murder of the first degree, and that the only difference of opinion was on the question of penalty; eleven jurors voting for the death penalty, and one juror voting for life imprisonment. This juror finally concluded that, if on the subsequent ballot all the other jurors adhered to their former vote for death, he would yield and change his vote from life imprisonment to death. The ballot showing that the other jurors did so adhere to their former expression of view, he did yield and agree to a verdict carrying the death penalty. By its ruling the trial court practically refused to receive the affidavit in evidence, and its ruling in this regard was fully justified by the law. And it may be added that, even if the facts were legally shown to be as detailed by the juror to defendant's counsel, there would be no ground therein for vacating the verdict.

No other point is made for reversal. We have fully examined the record, and find nothing therein warranting a reversal.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

(172 Cal. 541)

SAN FRANCISCO & O. TERMINAL RYS. v. SUPERIOR COURT OF ALAMEDA COUNTY et al. (S. F. 7795.)

(Supreme Court of California. May 4, 1916. Rehearing Denied June 1, 1916.)

NEW TRIAL ⟸155—POWER TO PASS ON MOTION—STATUTE REDUCING TIME.

Code Civ. Proc. § 660, as amended by St. 1915, p. 202, to reduce the time within which motions for new trial may be heard, by providing that the power of the court to pass on motion for new trial shall expire in three months after the verdict or service of the notice of decision, is limited to proceedings on motion for new trial instituted after the change in the law.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. ⟸155.]

In Bank. Application by the San Francisco & Oakland Terminal Railways for writ of mandate to the Superior Court of Alameda County and Hon. T. W. Harris, judge thereof. Peremptory writ granted.

W. H. Smith, of Oakland, and A. L. Whittle and Frank B. Lorigan, both of San Francisco (Chapman & Trefethen, of Oakland, of counsel), for petitioner. Ostrander, Clark & Carey, of Oakland, for respondents. Clarence N. Riggins, of Napa, amicus curiæ.

ANGELLOTTI, C. J. This is a proceeding in mandamus to compel respondents to hear and determine on its merits a motion for a new trial regularly made by petitioner in an action in said superior court, in which one Theo. C. Forrester is plaintiff and petitioner is defendant. The alleged ground of respondents' refusal to act is that its power to pass on said motion has expired by reason of the provisions of section 660, Code of Civil Procedure, as amended August 8, 1915. St. 1915, p. 202. The matter has been submitted for decision on a demurrer to the petition.

The case of Forrester against petitioner was tried with a jury, and a verdict rendered in favor of Forrester for $8,500 on June 29, 1915. Judgment was entered on said verdict on June 30, 1915. Within the time allowed by law and as extended by stipulation, viz., on July 19, 1915, petitioner duly served and filed notice of its intention to move for a new trial on various grounds, the notice stating that the motion would be made upon a bill of exceptions to be thereafter prepared and served. All this was in accord with the law as it then was. On August 27, 1915, petitioner appealed from the judgment. On November 8, 1915, the bill of exceptions was regularly signed, certified, and filed. The hearing of petitioner's motion for a new trial was then set for November 26, 1915, and was by consent of counsel postponed from time to time until March 15, 1916. On the day last named respondents finally refused to hear and determine said motion on its merits.

Section 660, Code of Civil Procedure, was amended in 1915, the amendment taking effect August 8th, by the insertion, among other things, of this provision, viz.:

"The power of the court to pass on motion for new trial shall expire within three months after the verdict of the jury or service on the moving party of notice of the decision of the court. If such motion is not determined within said three months, the effect shall be a denial of the motion without further order of the court."

This provision has been held to be a valid exercise of legislative power. Lancel v. Postlethwaite, 156 Pac. 486. Prior thereto this section had contained in this regard simply the provision that it still contains one substantially to the effect that the motion for a new trial must be heard at the earliest practicable time after the record is in such condition as to permit its being heard. No express saving clause as to proceedings on motion for a new trial initiated before the taking effect of the amendment is contained in the section. As on March 15, 1916, more than three months had expired after the verdict of the jury, and also after the taking effect of the amendment and the settlement and filing of the bill of exceptions on which the motion was to be heard, it is clear that upon no theory can petitioner now require the superior court to pass on its motion for new trial if the provision quoted is construed as applicable under the circumstances stated. In such event the motion stands denied by reason of the failure of the superior court to act within the time prescribed. The question is whether the provision should be construed as being in any way applicable to proceedings on motion for new trial initiated prior to the amendment, and pending at that time.

By an amendment to another section of our Code of Civil Procedure, also taking effect August 8, 1915 (St. 1915, p. 209), the right of appeal from an order denying a new trial was abolished (section 963, Code Civ. Proc.). It has been held that as to the right of appeal from such an order it is the condition of the law at the time of the denial of the motion for new trial that controls, regardless of whether the proceeding for a new trial was initiated prior to or subsequent to the change in the law. See Woodruff v. Colyear, 156 Pac. 475. This ruling, however, is in no way determinative of the question presented by this application. No question of the giving of anything in the nature of a retroactive effect to a statute was involved, but the order was held to be nonappealable simply because at the time it was made there was no law, constitutional or statutory, authorizing an appeal from or other review of such an order. On the other hand, we have declined to dismiss appeals pending from such orders made prior to the abolition of such right of appeal and taken when the law authorized such an appeal, for the reason that to so do would be to give the change in the statute a retroactive effect not intended by the Legislature. No written opinion was filed to that effect, but such were the rulings from the bench.

The provision of section 660, Code of Civil Procedure, involved in this proceeding is entirely new; nothing of a similar nature having before been included in our statutory provisions relating to motions for a new trial. As said in Lancel v. Postlethwaite, supra, it is a provision "designed to secure a speedy determination of a motion for a new trial, and thus to obviate one of the many delays preceding the review by an appellate court of the proceedings of the trial court," and its effect is to limit the power of a trial court to grant a new trial to a time "within three months after the verdict of the jury or service on the moving party of notice of the decision of the court." We do not think this provision may fairly be construed, as suggested by counsel for respondents, as authorizing a trial court to pass on a motion for new trial pending at the time it went into effect, at any time within three months after it so went into effect, or at any time within three months after the record on which such mo-

tion was to be heard is finally settled. The only time expressed in the provision is "within three months after the verdict of the jury or service on the moving party of notice of the decision of the court." In Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48, subsequent to the entry of judgment the statute fixing the time within which an appeal could be taken therefrom was changed by reducing the time from twelve months from entry to six months from entry. While the appeal there was not taken within six months after the entry of judgment, it was taken within six months after the change in the law took effect, but it was not sustained for this reason. The court squarely held that to apply the statute to judgments entered before it went into effect would give it a retroactive effect, and that the statute gave "no time whatever * * * to appeal in those cases in which judgments had been entered six months or more previously," and, in view of this construction and the consequent cutting off of the right of appeal if the law were construed as retroactive, it was held that the Legislature intended that the operation of the law should be limited to "judgments thereafter entered." This decision is clearly opposed to the suggestion of counsel for respondents that under the provision the trial court had power to pass on the motion within three months after its taking effect, or within three months after the bill of exceptions was settled and filed. Decisions cited by counsel involving statutes shortening the period of limitation for the commencement of legal proceedings (Crothers v. Edison Electric Co. [C. C.] 149 Fed. 606; Garrison v. Hill, 81 Md. 551, 32 Atl. 191), to the effect that the reduced period will be held to commence to run only from the time the change becomes operative, and not from the date the cause of action accrued, concern a somewhat different subject-matter, and are hardly in point on principle. We are here dealing with a provision of law which deprives a court of power to pass on a motion for new trial unless such power is exercised within a specified time after verdict or notice of decision. The time is designated in clear and unequivocal terms, and, if the provision is applicable at all to proceedings pending at the time it became operative, its terms are such, in our opinion, as to preclude a construction to the effect that it did not absolutely take away from a trial court the power to pass on the motion for a new trial after the expiration of three months from the rendition of the verdict or service on the moving party of the notice of the decision of the court, regardless of all other circumstances.

This being the construction that must be given to the provision, we have no doubt that it should not be construed as applicable to proceedings on motion for new trial pending at the time it became operative. Pignaz v. Burnett, supra, is practically controlling as to this. We have already substantially stated the question decided in that case. There was involved the question of the application of a statute shortening the time within which an appeal might be taken from a judgment from one year to six months to judgments entered prior to the taking effect of the statute. The statute contained no saving clause as to judgments entered prior to such time. Holding that, if this statute were to be construed as applicable to such judgments, the effect would be to absolutely cut off at the very instant it went into effect the right of appeal from any judgment entered six months or more previously, the court said:

"Unless it is absolutely necessary, we should not impute such an intention to the Legislature. In view of the construction which has almost invariably been given to statutes of this character, I feel sure that the Legislature intended that its operation should be limited to judgments thereafter entered."

In the case of the provision here involved, if the same be held applicable to proceedings on motion for new trial pending at the time it took effect, the result would be to absolutely cut off at that moment the right of the party to have the determination of the trial court on his motion regularly instituted and prosecuted in all cases where the verdict was rendered or notice of the decision given three months or more before the provision became a law. As said in Pignaz v. Burnett, supra, "no such intention should be imputed to the Legislature unless absolutely necessary." Under the circumstances we are satisfied that it must be held that the operation of the provision in question was intended to be limited to proceedings on motion for new trial initiated after the change in the law. Especially is this true in view of the decision in Pignaz v. Burnett, supra, which, it is only fair to assume, was in the minds of those enacting the provision, and to them declared the rule by which their enactment would be construed by the courts.

Let a peremptory writ of mandate issue in accord with the prayer of the petition.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

172 Cal. 507

PEOPLE v. BANK OF SHASTA COUNTY et al. (S. F. 7306.)

(Supreme Court of California. April 24, 1916.)

TAXATION ⇐⇒386(2)—BANKS—ASSETS — CONSTITUTIONAL PROVISIONS.

Under Const. art. 13, § 14, subd. "c," providing that the shares of capital stock of banks shall be assessed and taxed to the owners thereof, and that there shall be assessed upon such shares an annual state tax of 1 per cent., and that the value of each share of stock in each bank in liquidation shall be taken to be its pro rata of the actual assets of the bank, no tax was chargeable against a fund of $8,731 reported by the superintendent of banks and representing the amount then in his hands after the entire assets of an insolvent bank had been con-

verted in money and he had received moneys from the stockholders on their individual liability and after he had paid out more than the total assets of the bank, since such amount for purposes of taxation was to be deemed to be left over from the voluntary contributions of the stockholders and to constitute no part of the bank's assets, and there was therefore no value in the shares.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 644–647; Dec. Dig. ⊂⇒386(2).]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the People of the State of California against the Bank of Shasta County and W. R. Williams, Superintendent of Banks. Judgment for defendants, and plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and Raymond Benjamin, of San Francisco, for appellant. Hiram W. Johnson, Jr., of San Francisco, and A. A. De Ligne, of Sacramento, for respondents. De Laveaga & Magee, of San Francisco, amici curiæ.

SHAW, J. The plaintiff, by this action, seeks to enforce payment of $540.90 assessed as taxes against the Bank of Shasta County by the state board of equalization, under the supposed authority of subdivision "c" of section 14, article 13, of the Constitution, and section 4 of the act of April 1, 1911 (Stats. 1911, p. 531).

On March 24, 1911, the Bank of Shasta County, being then insolvent, was closed by the superintendent of banks, and he took possession of its assets for purposes of liquidation, under the provisions of the banking act. He proceeded to reduce the assets of the bank to money and realized therefrom $518,260.37. The total indebtedness of the bank amounted to $637,801.08, leaving a deficiency of $119,197.11. He then obtained from the stockholders, on account of their constitutional liability to creditors, the sum of $45,358, making a total fund of $563,618.37 for the payment of debts. Of this fund he had paid to the creditors of the bank, prior to the first Monday of March, 1913, the sum of $554,886.94, leaving the sum of $8,731.43 in his hands at that date.

On the 13th of March, 1913, the superintendent of banks reported to the state board of equalization that on the first Monday of March, 1913, he had on hand assets of the bank amounting to $8,731.43. The state board levied a tax of $540.90 against the supposed assets of said bank, upon the theory that the superintendent had reported assets amounting to $54,089.43. The complaint prays judgment for this sum against the bank and the bank superintendent.

At the trial it was admitted that the report showed only $8,731.43 as assets on hand. The tax rate is fixed at 1 per cent. of the value of the shares. It follows from this admission that the claim for taxes cannot exceed $87.31 in any event. It is claimed by the respondent that this balance of $8,731.43 is not taxable, under the Constitution, as the value of the shares.

Subdivision "c" of section 14, article 13, aforesaid, provides that the shares of capital stock of banks organized under the laws of this state "shall be assessed and taxed to the owners or holders thereof." It then provides as follows:

"There shall be levied and assessed upon such shares of capital stock an annual tax, payable to the state, of one per centum upon the value thereof. The value of each share of stock in each bank, except such as are in liquidation, shall be taken to the amount paid in thereon, together with its pro rata of the accumulated surplus and undivided profits. The value of each share of stock in each bank which is in liquidation shall be taken to be its pro rata of the actual assets of such bank."

The state board was in error in assuming that the balance of $8,731.43 in the hands of the bank superintendent on the first Monday of March, 1913, constituted any part of the assets of the bank, or any part of the shares of the capital stock thereof. The bank being in liquidation, the value of each share was "its pro rata of the actual assets of the bank." It will be seen from the foregoing statement that the entire assets of the bank had been converted into money, and that, in addition thereto, the superintendent had received from the stockholders the sum of $45,358 on their individual liability. The assets and the stockholders' contribution together made up the sum of $563,618.37, in the hands of the superintendent for the payment of debts. When the superintendent made payments out of this fund exceeding the total assets of the bank he began immediately to encroach upon the fund contributed by the stockholders. The stockholders' liability to creditors is direct. So also is that of the bank. The creditors may pursue each independently of the other. But as between the bank and the stockholders, and for the purpose of ascertaining the value of the shares, the bank has the primary liability for debts and its funds must be first exhausted. Hence it follows that the balance of $8,731.43, left after paying $554,896.94 out of the combined fund, must, for purposes of taxation, be deemed to be left over from the contributions of the stockholders. The funds so obtained from them by the superintendent of banks constituted no part of the bank's assets. Williams v. Carver, 154 Pac. 474. Such contributions are not to be counted in ascertaining the value of the shares. The superintendent of banks, under the law as it then existed, had no authority whatever, in his official capacity, to demand contribution from the stockholders on account of this personal liability. Williams v. Carver, supra. In contemplation of law, their contributions were voluntary and the bank superintendent, in accepting the money from them and administering it, was not acting officially, but was their private agent for that purpose. He should not have reported the balance left

of their contributions as part of the assets of the bank. The fact that he did so gave no authority to the state board to assess it, under the constitutional provision, as the value of the shares. If taxable at all, it was to be taxed as money belonging to each stockholder in proportion to his contribution. The bank being in liquidation, the value of each share, according to the constitutional plan for taxation, was its "pro rata of the actual assets of the bank." There were no "actual assets" of the bank in existence, and, consequently, no value in the shares. The court below was correct in its conclusion that no tax was justly chargeable on account of this fund, and in rendering judgment for the defendants.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

172 Cal. 525

O'HARA v. LYNCH et al. (S. F. 6383.)

(Supreme Court of California. July 23, 1915. On Rehearing, May 3, 1916.)

1. FRAUDS, STATUTE OF ⊂⊃129(3)—PART PERFORMANCE—EFFECT.

While part performance of contracts for the conveyance of land is sufficient to lift the bar of the statute of frauds, it does not vary the terms of the contract in other ways, nor relieve it from any other infirmity demanding its condemnation.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 289–291; Dec. Dig. ⊂⊃ 129(3).]

2. SPECIFIC PERFORMANCE ⊂⊃49(2) — INADEQUACY OF CONSIDERATION—STATUTES.

A consideration of $2,000, paid in monthly installments of $30 and $25 each, for a house worth $8,000, of which the rental value was $35 per month, and upon which the vendee had spent only $100 for repairs, was so inadequate, even on taking into consideration the love and affection for which the contract was made, as to justify refusal of specific performance against the vendor's administrator; Civ. Code, § 3391, subd. 1, providing that specific performance shall not be enforced if the vendor has not received an adequate consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 141–151; Dec. Dig. ⊂⊃ 49(2).]

On Rehearing.

3. SPECIFIC PERFORMANCE ⊂⊃49(2) — INADEQUACY OF CONSIDERATION—STATUTES.

Under Civ. Code, § 3391, subd. 1, providing that specific performance of a contract shall not be enforced if the vendor has not received an adequate consideration for the contract and if it is not as to him just and reasonable, the court will not enforce specific performance unless the consideration for the contract is adequate; and the relationship of the parties, and affection existing between them is to be considered.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 141–151; Dec. Dig. ⊂⊃ 49(2).]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Thomas J. O'Hara, as administrator of the estate of Mary Lynch, deceased, against Kate Lynch (Thomas J. Wattson, as executor of Kate Lynch, deceased, substituted) and others. From a judgment for plaintiff, defendant Thomas J. Wattson appeals. Affirmed.

W. P. Johnson, of San Francisco, for appellant. P. F. Dunne and H. H. McPike, both of San Francisco (J. C. Murray, of San Francisco, of counsel), for respondent.

HENSHAW, J. Plaintiff, administrator of the estate of Mary Lynch, deceased, brought his action in ejectment against Kate Lynch to recover possession of improved real estate in the city and county of San Francisco. Kate Lynch answered and likewise filed her cross-complaint, the two pleadings setting forth substantially the same matters. These matters are the following: Mary Lynch acquired the major part of the property in controversy by succession as heir of her husband, who owned it all, and, by purchase, of the other undivided portion of the property from his other heirs. Mary Lynch and Kate Lynch were cousins by marriage, and for many years a warm affection and close intimacy had existed between them. In June, 1898, Mary Lynch expressed to Kate Lynch her desire that Kate Lynch should acquire and own a residence of her own, and made a verbal offer to put Kate Lynch in possession of the premises in question and to sell her the same for the sum of $2,000, to be paid in monthly installments of $30 a month, "and that when said sum of $2,000 should be paid it was agreed that Mary Lynch should execute and deliver to said Kate Lynch a good and sufficient deed conveying to her the aforesaid real property." Kate Lynch so took possession and duly paid the sum of $30 a month until later, when, by oral agreement, this monthly payment was reduced to the sum of $25 a month, which Kate Lynch duly and regularly paid, until at the time of the filing of the cross-complaint in May, 1908, she had paid the sum of $1,470. Mary Lynch, in her lifetime, never expressed her dissatisfaction with or repudiated the contract. After the death of Mary, Kate tendered and continued to tender to plaintiff as administrator of her estate the monthly sum of $25, which the administrator refused to receive and accept as payment under the contract. Relying on this contract, and with the consent of Mary Lynch, she made valuable improvements, and expended therefor the sum of $450, which she would not have expended saving in reliance upon the contract. She has tendered to plaintiff the entire unpaid balance of the contract price, which plaintiff has refused to accept. She sought a decree of specific performance.

The court found the oral contract pleaded; found the entry into possession by Kate

Lynch with the consent of Mary Lynch under the contract; found that the payments were made by Kate Lynch to Mary Lynch under the contract as pleaded; found that Kate Lynch did not expend $450 in improvements, but that she expended small sums for repairs, which in the aggregate did not exceed $100, but that, upon the other hand, Mary Lynch "frequently made and paid for valuable improvements and additions to said premises and paid all taxes levied or assessed upon said premises"; found that the value of the property at the time of this oral agreement and continuously thereafter was and is $8,000. The court also found that the rental value of the premises during the whole period of Kate Lynch's occupancy was $35 per month. The court denied specific performance, and, as by its judgment it has decreed a restitution of the premises to the administrator, it necessarily set aside the oral contract, at least so far as the right of possession was concerned. From this decree defendant has appealed.

Upon the appeal it is argued that, admitting the disparity between the actual value of the property and the contract price, mere inadequacy of price is not alone sufficient in equity to justify the avoidance of such a contract as this, and that in the specific case at bar other considerations enter which, added to the price, remove from the contract whatever sting may be thought to attach to it because of this inadequacy. Those considerations are the love and affection which Mary Lynch bore to Kate, and her expressed desire that Kate should have a home of her own, the entry by Kate into possession under these circumstances, which entry she would not have made saving for the belief that she was taking possession under a good and enforceable contract, the long acquiescence of Mary Lynch in the contract, and her receipt of moneys thereunder, and the fact that the repudiation was not made by her, but by her personal representative after her death. Lying across the threshold of these considerations appellant relies upon the familiar and not to be disputed doctrine that part performance of a parol contract for the sale of land will be held to remove the bar to its enforcement of the statute of frauds.

It is to be noted that, while the court found the existence of the contract as pleaded, there are no findings touching the relations of friendship and love asserted to exist between Mary and Kate Lynch. But this is of slight consequence, since it is at least fairly inferable (fraud or deceit not being charged) that some such consideration moved the vendor to the making of the contract which the court found to exist. And therefore for the purposes of this consideration appellant's contention that such relations did exist will be treated as well founded.

The cross-complaint will be scanned in vain to discover therein any allegation of the adequacy of the consideration moving from defendant to plaintiff's intestate or of the justness and reasonableness of the contract. Yet from the early case of Bruck v. Tucker, 42 Cal. 346, consistently down it has uniformly been held that such averments are essential to a good pleading in equity for specific performance. Only a few of these cases need be cited. Civil Code, § 3391; Stiles v. Kane, 134 Cal. 170, 66 Pac. 231; White v. Sage, 149 Cal. 616, 87 Pac. 193; Kaiser v. Barron, 153 Cal. 788, 96 Pac. 806; Joyce v. Tomasini, 168 Cal. 236, 142 Pac. 67; Young v. Turner Co., 168 Cal. 671, 143 Pac. 1029. But, without pausing to pass upon the insufficiency of the cross-complaint in this respect, but merely calling attention to it, to the end that it may not be thought to be approved by this court, we will pass on to the matter demanding elucidation and settlement.

[1] While it is, of course, true that part performance of contracts for the conveyance of land in certain instances is held sufficient to lift the bar of the statute of frauds, it is equally true that not every act of part performance is sufficient. We need not enter into this consideration, for again it will be assumed for the purposes of this case that the part performance here is sufficient. But precisely what does this mean? It means only that equitable considerations impel the chancellor to say that he will treat the contract as though it were duly written and signed by the parties. It raises an equitable estoppel against a plea of the statute of frauds. In no other respect, however, does it vary the terms of the contract. It does not relieve it from any other infirmity demanding its condemnation. If the consideration be inadequate, it does not make that consideration adequate. If it be unjust or unfair to the vendor, it does not remove that injustice or unfairness. If it shall have been procured through oppression or by fraud, it does not relieve it from these condemning vices. Pomeroy, Eq. Jur. §§ 1034, 1405; Arnold v. Trice, 39 Ga. 511; Weed v. Terry, 2 Doug. (Mich.) 344, 45 Am. Dec. 257; Walker v. Bohannan, 243 Mo. 119, 147 S. W. 1024.

[2] It is quite manifest that the court denied cross-complainant the relief of specific performance under the conviction that the contract of conveyance was without adequate consideration moving to the vendor. Civ. Code, § 3391, subd. 1. Appellant's position herein is that mere inadequacy of consideration is never a ground for a refusal to decree specific performance, unless the inadequacy be of such character (quoting the language of Lord Eldon in Coles v. Trecothick, 9 Vesey Jr. 246) "as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction." Further, appellant argues that this mere inadequacy of price may be supplemented and made good by certain equitable phases which amount to an additional consideration to the purchase money; or, in other words, that in addition to the money, the appellant paid

pretium affectionis. Appellant further contends that this view finds not only general support in the quoted cases, but finds specific support in at least one, and that a very recent case decided by this court, Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817. To this immediate consideration we now address ourselves.

There were many, and there are still some, debatable and disputable propositions touching the granting or withholding of equitable relief. Some that were debatable and over which there was a conflict of authority in equity have been removed from the domain of argument and definitively settled by the provisions of our Code. One of those much debated propositions was whether equity, where specific performance was sought, should deny relief upon the sole ground of the inadequacy of price or other consideration. In the famous and leading case of Seymour v. Delancey, 6 Johns. Ch. (N. Y.) 222, Chancellor Kent applied his great wisdom and learning to the question, and, under an elaborate review of the authorities, held that equity would and should withhold the relief of specific performance for mere inadequacy of price, unconnected with any other consideration; that is to say, an inadequacy of price untainted by fraud, oppression, or other advantage taken. The learned Chancellor's holding in this respect was overruled upon appeal to the Court for the Trial of Impeachments and the Correction of Errors, though it is not amiss to note that no Justice nor Chancellor dissented from the view of Chancellor Kent, and that his decision was overruled by a vote of the Senators. The learned Chief Justice of that court wrote the opinion sustaining the views of Chancellor Kent, and, recognizing that it was a question "upon which very great men have differed and have administered the equity of the court upon diametrically opposite principles," he reached and expressed the conclusion that not only was the weight of authority very heavily against the doctrine condemning mere inadequacy of price as a ground for withholding relief, but he arrayed by name against Lord Eldon, as the protagonist of what he called the later doctrine, many men very learned in equity, and amongst them, and not the least of them, Chancellor Kent himself. Moreover, Chief Justice Savage is at pains to point out that the doctrine announced by Chancellor Kent has been the prevailing practice in courts of equity. It is said by Prof. Pomeroy (6 Eq. Jur. § 790) that:

"The earlier cases were inclined to make mere inadequacy a sufficient hardship to defeat specific performance, but this tendency was checked by Lord Eldon."

Coles v. Trecothick, 9 Vesey Jr. 246, and Mortlock v. Buller, 10 Vesey Jr. 292, are Lord Eldon's cases so declaring. They undoubtedly so declare, but in their facts they were both addressed to contracts growing out of a public auction of the property sold, and to which title was sought to be obtained by this equitable action. Upon the other hand, it is pertinent to point out that, while Lord Eldon's cases were decided early in the last century (1804–1805), later in 1859 the same matter came before the English court in Falcke v. Gray, 4 Drew, 651, where the precise contention was urged upon the court that mere inadequacy of price did not forbid specific performance. The Vice Chancellor, speaking for the court, reviewed the cases, and declared that Lord Eldon's opposing view was based upon the ground that the sale was by auction, and summed up the conclusion in the following language:

"Now, these last two mentioned cases appear to me to be decisive on the point, and I am of the opinion that in the present case I ought to refuse specific performance on the mere ground of inadequacy of price, even if there were none other."

True it is that the learned Prof. Pomeroy declares the rule to be the opposite, and further insists that:

"The doctrine is now settled that mere inadequacy—that is inequality—in value between the subject-matter and the price is not a ground for refusing the remedy of specific performance." 2 Pom. Eq. Jur. § 926.

We have no intention of entering into a discussion of this matter, and no desire to point out the trend of later decisions, since Prof. Pomeroy's most able text was written. But we have deemed it advisable to show that, however well settled the general rule may be conceived to be, there are courts—not a few of high dignity and authority—whose rulings are in flat contrariety to that rule, and this has been said only as preliminary to the declaration that the state of California did adopt the rule of Chancellor Kent, and does not stand alone in so doing. That it did adopt the rule of Chancellor Kent is established beyond controversy by the language of the Code commissioners who formulated our Code section governing the matter. When they cast section 3391 of the Civil Code into its present form, they said, referring to it:

"This rule was expressly adjudged upon full consideration by Chancellor Kent in Seymour v. Delancey, 6 Johns. Ch. (N. Y.) 222, and sustained by Savage, C. J., and nine Senators on appeal, on a point to which such decision was essential, while it was admitted by the Senators who voted for reversal." Haymond and Burch, Annotated Civil Code of California, 1874.

It is therefore put beyond the reach of successful argument that the laws of the state of California declare to its courts of equity that they shall deny the equitable relief of specific performance when they find an inadequacy of price standing alone. Such has been the universal rule of decision in this state, and herein let it suffice, amongst the many, merely to refer to Morrill v. Everson, 77 Cal. 114, 19 Pac. 190, Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548, White v. Sage, 149 Cal. 613, 87 Pac. 193,

and Wilson v. White, 161 Cal. 453, 119 Pac. 895. And it may with propriety be added in explanation of Prof. Pomeroy's text that, while in section 790 of his Equity Jurisprudence he states the rule as above quoted, in the footnote to that section it is recognized that a different rule obtains in California, and Prince v. Lamb, 128 Cal. 120, 60 Pac. 689, is cited in illustration of that rule, with a declaration that the California rule "rests on the provisions of Civil Code, § 3391."

It has been said that appellant, notwithstanding our statutory rule and the observance paid to it in a long and uniform line of decisions, holds that the language of this court in Dore v. Southern Pacific Co., supra, supports his view. It is just that that language should be quoted at length. It is as follows:

"It is a well-established rule of equity that in an action to enforce specific performance of an executory agreement for the sale of land the plaintiff must allege and prove that the consideration received by the other party was adequate, and that the agreement is, as to him, just and reasonable; in other words, that it is not, as to the other party, an unconscionable, inequitable, or hard bargain; that the value of the land and the price to be paid are in reasonable approximation to equality. Civil Code, § 3391; White v. Sage, 149 Cal. 615, 87 Pac. 193; Kaiser v. Barron, 153 Cal. 790, 96 Pac. 806; Stiles v. Cain, 134 Cal. 171, 66 Pac. 231; Bruck v. Tucker, 42 Cal. 353. There are many other cases. If the other party, with knowledge of such inequality as there may be, nevertheless desired to, and freely did, enter into the contract without any unfair advantage being taken of him, it will not be deemed inequitable as to him. The demands of this rule will be considered as sufficiently met by these circumstances."

It would be indeed singular if this court in bank should deliberately contemplate the setting aside of the Code provision and the overruling of our cases following it, and in doing so should have payed such scant consideration to that rule and to those cases, It would be the more remarkable if the learnsideration to that rule and to those cases. had himself designed to do this thing when in his later opinion in Joyce v. Tomasini, 168 Cal. 234, 142 Pac. 67, he reannounces our well-established and familiar rule, and bases it upon the express language of the Code in the following sentence:

"The Civil Code, following the settled doctrine of equity jurisprudence, declares that specific performance of an executory contract cannot be enforced against a party if he has not received an adequate consideration therefor, or if it is not, as to him, just and reasonable. Section 3391."

The truth of the matter is that the court in the Dore Case was not called upon to consider the proposition here advanced, and was not considering it. It was considering the degree or amount of disparity between value and contract price which would establish inadequacy, and it was further considering the nature of the evidence in the case before it establishing value as distinguished from price. It is in this respect not unlike another case to which attention will hereafter be directed. So understood, the declaration amounts to this, that if there be a reasonable approximation to equality between the actual value as found by the court and the price fixed by the contract, the vendor will not be heard to complain of such inconsequential disparity as may be found to exist, but will be bound by the fact that he desired to and did freely enter into the contract without unfair advantage taken of him. This language was, of course, most pertinent to the consideration there before the court, because the question will often arise as to what disparity between value and price amounts to the inadequacy of the statute. And in this connection we may refer, as it was above suggested we would, to Wilson v. White, 161 Cal. 453, 119 Pac. 895. In that case our rule of decision is redeclared, and it is said that, while Prof. Pomeroy lays down the contrary rule, "it is clear, of course, that our statute has made inadequacy of consideration a separate ground for refusing specific performance." There the property was found to be worth $15,000, while the contract price was $14,000, and the question before this court was whether the trial court's determination that this was an inadequate price was supported. The court expressed its doubt as to whether this disparity amounted to the inadequacy of our statute. But in the light of other considerations which showed the dependence of the vendor upon the vendee for his means of information as to the value of his property, the duty of the vendee under the circumstances to give such information, and his withholding of it, there were added grounds which, taken with the difference between the value and the contract price, established the latter's inadequacy. But from any point of view the disparity in the present case is so gross as to require nothing further to support the declaration that it measures up in all respects to the inadequacy contemplated by our Code section, an inadequacy which cannot be made good by considerations of love and affection.

It requires no discussion to support the statement that the contract in this case was executory, and not executed. By the very terms of it, as pleaded by the appellant, her payments were to continue at the rate of $25 per month, and it was no more within the contemplation of the contract that she could pay the money otherwise than in accordance with its terms than that the plaintiff could put her in default by demanding immediate payment of the whole of the remainder of the purchase price.

Appellant finally argues that, even if the contract be unenforceable in equity, yet it is a valid contract in law, and that so long as she conforms to the terms of the contract her possession cannot be taken from her as is done by this decree. Herein reliance is placed upon Manning v. Franklin, 81 Cal. 205, 22 Pac. 550, and Miller v. Waddingham, 91 Cal.

377, 27 Pac. 750, 13 L. R. A. 680. It is quite true that, when parties have submitted themselves and their contract to a court of equity, that court may simply withhold equitable relief, leaving the parties to such remedies as the law affords them. But this is not the limit of the power of equity when litigants have submitted themselves to its jurisdiction. It is fundamental that it will do complete justice between the parties. What equity may do is well declared by Lord Eldon in Willan v. Willan, 16 Vesey Jr. 83, where he says that:

"There were many cases in which the court would not disturb an agreement that has been executed, though it would have refused to carry that agreement into execution; and there were also many cases upon the other point, where, refusing to execute an agreement, it will leave the party to make the most of it at law, where the jury may determine, upon all the circumstances, what shall or shall not be given as damages; and there is a third class of cases in which the court, refusing to carry the agreement into execution, would not stand neuter, but would order it to be delivered up."

In this case the decree of the court, in effect, annuls the contract, and as under its findings it appears that defendant had enjoyed possession of the property for many years, paying therefor a sum less than its rental value, and that this difference between the monthly payments and the rental value far exceeded in amount all that she had expended in the repairs of the property, the decree annulling the contract was not inequitable, and is sustained.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

On Rehearing.

In Bank.

SHAW, J. In this case a rehearing after the decision in department was ordered mainly for the purpose of having the whole court consider and pass upon an important question frequently arising and upon which our decisions seem to be considered uncertain.

[3] There is no difficulty in reaching the conclusion that, under subdivision 1 of section 3391 of the Civil Code, the courts of this state should not enforce specific performance of a contract unless the consideration therefor is adequate. So far the Code declares our law and settles the question. The difficulties will be found in the application of the rule, and chiefly in the determination of what is to be deemed an adequate consideration in each case, under the circumstances surrounding the transaction at the time the contract was made. This is a question upon which the decision of the trial court must, in large measure, control. Much may be learned as to the meaning of the term "adequate consideration," as used in the Code, by a perusal of the opinions of Chancellor Kent in Seymour v. Delancey, 6 Johns. Ch. (N. Y.) 222, and of Chief Justice Savage in the same case on appeal, in 3 Cow. (N. Y.) at page 504, 15 Am. Dec. 270. The Code provision was framed with the intention of restating the rule declared in these opinions. Chief Justice Savage states the opposing doctrines thus:

"The one class maintain that the court will not lend its aid to enforce the performance of contracts unless they are fair, just, and reasonable, and founded on adequate consideration. The other class maintain that, unless the inadequacy of price is such as shocks the conscience, and amounts in itself to decisive and conclusive evidence of fraud in the transaction, it is not of itself a sufficient ground for refusing a specific performance." 3 Cow. 517, 15 Am. Dec. 270.

His own conclusion is summed up as follows:

"On the question of decreeing specific performance of executory contracts, the court of chancery must exercise its discretion; not an arbitrary, but a sound judicial, discretion. If the contract be free from objection, it is the duty of the court to decree specific performance. But, if there are circumstances of unfairness, though not amounting to fraud or oppression, or if the inadequacy of consideration be so great as to render the bargain hard and unconscionable, on either ground the court may refuse its aid to enforce the contract, and leave the parties to contest their rights in a court of law." 3 Cow. 521, 15 Am. Dec. 270.

It will not do to say that the consideration must be held inadequate unless the value of the property at the time of the contract, as the court finds it to be, exactly or even substantially equals the price fixed by the contract. The court must ascertain the value from the evidence, which ordinarily consists mainly of the opinions of witnesses. There are few subjects on which witnesses are more likely to differ than that of the value of property, and few are more difficult of satisfactory determination. Exact accuracy is not to be expected. And after the value is determined the question of adequacy is not necessarily settled thereby; for other circumstances may affect the question. Undoubtedly the relations of the parties, and their love, affection, or regard for each other, as well as the object to be attained by the contract, may be given some effect. Just how far such matters should incline a court, in its sound discretion, to conclude that a price less than the value as found, is nevertheless adequate to justify specific performance, we cannot state by any general formula of words. Nor need we do so in this case; for we cannot say that the court below erred in holding that a price of $2,000 for property worth $8,000 is inadequate under the circumstances. That the vendor had great love and affection for the vendee and was actuated by a desire that the vendee should be the owner of a home, and that a part of the consideration was that the vendee should move her residence from another part of the city where she then resided to the premises in question, are circumstances proper to be considered as tending in some slight degree to show that a price less than the fair value was not inequitable to the vendor and should not be considered inadequate

by a court of equity. But the facts that the vendor, after the sale, continued to pay the taxes and insurance on the property as before, and to make very considerable repairs thereon, and that the price was to be paid in monthly installments of less than the actual monthly rental value of the premises, show that the transaction was, in effect, a gift by Mary Lynch to Kate Lynch, and was practically without any consideration other than love and affection.

We are satisfied with the opinion of Justice HENSHAW, rendered in department, and adhere to the views there expressed.

The judgment and the order denying a new trial are affirmed.

We concur: HENSHAW, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

(29 Cal. App. 641)

UNION TRUST CO. OF SAN FRANCISCO v. ENSIGN-BAKER REFINING CO.

(Civ. 1472.)

(District Court of Appeal, Third District, California. Feb. 10, 1916.)

1. APPEAL AND ERROR ⟸673(2) — EVIDENCE NOT IN RECORD.

In an action on a note, the defense that the same cause of action was pending in another action at the time this judgment was entered, there being nothing in the record to show that such defense was established, cannot be considered in an appeal on the judgment roll alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2873; Dec. Dig. ⟸673(2).]

2. BILLS AND NOTES ⟸495—ACTIONS—MATTERS OF PRESUMPTION.

In an action on a note, where a corporation received the money consideration of the note, it will be presumed that it was for its benefit.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1663–1668; Dec. Dig. ⟸495.]

3. CORPORATIONS ⟸465—NOTES—VALIDITY—ESTOPPEL AS TO DEFECTS—CORPORATE SEAL.

In an action on a note, where defendant corporation received the money consideration, it cannot question the validity of the note on the ground that its corporate seal was not affixed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1822–1826; Dec. Dig. ⟸465.]

4. CORPORATIONS ⟸513(4)—PLEADING—ALLEGATIONS—MATTERS OF PRESUMPTION—AUTHORITY OF OFFICERS.

In an action on a note executed by the defendant corporation, where the complaint shows that the note purports to be the corporate act of the defendant, it was not necessary to allege that the president and secretary were authorized by resolution of the directors to execute the instrument, as it will be presumed that they had such authority, since it is admitted that the corporation for which they assumed to act executed and delivered the note and received the consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2023, 2044; Dec. Dig. ⟸513(4).]

5. EVIDENCE ⟸16—JUDICIAL NOTICE—COMMON KNOWLEDGE—ABBREVIATIONS.

In view of Code Civ. Proc. § 186, in respect of courts and judicial officers, providing that such abbreviations as are common may be used, and that numbers may be expressed by figures in the customary manner, the courts will take judicial notice of the meaning of abbreviations of words commonly used.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 20; Dec. Dig. ⟸16.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Union Trust Company of San Francisco against the Ensign-Baker Refining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Daniel O'Connell, of San Francisco, for appellant. Heller, Powers & Ehrman, of San Francisco, for respondent.

CHIPMAN, P. J. This is an action upon a promissory note. Plaintiff had judgment for $12,500, principal, and $470.83, simple interest, computed at the rate of 6 per cent. per annum. Defendant appeals from the judgment. It is alleged in the complaint that both plaintiff and defendant are corporations organized under the laws of California. The third paragraph of the complaint reads as follows:

"On or about December 15, 1910, at the city and county of San Francisco, state of California, the defendant for value received, to wit, the sum of twenty thousand (20,000) dollars then and there loaned and advanced by the plaintiff to the defendant, made, executed and delivered to the plaintiff its promissory note, of which the following is a copy:

" '$20,000.00.

" 'San Francisco, Cal., December 15, 1910.

" 'One day after date, without grace, for value received, Ensign-Baker Refining Company (a corporation) promises to pay to the order of the Union Trust Company of San Francisco (a corporation) at its office in this city, the sum of twenty thousand dollars, in United States Gold Coin, of the present standard of weight and fineness, with interest thereon in like Gold Coin, from date until paid, at the rate of six per cent. per annum, payable monthly, and if not so paid, to compound and become a part of the principal, and bear interest thereafter at the same rate.

" 'Ensign-Baker Refining Co.

" 'By E. J. Ensign, Pres.

" 'By L. E. Ensign, Secy.' "

It is further alleged that the sum of $7,500 and no more has been paid on account of the principal of said promissory note and interest to and including June 30, 1913, and no more, leaving a balance unpaid upon the principal of $12,500 and interest thereon from June 30, 1913, "at the rate of 6 per cent. per annum, payable monthly and compounded," no part of which said principal sum of $12,500 and no part of any interest accruing since said June 30, 1913, had been paid. The complaint is verified. Defendant interposed a general demurrer on the ground that the complaint fails to state whether or not said president and secretary were authorized by said corporation to execute and deliver said promissory note; that the complaint does not state that any money received in exchange for said promissory note was used for the benefit of

said corporation; that the complaint is uncertain; and that it does not set forth any authorization of said president and secretary to make, execute, or deliver said promissory note. The demurrer was overruled, and defendant answered. The answer admits the corporate capacity of plaintiff and defendant; admits the execution and delivery of said promissory note as alleged in paragraph 3 of the complaint, but "denies that any more than $7,500 of principal, and interest at the rate of 6 per cent. and no more is due upon said note," and denies that there is any compound interest due. As a further answer defendant alleges that another action was commenced by plaintiff upon this same promissory note prior to the commencement of this present action, in which certain named persons, other than defendant, are defendants; that said action went to trial, and judgment from which an appeal has been taken to the Supreme Court, and execution was stayed by proper undertaking, and defendant alleges that said judgment is a bar to the further prosecution of this action. The judgment from which the present appeal was taken recites that the cause came on regularly for trial on February 16, 1914.

"The defendant did not appear, and was not present either in person or by attorney or counsel. Thereupon proof was made to the satisfaction of the court that more than five days' notice of trial, and that the action would be tried on this day, has been given to the defendant and its attorney, Daniel O'Connell, Esq. Thereupon the action was tried upon the issues joined by the complaint and answer on file herein, and the evidence, oral and documentary, was taken on behalf of plaintiff in support of the allegations in the complaint; and the plaintiff by its attorneys having waived its claim of compound interest and consented that interest might be computed at simple interest at the rate of 6 per cent. per annum, thereupon the court found that the plaintiff was entitled to recover," etc.

The judgment also recited that findings of fact and conclusions of law were waived by defendant's failure to appear or be represented at the trial. The appeal necessarily is on the judgment roll alone.

[1] The defense that the same cause of action was pending in another action at the time this judgment was entered cannot be considered, for there is nothing in the record to show that such defense was established. The only question raised by the demurrer that we can consider concerns the alleged insufficiency of the complaint to state a cause of action, and the grounds on which insufficiency is claimed are that the complaint fails to state that the president and secretary of plaintiff corporation were authorized to execute and deliver the promissory note sued upon and the complaint does not state that any money received in exchange for said note was used for the benefit of the defendant corporation.

[2, 3] It is alleged, and admitted by the demurrer, that defendant, "for value received, to wit, the sum of $20,000, loaned and advanced by plaintiff to defendant," executed and delivered to plaintiff the promissory note of which a copy is set out in the complaint. If the corporation defendant received the money, it will be presumed that it was for the benefit of the corporation. It plainly appears that the transaction was between the two corporations in their corporate capacity, and plaintiff corporation advanced the money to defendant corporation, which was the "value received" by the latter for executing the promissory note. The copy shows that the corporate seal of defendant was affixed to the note, and, even if it had not been, the defendant, having received the money, could not question the validity of the note on that ground.

[4] The objection that there was no averment in the complaint that the president and secretary were duly authorized to execute the note is without merit. The complaint shows that the promissory note purports to be the corporate act of defendant, and it was not necessary to allege that the president and secretary were authorized by resolution of the directors to execute the instrument. It will be presumed that they had such authority, since it is admitted that the corporation, for which they assumed to act, executed and delivered the note and received the consideration. It was said in Malone v. Crescent City etc., Co., 77 Cal. 38, 42, 18 Pac. 858, 859:

"The contract is signed, 'The Crescent City Mill & Transportation Company, by J. Wenger, President.' If the president, as such, had no authority to enter into the contract, it was a matter of defense. The allegation that the defendant made the contract is sufficient, certainly as against a * * * demurrer."

[5] Nor is there any merit in the contention that the abbreviations used to designate the official capacity in which the president and secretary signed the note were insufficient to show such official capacity. Courts take judicial notice of the meaning of abbreviations of words commonly used. This is the rule in respect of courts and judicial officers (Code Civ. Proc. § 186), and is the rule applied in ascertaining the meaning of words shortened in common use by abbreviating them. Estate of Lakemeyer, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96. In this case the court said:

"Abbreviations form, indeed, part of language, and do not differ essentially in their nature from words, which, like them, are themselves merely signs of thoughts."

It seems to us that the admissions implied by the demurrer substantially answer the objections upon which it purports to rely. In its answer, after demurrer overruled, defendant admitted the execution of the note; admitted that it had paid a considerable part of it; admitted that there was still due $7,500; and admitted that it received the full consideration, the amount stated in the promissory note. There was perhaps enough in the answer to require proof of the amount remaining unpaid and the interest to be al-

lowed, but these were the only facts for the court to determine.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(30 Cal. App. 91)

UNION TRUST CO. OF SAN FRANCISCO v. DICKINSON et al. (Civ. 1471.)

(District Court of Appeal, Third District, California. March 7, 1916.)

1. GUARANTY ⇐=81—REMEDIES OF CREDITORS —LIMITATIONS—"AT ONCE."

Where a written guaranty provided that upon default of the debtor the creditor may, at his option, proceed directly and at once against the guarantors to collect, the words "at once" not being used in the sense of "immediately," but clearly intended only to emphasize the right to proceed against the creditors as though they were principal debtors, a delay of less than 4 months after the default in bringing suit on the guaranty did not constitute fatal laches.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 96; Dec. Dig. ⇐=81.

For other definitions, see Words and Phrases, First and Second Series, At Once.]

2. GUARANTY ⇐=30—CONSTRUCTION OF CONTRACT—PARTIES.

Where the name of the creditor appeared in the body of the contract of guaranty and the guarantors signed their names at the foot of the instrument, the names of all the parties intended to be bound by contract were sufficiently identified.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 30–32; Dec. Dig. ⇐=30.]

3. CORPORATIONS ⇐=513(4)—PLEADING—COMPLAINT—AUTHORITY OF OFFICERS.

In an action on a written guaranty of a debt evidenced by a note executed by the officers of a corporation a complaint which did not state that the officers who executed the note were authorized was not demurrable; it being an evidentiary fact and matter of defense.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2023, 2044; Dec. Dig. ⇐=513 (4).]

4. GUARANTY ⇐=82(3)—REMEDIES OF CREDITORS—PLEADING PARTIES.

In an action on written guaranty of an obligation evidenced by a note, as the instrument of guaranty constituted the sole contract of the defendants, it was not necessary to join the maker of the note as a party defendant in an action against the guarantors.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 97; Dec. Dig. ⇐=82(3).]

5. GUARANTY ⇐=77(2)—REMEDIES OF CREDITORS — CONDITIONS PRECEDENT — MUTUAL ACCOUNTS.

In an action on a written guaranty involving the loan of a certain sum of money and the payment of a certain sum, it not being a case of "mutual accounts" in the strict technical sense of that phrase, the amount loaned being alleged, the note as evidence of the loan being set up and the amount paid by the borrower on account definitely stated, an accounting was not necessary before suing.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 89; Dec. Dig. ⇐=77(2).]

6. EVIDENCE ⇐=352(1) — DOCUMENTARY EVIDENCE—MINUTE BOOK OF CORPORATION.

In an action on a written guaranty of a debt evidenced by a note, the minute book of the debtor corporation, kept as required by Civ. Code, § 377, and vouched for by the president, defendants as guarantors of the corporation not being "third parties," was admissible in evidence to show that the note set out in the complaint was executed by officers of the corporation by its authority, duly authenticated by a resolution adopted by its board of directors.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1398, 1399; Dec. Dig. ⇐=352 (1).]

7. BILLS AND NOTES ⇐=489(6)—MATTERS TO BE PROVED—ADMISSIONS BY PLEADING—EXECUTION OF NOTE.

Where the execution of a note was admitted by the pleadings, proof of the fact of the due execution of the obligation was unnecessary.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1611–1616; Dec. Dig. ⇐=489(6); Pleading, Cent. Dig. § 1325.]

8. PLEADING ⇐=126 — ANSWER — NEGATIVE PREGNANT.

In an action on a written guaranty of an obligation evidenced by a note, an allegation in the answer, in admitting the due execution and delivery of the note, declares that the alleged copy set forth in a paragraph of the complaint is not correct, involving a negative pregnant, in that it itself virtually admits the execution and delivery of a note for the amount which the pleaded note calls for, is defective and tenders no issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261–263; Dec. Dig. ⇐=126.]

9. PLEADING ⇐=122 — ANSWER — STATUTORY PROVISIONS.

In an action on a written guaranty of an obligation evidenced by a note, the answer, admitting the due execution and delivery of the note, and declaring that the defendants have no copy of the note or no recollection of the words and phrases as stated in the complaint, and have no other information on the subject sufficient to enable them to answer such allegations more specifically, and placing their denial upon that ground, denying that the alleged copy set forth in the complaint is a correct copy of the note, is not strictly the statutory denial provided in Code Civ. Proc. § 437, subd. 2, providing that if the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer and place his denial on that ground.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249–252; Dec. Dig. ⇐=122.]

10. PLEADING ⇐=376—ADMISSION IN ANSWER —BURDEN OF PROOF.

Where the answer expressly admitted the execution of an instrument of guaranty as pleaded in the complaint, plaintiff was relieved of the burden of proof that a defendant joined in the instrument of guaranty.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225–1227; Dec. Dig. ⇐=376.]

11. APPEAL AND ERROR ⇐=712—PROCEEDINGS NOT IN THE RECORD.

Where there is no record of proceedings culminating in the filing of a supersedeas bond, the court has no record knowledge of its filing or of its conditions, and will not authorize the entry of judgment against the sureties on the bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2951–2954; Dec. Dig. ⇐=712.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Union Trust Company of San Francisco against E. C. Dickinson and others. From a judgment for the plaintiff and from an order denying a motion for new trial, defendants appeal. Affirmed.

Daniel O'Connell, of San Francisco, for appellants. Heller, Powers & Ehrman, of San Francisco, for respondent.

HART, J. This action was instituted by the plaintiff to recover on a certain guaranty executed by the defendants, guaranteeing the payment of any and all indebtedness, not to exceed $20,000, which the Baker-Ensign Refining Company, a corporation, might at the time of the execution of the guaranty or at any time thereafter owe to the plaintiff. Judgment was awarded the plaintiff in the sum of $12,500 and accrued interest, the sum of $7,500 having been paid on the note previously to the commencement of this action. This appeal is by the defendants from the judgment and the order denying them a new trial. The complaint alleges:

"On or about the 10th day of December, 1910, at the city and county of San Francisco, state of California, the defendants made, executed, and delivered to the plaintiff for valuable consideration a certain instrument in writing whereby the said defendants jointly and severally guaranteed to the plaintiff unconditionally and at all times the prompt payment in United States gold coin of the then present standard of weight and fineness of any and all indebtedness which said Ensign-Baker Refining Company, then doing business at 24 California street, San Francisco, might then or at any time thereafter owe to the plaintiff to the extent of and not exceeding the sum of $20,000, and said written instrument contained certain other promises and agreements on the part of the defendants, and each of them, to and with the plaintiff, all of which promises and agreements are fully set out in the said instrument in writing, a true copy of which is hereto annexed and is hereby made a part of this complaint in the same manner as if the same were fully set forth herein."

On the 15th day of December, 1910, so the complaint further alleges, said Ensign-Baker Refining Company made, executed, and delivered to the plaintiff its promissory note for the sum of $20,000 to evidence the loan of said sum by the plaintiff to the said refining company. Said note is set out in hæc verba in the complaint, and is made payable one day after date. The complaint alleges the payment of $7,500 on said note, alleges that there is unpaid and due the plaintiff on said note the sum of $12,500 and interest, and prays for judgment against the defendants and each of them for the amount so remaining unpaid on the principal, with interest. The written guaranty contains the following clause:

"Upon any default of the debtor, said Union Trust Company of San Francisco may, at its option, proceed directly and at once against the undersigned to collect the full amount of the liability hereunder, or any portion thereof, without first proceeding against the debtor or foreclosing upon, selling or otherwise disposing of any collaterals it may have as security for such indebtedness."

The defendants demurred to the complaint on both general and special grounds. Thus it is urged that the complaint does not state sufficient facts, that the Ensign-Baker Company should have been joined as a defendant, and that the complaint is defective in failing to disclose an accounting to ascertain the balance due to plaintiff on the note, such an accounting, so it is claimed, being necessary.

The principal points made under the demurrer, however, are that the plaintiff lost its right of action on the guaranty by a failure to bring an action thereon immediately upon the note falling due, to wit on the 16th day of December, 1910, this action having been commenced on the 15th day of October, 1913, or 2 years and 10 months after the note became due and payable, that there are certain defects in the form of the written guaranty and that the complaint is defective in not stating that the promissory note of the corporation was authorized by resolution duly and regularly adopted by its board of directors.

[1] The first point—that of laches—arises from the construction put upon the above-quoted part of the instrument of guaranty by the defendants, the claim being that the plaintiff, to avail itself legally of the option given it by the guaranty to proceed directly against the guarantors, should have done so immediately upon the note falling due and the default of the maker in satisfying it at that time, and that, having failed so to proceed, it lost its right to sue on said obligation. We do not agree to the construction thus given the instrument sued on. The clause of the guaranty above quoted was merely intended to authorize the plaintiff, if it so elected, to proceed against the guarantors directly and without first looking to the principal debtor for the extinguishment of the obligation and without seeking to recover satisfaction thereof by resort to any collateral security which may have been pledged for its payment. The words "at once," as used in the instrument of guaranty, and which are interpreted to mean that the intention was that the plaintiff, if it elected to exercise the option to sue the guarantors, should proceed upon the guaranty *immediately* upon default by the maker of the note in the payment thereof, or forfeit any benefit which it was to derive from the guaranty, were clearly intended only to emphasize the right intended to be vested by the instrument in the plaintiff to proceed against the guarantors as independent obligors or, in effect, as the guaranty clearly contemplates, as though they were the principal debtors. Moreover, the complaint alleges that the refining company paid the $7,500 on the principal and—

"all interest thereon accruing up to and including the 30th day of June, 1913, and no more, leaving a balance unpaid on the principal sum of said promissory note of the sum of $12,500 and interest thereon from and after the 30th day of June, 1913," etc.

Either the failure by the maker of the note to pay the full amount on said 30th day of June, or its failure to pay the balance on some date subsequent thereto and before the commencement of this action, constituted the default which authorized the plaintiff, under the express terms of the guaranty, to proceed directly against the guarantors, and giving the words "at once" the interpretation ascribed to them by the defendants, it would be unreasonable to hold that a delay of 1 or 2 months, or at the most less than 4 months, after the default in bringing the suit on the guaranty constituted laches fatal to the right of the plaintiff to maintain an action on that instrument.

The defendants have in their briefs cited many cases which thy assume sustain their position as to the claim of laches on the part of the plaintiff in bringing this action. It is not necessary to review those cases herein. It is enough to say that none of them has any application to the present case. They undoubtedly state the true rule applicable to guarantors and indorsers of promissory notes and the rule requiring the plaintiff, where he proceeds against an indorser or guarantor, to show by his complaint, as essential to the statement of a cause of action in such case, an excuse for what may, on its face, appear to be an unreasonable delay in making a demand for the payment of the money due on the obligation. For illustration, in the case of Jerome v. Stebbins, 14 Cal. 457, it is said (quoting the syllabus):

"An indorser of a note payable on demand, no demand being made until 13 months after the indorsement to plaintiff, is prima facie, not liable."

The court held that the delay of 13 months in making demand for payment was unreasonable, but that if there were any circumstances legitimately excusing the delay, they constituted an essential part of the plaintiff's case, and should therefore have been alleged in the complaint. See Johnson v. Santa Clara County, 28 Cal. 547, and Daley v. Russ, 86 Cal. 114, 117, 24 Pac. 867, both cases holding that a valid excuse for unreasonable delay in the performance of an act required of the plaintiff by contract must be pleaded by the plaintiff when suing upon the contract. Obviously, as stated, those cases have no bearing upon or relevancy to the question presented here and now under discussion. The defendants here, by their instrument of guaranty, bound themselves to an independent and unconditional obligation; that is, an obligation whereby they bound themselves to stand for the default of a third party regardless of whether the obligee could or could not secure satisfaction from such third party. In brief, and paraphrasing the language of the guaranty, the guarantors in effect said to the plaintiff:

"Advance money to the refining company in any sum required by it, and we will, upon the default of the company in the payment thereof, ourselves repay the money so loaned, without regard to the obligation of the company to pay or any collateral it may pledge to you to secure the debt, and you may, upon such default, proceed against us directly for the satisfaction of the debt as fully as though we were the principal debtors."

Thus it will be observed that, as above stated, the plaintiff in this case was not required, as a condition precedent to the exercise of the right to proceed against the guarantors, as was true in the case above cited and also in the case of Penniman v. Hudson, 14 Barb. (N. Y.) 579 (cited by the defendants), in which the guarantors guaranteed the payment of certain debts of a certain firm due to the creditor upon the condition that the latter was not able, by *due and legal diligence*, to collect the same from the firm, to look first to the principal debtor and use all reasonable diligence to secure from it satisfaction of the indebtedness.

[2] There is certainly no merit in the second point urged against the guaranty, viz., that it is defective as such an obligation because the names of the guarantors do not appear in the body thereof. As is suggested by counsel for the plaintiff, the operative words of the guaranty are "the undersigned hereby guarantee unto said Union Trust Company of San Francisco, its successors and assigns unconditionally and at all times the prompt payment," etc., and to the instrument and at the foot thereof are subscribed the names of the defendants. We are aware of no rule of law which, to bind the parties to a contract, imperatively requires the names of all such parties to be inserted in the body of the instrument. If the contract shows, by some reference, who the parties to the contract are and so sufficiently identifies them, it is sufficient. Browne on Stat. of Frauds, § 372. The body of the instrument sued on here contains the name of the party to be guaranteed, and the names of the defendants subscribed at the bottom of the instrument show who the guarantors are. Thus the instrument clearly contains and sufficiently shows the names of all the parties intended to be bound by the contract.

The case of Williams v. Lake, 2 El. & E. 349, 121 Eng. Rep. 132, cited by the defendants, involved an action on a guaranty. The court held it not to be a sufficient agreement, because, while the instrument was signed by the guarantor, "it turns out to be in blank so far as regards the name of the party to be guaranteed." Some general observations then follow as to the essentials of a valid agreement, and among these is that it should contain the names of both parties thereto. That case, however, contains no statement which supports the proposition that a contract of guaranty is not sufficient to bind the guarantors where the name of the guarantee appears in the body of the instrument and the guarantors have signed their names at the foot of the instrument, identifying themselves as parties thereto by

referring to themselves in the body thereof as "the undersigned." What more should be required to make it perfectly clear that the Union Trust Company of San Francisco and the "undersigned" are all the parties to the agreement we are unable to conceive. No more is required of the ordinary promissory note, whose validity cannot justly be questioned because the name of the maker is not, eo nomine, stated in the body of the instrument. Indeed, contracts are not uncommon where a party thereto, particularly the promisor, without stating his name in the body thereof, refers to himself therein in the first person by means of the appropriate personal pronoun or by the words, "the undersigned," and it would be absurd to say that the person signing such contract at the foot thereof is not the person thus referred to and who so intended to bind himself to the terms of the agreement as one of the parties thereto.

[3] The next point urged under the demurrer is that the complaint itself is fatally defective in that it omits to state that the execution and delivery of the promissory note concerned here was authorized by a resolution of the board of directors of the corporation. The point is not well taken. Whether the corporation did or did not authorize the execution and delivery to the plaintiff of the note involves an evidentiary fact, which it would be contrary to the very first rules of good pleading to aver in the complaint. If the officers of the corporation who signed and executed the note had no legal authority to do so, that fact is or was a matter of defense. Malone v. Crescent City M. & T. Co., 77 Cal. 38, 42, 18 Pac. 858. The note as pleaded purports to be the corporate act of the corporation—

"and it was not necessary to allege that the president and the secretary were authorized by resolution of the directors to execute the instrument." Union Trust Company of S. F. v. Ensign-Baker Refining Co., 157 Pac. 613.

[4] Nor was it necessary to join the maker of the note as a party defendant to this action, as defendants further contend. As shown above, the instrument of guaranty constituted solely the contract of the defendants. The refining company, although the maker of the note, the payment of which is guaranteed by the defendants, is not a party to the agreement of guaranty, by which the guarantors invested the plaintiff with the right or option to proceed against them upon their guaranty, upon default in the payment of the note or any portion thereof by the maker, and this independently of the liability of the maker.

[5] The contention that the action cannot be maintained because there was no accounting had to ascertain the balance due the plaintiff is not tenable. The transaction between the plaintiff and the corporation out of which this action grows involves the mere matter of a loan of a definite sum of money and the payment of a certain sum in part satisfaction thereof. It is not a case of "mutual accounts" in the strict technical sense of that phrase, nor does the transaction involve circumstances of great complication. The amount loaned is alleged, the evidence of the loan (the note) set out and the amount paid by the borrower on account thereof definitely specified and stated. The ascertainment of the balance due on the note was capable of ready ascertainment in this action without any other or further accounting than might be involved in the proof of the note and of the payment or payments made thereon.

[6-9] The remaining assignment involves an attack upon certain rulings admitting certain evidence. The first of these objections relates to the admission in evidence of the minute book of the Ensign-Baker Company for the purpose of showing that the promissory note set out in the complaint was executed by the officers of the corporation by the authority of the latter, duly authenticated by a resolution adopted by its board of directors. We think the book constituted proper and competent means for proving the adoption by the board of directors of the resolution authorizing the borrowing of the money from the plaintiff and the execution of the promissory note as evidence of the loan. C. A. Eaton, the secretary of the corporation at the time of the trial, testified that he was not such officer of the corporation at the time of the transaction referred to, but that his predecessor, L. E. Ensign, turned the minute book containing a record of said transaction over to him (Eaton) when he took possession of the office of secretary, and that said minute book was the only book which contained the minutes of the proceedings of the board of directors on the occasion of the adoption of the resolution authorizing the transaction. E. J. Ensign, father of L. E. Ensign, and president of the corporation during the time his son was secretary, identified his own signature, as president, to the minutes of the proceedings of the directors on the occasion mentioned as preserved in the book admitted in evidence, and identified the signature of his son thereto as secretary. We think this evidence was sufficient to justify the ruling admitting the book in evidence for the purpose of showing the authority for the execution of the note. The law requires such records to be kept by a private corporation (section 377, Civ. Code), and we can conceive no just reason why they should not be admissible, at least as prima facie proof of an act which is an essential predicate of a corporate transaction of the character of the one here. It is true that the entries in the books of a corporation showing its transactions are, as a general rule, not admissible against or binding upon third parties. We do not, however, look upon the defendants as "third parties." They in substantial effect, by their contract of guaranty, made themselves the principal debtors. But there is another reply to the objection in

the fact that the defendants, in their answer, substantially admit the due execution of the note, and in such case proof of the fact of the due execution of the obligation is wholly unnecessary and, indeed, supererogatory. It is true that the answer, in connection with the admission of the due execution and delivery of the note, declares that the defendants have no copy of the note and no recollection of the "words and phrases" of the note as set out in the complaint—

"and having no other information upon the subject sufficient to enable them to answer said allegations more specifically, and placing their denial upon that ground, they deny that the alleged copy set forth in paragraph 4 of said complaint is a correct copy of the promissory note."

But this allegation is defective and tenders no issue upon that question because: (1) It involves a sort of negative pregnant, in that it itself virtually admits the execution and delivery by the refining company to the plaintiff of a promissory note for the amount for which the pleaded note calls; (2) the purported denial that the note as pleaded is a correct copy of the note executed is not, strictly, the statutory denial where the allegation is based upon a want of information or belief upon the subject to which the allegation is addressed. Section 437, subd. 2, Code Civ. Proc.; Cook v. Suburban Realty Co., 20 Cal. App. 538, 541, 129 Pac. 801.

[10] It is next contended that the plaintiff failed to prove that the defendant Dickinson, joined in the making of the guaranty. But the answer expressly admitted the execution of the instrument of guaranty as pleaded in the complaint, and hence, as last above suggested, the plaintiff was relieved of the burden of proving that fact.

There were some other rulings upon the evidence to which exceptions were reserved at the trial and objections urged here, but they are not deemed to be of sufficient importance to call for special notice herein.

It appears from respondent's brief that the defendants, on taking the appeal to the Supreme Court in this case, attempted to give a stay bond, but the attempt proved futile because of the failure of the sureties to justify when excepted to. Thereafter the defendants, it is likewise made to appear, applied to the Supreme Court for a writ of prohibition to restrain the execution of the judgment, but the application was disallowed. The Supreme Court, however, made an order to show cause why a supersedeas should not be granted and, upon hearing the matter, held that the sureties on the stay bond had failed to justify conformably to law, and that therefore the bond filed in the superior court was of no force or effect, and thereupon ordered that a supersedeas should issue, and that all proceedings on the judgment should be stayed pending the appeal, upon the condition that the defendants file in the Supreme Court a new bond with sufficient sureties, to be approved by the judge of the superior court. Respondent's brief declares that the defendants thereupon gave a new bond in the penal sum of $26,000, and that the same was approved as prescribed by the order requiring it to be filed.

[11] We are now asked that we expressly authorize the entry of the judgment, if it be affirmed, against the sureties on the supersedeas bond above referred to. We cannot do this. Assuming that the course suggested would be warranted in a proper case, there is no record in this court of the proceedings culminating in the filing of the supersedeas bond, and we, therefore, have no record knowledge of the filing of said bond and know nothing of its conditions. The request must therefore be denied.

For the reasons herein stated, the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(30 Cal. App. 114)

PEOPLE ex rel. SMITH v. GUNN.

(Civ. 1521.)

(District Court of Appeal, Third District, California. March 10, 1916.)

OFFICERS ⇐56—APPOINTMENT OR ELECTION—CONSTITUTIONAL AND STATUTORY PROVISIONS—"REMOVAL FROM OFFICE."

Const. art. 20, § 4, provides that all officers whose election or appointment is not provided for by the Constitution, and all officers whose offices are thereafter created, shall be elected by the people or appointed, as the Legislature shall direct. The Legislature elected to make the office of county auditor elective. Pol. Code, § 4018, provides that, where the duties of two offices have been consolidated, the board of supervisors may provide that the duties of each office shall be performed by a separate person; section 4041, subd. 19, empowers the board to fill by appointment all vacancies occurring in any county office, except the office of supervisor, etc.; and section 996, prescribing how vacancies may occur, by subdivision 4 provides that a vacancy occurs upon an incumbent's removal from office. The board of supervisors separated the duties of the office of county auditor from the duties of the office of county recorder, and declared that the incumbent in the consolidated office, duly elected thereto, should fill the office of recorder, and that the office of auditor should be vacant, and appointed the relator to such office. *Held*, that the separation of the duties of the auditor and recorder was not a "removal from office," and that the board had no authority to appoint to the office of auditor, as the only mode provided to fill such office was by an election.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 85; Dec. Dig. ⇐56.

For other definitions, see Words and Phrases, First and Second Series, Removal.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Quo warranto by the Attorney General, on relation of Camillus R. Smith, against H. L. Gunn. Judgment for relator, and defendant appeals. Reversed.

Percy S. King and Clarence N. Riggins, both of Napa, for appellant. U. S. Webb, of San Francisco, and Frank M. Silva, of Napa, for respondent.

CHIPMAN, P. J. Action in quo warranto, involving the office of auditor of the county of Napa. The board of supervisors of said county, on January 5, 1885, duly passed Ordinance No. 9, section 1 of which was as follows:

"Section 1. The duties of the offices of auditor and recorder of Napa county are hereby consolidated, and the person elected to fill such offices must discharge all the duties pertaining to both such offices."

The court found that Ordinance No. 9 "is still in full force and effect, except in the particulars hereinafter stated." It is then found that, on November 10, 1915, the said board duly passed Ordinance No. 91, as follows:

"Section 1. It appearing to this board that the public interest will be best subserved thereby, this board does hereby elect to separate the duties of the office of auditor from the duties of the office of recorder, heretofore consolidated, without reconsolidation.

"Sec. 2. This board having elected to separate the duties of said offices, heretofore consolidated, without reconsolidation, the duties of the office of auditor and the duties of the office of recorder shall hereafter be performed by a separate person.

"Sec. 3. The incumbent, in the said consolidated office of auditor and recorder, shall continue to fill the office and perform the duties of the office of recorder, and the office of auditor shall be filled by appointment by this board on and after this ordinance shall take effect.

"Sec. 4. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

"This ordinance shall take effect and be in force 30 days after its final passage."

The court also found that, since December 10, 1915, Ordinance No. 91 "has been and still is in full force and effect." The court made the following findings:

"V. That section 3 of said Ordinance No. 91 provides as follows: 'The incumbent, in the said consolidated office of auditor and recorder, shall continue to fill the office and perform the duties of the office of recorder, and the office of auditor shall be filled by appointment by this board on and after this ordinance shall take effect.'

"VI. That thereafter, to-wit: on or about the 21st day of December, A. D. 1915, the said board of supervisors, by a resolution duly and regularly passed at a regular meeting of said board of supervisors, declared that a vacancy then and there existed in the said office of auditor of the county of Napa, in said state of California, which said resolution is in the words and figures following, to wit:

" 'Whereas, this board of supervisors has heretofore passed and adopted an ordinance separating the office of auditor from the office of county recorder; and whereas, said ordinance is now in force and effect:

" 'Be it resolved the board adjudge and determine that a vacancy does by reason of such separation now exist in the office of auditor.'

"VII. That after the passage of said resolution declaring a vacancy in the office of auditor of Napa county as aforesaid, and on said 21st day of December, 1915, the said board of supervisors of Napa county duly and regularly appointed the plaintiff, Camillus R. Smith, auditor of said Napa county."

It is then found that the said Smith, on or about December 29, 1915, duly qualified as said auditor, reciting the steps taken to effect such qualification; that, on or about January 3, 1916, the said Smith "demanded in writing of the said Gunn that he deliver over to him the said Camillus R. Smith, the said office of auditor," the books, documents, records, etc., pertaining to said office of auditor, which the said Gunn refused to do, and "the said H. L. Gunn did then and there and thereupon usurp, intrude into and unlawfully hold and exercise said public office of auditor * * * against the said Camillus R. Smith, the duly appointed and qualified auditor of said Napa county as aforesaid"; that, prior to January 3, 1916, defendant did not usurp or intrude into or unlawfully hold or exercise the public office of auditor of said county. Finding XII is as follows:

"That at the general election held throughout the state of California on the 3d day of November, 1914, H. L. Gunn, the defendant herein, was duly and regularly elected to the offices of recorder and auditor of the county of Napa, state of California. That he duly and regularly qualified as such and entered upon the performance of the duties of said offices, and continued to lawfully exercise the same until said 3d day of January, 1916, as aforesaid."

As conclusions of law the court found that defendant Gunn—

"was not on January 3, 1916, and has not at any time been since, and is not now, entitled to hold or exercise or perform the duties of the office of auditor of the county of Napa, * * * and that on said 3d day of January, 1916, he usurped and intruded into the same, * * * and that said defendant H. L. Gunn should be immediately excluded from said office, * * * and that said plaintiff, Camillus R. Smith, was and now is the duly appointed and qualified auditor of said county of Napa, on the 3d day of January, 1916, and ever since has been and now is entitled to the possession of said office."

Judgment was accordingly entered, from which defendant appeals.

The action taken by the supervisors in passing Ordinance 91 was under section 4018 of the Political Code, which provides that, where the duties of two offices have been consolidated, the board may by ordinance—

"elect to separate the duties so consolidated * * * without reconsolidation, and provide that the duties of each office shall be performed by a separate person, whenever, in their discretion, the public interest will best be subserved thereby."

The facts as found by the court show that the consolidation of the offices of auditor and recorder occurred some years prior to the passage of Ordinance 91, and that when this ordinance was enacted the defendant was the duly elected, qualified, and acting auditor and recorder, having been chosen by the votes of the electors at the general election in November, 1914. That the county auditor and recorder are elective officers, made so by the Legislature, is not disputed. Section 5, art. 11 of the Constitution, provides that:

"The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of su-

pervisors, sheriffs, county clerks, district attorneys, and such other county, * * * officers as public convenience may require," etc.

Section 4, art. 20, is as follows:

"All officers or commissioners whose election or appointment is not provided for by this Constitution, and all officers or commissioners whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct."

In a certain sense, the officers referred to in section 5, art. 11, or officers other than those whose election or appointment is not provided by the Constitution, referred to in section 4, art. 20, are not usually called constitutional officers. But they are created by authority of the Constitution, and, except that their election or appointment is not specifically provided for by the Constitution, are as much constitutional officers as are those thus provided for. The one class must look to the Constitution for the mode of their election or appointment, while the other class must look to the provisions made by the Legislature under the authority of the Constitution. The class of county officers to which the county auditor belongs is composed of officers who are by the Legislature made elective.

Section 4021 of the Political Code provides that:

"All elective county and township officers, except otherwise provided for in this title and by law, shall be elected at the general election at which the Governor is elected. * * * All officers elected under the provisions of this title shall hold office until their successors are elected or appointed and qualified. * * *"

Among the county officers so classified by section 4013, some are made elective by act of the Legislature, and others, for example, fish and game warden, are appointed by the supervisors (section 4149b); fish and game commissioners, the Governor appoints (section 344); live stock inspectors, supervisors appoint (section 4149).

But respondent contends that section 4018 of the Political Code confers authority upon the board to separate the duties of auditor and recorder, and to provide that the duties of each office shall be performed by a separate person, and that, having taken such action, a vacancy necessarily occurred, which the board may fill under subdivision 19, § 4041, of the Political Code. This section empowers the board to fill by appointment all vacancies that may occur in any county office except the offices of judge and supervisor. In short, the contention is that the board may create the vacancy and then proceed to fill it. This contention, it seems to us, is not maintainable. Section 996 of the Political Code provides how vacancies may occur. None of the nine enumerated "events," upon the happening of which before the expiration of the term will cause a vacancy, can be said to apply to the case here.

Respondent calls attention to the fourth subdivision, which says that a vacancy occurs, referring to an incumbent, "upon his removal from office," and asks, "Has not appellant been 'removed from office,' as provided by the Legislature?" Unhesitatingly we answer that the separation of the duties of auditor and recorder, as provided for in section 4018, is not in any sense a "removal from office," as contemplated by section 996. In Rosborough v. Boardman, 67 Cal. 116, 7 Pac. 261, it was held that the power of the supervisors to appoint petitioner depended upon there being a vacancy, and an office becomes vacant only upon the happening of any of the events enumerated in section 996 of the Political Code, among which the event relied on in that case is not mentioned. In People v. Ward, 107 Cal. 236, 40 Pac. 538, the court pointed out that the rule in the Rosborough Case could not be safely applied in all cases, for the Legislature, as was shown, had added to the list of "events" which would work a vacancy. People v. Ward, supra, at page 241 of 107 Cal., 40 Pac. 538. But there is nothing said in that case to justify respondent's claim that section 4018 furnishes such an "event." The court said, in People v. Ward:

"The power of the * * * supervisors * * * is limited to the filling of vacancies. That power could [be exercised solely] upon an existing vacancy. The board could by its action neither create a vacancy, nor by anticipation fill one, which was to arise in futuro during the term of its successor."

One may ask why and upon what authority the board elected to declare the office of auditor to be vacant, and not that of recorder? The board may separate the duties of the two officers, but the offices remain undisturbed. The office of recorder still existed, and there was an incumbent chosen, as the Legislature had provided—by the electors at a general election. There is certainly no express authority given in section 4018 to appoint an auditor, and none to treat the office as vacant, and we do not think that any such authority can be held to have been given by implication.

People ex rel. Rynerson v. Kelsey, 34 Cal. 470, was a case in quo warranto. At that time the Constitution required that assessors and collectors of town, county, and state taxes shall be elected, etc. Rynerson was elected sheriff of San Joaquin county, September 6, 1865, and duly qualified as such sheriff. The statute devolved upon the sheriff the duties of tax collector of the county. He duly qualified as such collector, and entered upon his duties as sheriff and ex officio tax collector. Kelsey was elected county treasurer at the same election. Subsequently, April 2, 1866, the Legislature passed an act making the county treasurer ex officio tax collector, to take effect from and after the first Monday in March, 1867. Pursuant to the act, Kelsey, as county treasurer, entered upon the duties of tax collector, excluding the sheriff therefrom. It was held that:

"The Legislature might repeal the law devolving the duties of tax collector upon the sheriff, and thereby deprive the sheriff of the right to perform the duties of tax collector, provided such repeal does not, in effect, abolish the office

of tax collector; but it does not follow that the Legislature has the power of conferring the duties of tax collector on any of the county officers or person not elected to the office by the electors of the county."

The court said:

"Unquestionably the Legislature may by law provide that the county treasurer, sheriff or any other county officer shall perform the duties of tax collector; but the law devolving such ex officio duty upon any county officer, must precede the election of such officer, so that the electors of the county may have an opportunity under the law of selecting the person or officer charged with the duties of tax collector. * * * It is not pretended a vacancy had occurred in the office of tax collector, nor that such vacancy had been in any legal manner declared on the first Monday of March, 1867, the day upon which said statute, by its terms, took effect, and respondent entered upon the duties of tax collector and excluded appellant therefrom. The statute was not enacted for the purpose of filling a vacancy in the office of tax collector actually existing or prospective. Its design is to make the treasurer of San Joaquin county ex officio tax collector, instead of the sheriff. This the Legislature could not accomplish until after a treasurer had been elected, under the law, by the qualified electors of the county."

Cited in Mills v. Sargent, 36 Cal. 382, holding the act operative as to future elections. Cited, also, to the effect that an officer may be deprived of ex officio position as tax collector, but not during his term, in Swinnerton v. Monterey County, 76 Cal. 116, 18 Pac. 135. See, also, People v. Wells, 2 Cal. 198; Christy v. Board of Supervisors, 39 Cal. 3.

Respondent claims that the case of People v. Kelsey, and other cases cited by appellant, were not applicable, "because, under the Constitution of 1849, the office of tax collector was a constitutional office, and the Constitution provided that a tax collector should be elected by the people." The present Constitution makes the auditor elective or appointive as the Legislature may direct, and the Legislature has directed that it be elective. Having thus conferred the power upon the Legislature to provide the mode of choosing that officer, and the Legislature having acted, the mode so provided and so determined by the Legislature becomes for the time being the only mode of selection. The principle of the Kelsey Case, it seems to us, governs here, and while the supervisors were acting within the power given them to separate the duties of auditor and recorder, the board had no authority to appoint some person other than the incumbent, or any person for that matter, to fill that office. Obviously this must be so, inasmuch as the only mode provided by law to select an auditor is by election by the people.

Section 4017 of the Political Code provides for the consolidation by the supervisors of the duties of several different county officers, to wit:

"Sheriff and tax collector; auditor and recorder; county clerk, auditor and recorder; county clerk and recorder; county clerk and auditor; treasurer and tax collector; treasurer and recorder; * * * district attorney and coroner; sheriff and public administrator."

Section 4018 authorizes the board to "separate the duties so consolidated." It is easily conceivable that, under the powers here given, if the supervisors can lawfully do what is here attempted, they might make any office of their selection appointive, at least for the time being, by vacating that office, or separating its duties, and thus remove the incumbent selected by the people. Thus the supervisors could separate the duties devolved upon the district attorney and coroner as consolidated, and declare the office of district attorney, filled by the vote of the people, vacant, and appoint a successor.

Of course, it is not to be presumed that a public officer will violate his duty or act in bad faith in its discharge. The supervisors might conscientiously believe, and so act on their belief, that they would best subserve the interests of the people by so separating the duties or so consolidating them in a given case as to make necessary the appointment of persons of their own selection rather than those chosen by the people. The temptation to do this might be strong, and be supported by the best judgment of the supervisors. We do not think the statute should be so construed as to allow either their judgment or temptation to be so far gratified as to allow them to declare a vacancy and fill it by appointment under the guise of subserving the public interest. It is safer and, we think, better that the principle enunciated in the Kelsey Case, supra, should be followed and the choice of the electors remain undisturbed until they may have an opportunity at the next election to fill the offices in accordance with the separation of duties as declared by the supervisors.

Respondent cites Kinsey v. Kellogg, 65 Cal. 111, 3 Pac. 405, as a case "that comes nearer to the case at bar than any other in California." In that case it appeared that by the act of February 28, 1876 (St. 1875–76, p. 81), it was provided that:

"The county clerk * * * shall receive for all services required of him as county clerk and ex officio clerk of the district court, probate court, board of supervisors, board of equalization, auditor and ex officio county recorder, a salary of $5,000 per annum, which salary shall be in full for all services required of and performed by him."

In 1880 Humboldt county passed into class 2. Prior to the election of plaintiff as county clerk the supervisors did not consolidate the office of county clerk with those of recorder or auditor, or either of them. But on July 8, 1882, the board consolidated the offices of recorder and auditor by ordinance duly published before the election in November of that year. At that general election plaintiff was elected clerk and defendant recorder and ex officio auditor of Humboldt county. Plaintiff entered upon the discharge of the duties of county clerk on the first Monday of January, 1883, and defendant commenced to act as recorder and auditor on the 8th day of January, 1883, and so continued to discharge

the duties of his office. On February 8, 1883, the board fixed the salary of the clerk at $2,700. After he had served one month he demanded of defendant a warrant for the sum of $416.66 (one-twelfth of $5,000) for the preceding month, which was refused, and he brought mandate to compel the issuing of the warrant. The lower court refused the writ and plaintiff appealed. In dealing with the situation the Supreme Court said:

"Here, when the act of 1876 was passed, there was a person who was discharging the duties of clerk, recorder and auditor, and unless subsequent legislation should require otherwise, one person would continue to fill the three separate offices. It was to this condition of things that the law was made applicable, and the compensation provided by it was provided as compensation to the clerk, the recorder and the auditor. The law did not determine how much should be paid to each of the three officers—a matter of no consequence so long as the three offices were in one man. But when the organization of the county government was changed, and the person who was clerk was not auditor nor recorder, it is clear that no one of the three officers was entitled to receive the compensation intended for the three; and as the act of 1876 did not provide for the event, the act, by force of its own expressions, became inoperative when the event occurred. As there was no operative law fixing the compensation of the county clerk after Humboldt became organized as a county of the second class, the board of supervisors had authority to fix the compensation of that officer. Pol. Code, § 4046, subd. 18. Judgment affirmed."

It will at once be seen that the power exercised by the supervisors in the present case was not involved in the Humboldt county case. There the clerk and the auditor and recorder each was elected after the passage of the ordinance, and each continued to discharge the duties of the office to which he was elected. The act of 1876 was no longer operative, and the court very properly held that the supervisors could fix the salary of the clerk, the only question involved.

Our conclusion is that the learned trial court was in error in its view of the statute.

The judgment is reversed.

We concur: BURNETT, J.; HART, J.

30 Cal. App. 170

ROUNTREE et al. v. MONTAGUE et al.

(Civ. 1742.)

(District Court of Appeal, First District, California. March 22, 1916. Rehearing Denied by Supreme Court May 18, 1916.)

1. HOMESTEAD ⇐150(1) — PROBATE HOMESTEAD—WIDOW'S RIGHT—STATUTE.

Under St. 1860, pp. 311, 312, §§ 1, 4, providing for a probate homestead consisting of any quantity of land, together with a dwelling house thereon, not exceeding $5,000 in value, where a widow, then residing upon decedent's lands, filed her petition for a probate homestead, after order was made granting it to her, and appraisers appointed by the court had segregated 51.98 acres and set it apart, she was entitled to homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 294–301; Dec. Dig. ⇐150(1).]

2. HOMESTEAD ⇐150(2) — PROBATE HOMESTEAD — ACQUIESCENCE IN ORDER SETTING ASIDE.

Where an order was made under the Probate Act (St. 1850, p. 387) § 125, limiting a homestead to the widow and providing that it should not exceed 20 acres in extent, at a time when a widow had remarried, the quantity of land set apart being in excess of the 20 acres permitted by the act, such facts could not, after 50 years had elapsed, deprive her of the benefits she received; the order of the probate court never having been appealed from.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 302–305; Dec. Dig. ⇐150(2).]

3. JUDGMENT ⇐812(1) — IN REM — BINDING FORCE.

Proceedings in probate for the settlement of estates of deceased persons are in the nature of proceedings in rem, and judgments therein, so far as they relate to the disposition of the property of the estate, are binding upon those interested.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1435, 1436, 1441, 1442; Dec. Dig. ⇐812(1).]

4. JUDGMENT ⇐504(3)—COLLATERAL ATTACK —"JURISDICTION"—ERROR IN JUDGMENT.

Where a court has jurisdiction, mere error in its judgment will not vitiate the decree, unless appealed from; jurisdiction being the power to hear and determine, and not depending upon the correctness of the decision made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 946; Dec. Dig. ⇐504(3).

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

5. HOMESTEAD ⇐150(2) — PROBATE HOMESTEAD—REVIEW OF DECREE.

Where the probate court, in the matter of a widow's application for probate homestead, had power to make the order setting it aside to her, its decree can be reviewed only by direct appeal therefrom.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 302–305; Dec. Dig. ⇐150(2).]

6. HOMESTEAD ⇐150(2) — PROBATE HOMESTEAD—REVIEW OF DECREE.

Such rule is not changed by the fact that error does not appear on the face of the decree.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 302–305; Dec. Dig. ⇐150(2).]

7. WILLS ⇐782(13) — ELECTION — PROBATE HOMESTEAD — RIGHT OF WIDOW — SPECIFIC DEVISE.

Where testators' will contained nothing to show that he intended the specific devise of a life estate in his lands to his wife to be in lieu of any rights which she might acquire under the statutes making provision for a probate homestead to her as his widow, she was entitled to such a homestead, though the premises out of which it was carved were specifically devised to her for life, the right of a surviving wife to a probate homestead being an independent right which she has in addition to any other right of property which the law gives her, whether acquired under her husband's will or otherwise, his power to create a life estate being subordinate to her right to a homestead.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2032; Dec. Dig. ⇐782(13).]

8. EXECUTORS AND ADMINISTRATORS ⇐383—SALE OF PROPERTY—COLLATERAL ATTACK.

Where no appeal was ever taken from orders of the probate court granting the family allowance, or from the orders authorizing or confirming the sales of parcels of testator's land made to pay debts of the estate, of which the amount due for family allowance was but a part, the sales of the land could not be attacked

after 50 years on the ground that they would have been unnecessary had testator's wife not insisted upon payment of the family allowance accruing subsequent to her remarriage, since, if any errors were committed in granting the orders, appropriate action should have been taken at the time.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1554; Dec. Dig. ⇐383.]

9. Fraud ⇐58(1)—Proof.

Fraud, when charged, must be clearly proved.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 55; Dec. Dig. ⇐58(1).]

10. Executors and Administrators ⇐176—Homestead ⇐150(1)—Family Allowance and Probate Homestead.

Both a widow's claim to family allowance and to probate homestead are strongly favored in California law.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 661–666; Dec. Dig. ⇐176; Homestead, Cent. Dig. §§ 294–301; Dec. Dig. ⇐150(1).]

11. Conspiracy ⇐19—Sufficiency of Evidence.

In an action to quiet title, evidence *held* insufficient to show that the award of family allowance to a widow, made after her remarriage to a defendant, was pursuant to a fraudulent conspiracy of the widow, decedent's executor, his attorney, and the defendant to defeat the remaindermen after the widow's life estate.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. ⇐19.]

12. Judgment ⇐375—Vacation—Fraud.

A judgment or decree of a court of competent jurisdiction can be set aside for fraud only when the fraud alleged is shown to be extrinsic or collateral to the matter tried and determined, such as results from (1) keeping the unsuccessful party away from the court by a false promise of compromise; (2) purposely keeping him in ignorance of the suit; (3) where an attorney fraudulently pretends to represent a party and connives at his defeat; (4) or, being regularly employed, corruptly sells out his client's interest.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 712; Dec. Dig. ⇐375.]

13. Wills ⇐782(13)—Election—Statutory Right—Probate Homestead—Estoppel.

Where neither by the terms of testator's will nor otherwise was his widow expressly or impliedly put to an election between a devise to her of a life estate in his lands and her right of probate homestead, such widow and her second husband were not estopped from claiming that after she took a life estate under the will she acquired the fee in the area segregated to her as a probate homestead against the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2032; Dec. Dig. ⇐782(13).]

14. Wills ⇐792(1)—Election—Devise and Statutory Rights.

Where testator's widow was put to an election by his will, whether to take the life estate devised her or the statutory probate homestead, she took under the law, and not under the will, when, immediately following her husband's death, she instituted proceedings to gain a homestead and secure a family allowance, though a tract was attempted to be distributed to her under a void decree of distribution at a time when she believed she had acquired the entire premises under the homestead and the decree of sale.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2049, 2063; Dec. Dig. ⇐792(1).]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Harrison H. Rountree and others against W. W. Montague and others. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Judgment and order reversed.

J. A. Cooper, of San Francisco, P. L. Benjamin, of Oakland, and Walter H. Linforth, of San Francisco, for appellants. S. F. Leib and Edwin A. Wilcox, both of San Jose, for respondents.

LENNON, P. J. In this action the plaintiffs sought and recovered a judgment quieting their alleged title to a certain tract of land situate in the county of Santa Clara and consisting of some 200 acres. The plaintiffs are the heirs of Elizabeth Rountree, and their claim of title to the lands in suit is based upon allegations to the effect that they succeeded to the same as the remaindermen mentioned in the last will and testament of one Philip Southworth. The defendant W. W. Montague, who is in possession of the lands in suit, answering the plaintiff's complaint, disclaimed any interest in a certain designated 32½ acres of the whole tract, and affirmatively admitted that the title to such acreage was in the plaintiffs under the terms of the will referred to, but he denied that the plaintiffs have any interest of title in or to any part of the remainder of the lands in suit. The judgment of the lower court was rendered and entered for the plaintiffs, and this appeal is from that judgment and from an order denying the defendant a new trial.

The pleaded and proven facts of the entire case are practically undisputed, and may be substantially stated as follows: Elizabeth Mary Montague, the deceased wife of the defendant W. W. Montague, was at the time of her marriage to the latter the widow of Philip Southworth, to whom she had been married in February, 1856. At that time Southworth was the owner of the land in question, and it was his separate property at the time of his marriage. Upon his marriage and down to the time of his death—which occurred on the 31st day of December, 1860—he and his wife resided upon said lands. Southworth left a last will and testament dated April 1, 1858, by the terms of which his widow was appointed executrix, and Joseph C. Vandervoort and George I. Bragg executors. Both the widow and Vandervoort renounced their right to serve. Thereafter, on the 3d day of January, 1861, the will was admitted to probate and Bragg was appointed sole executor thereof. By the will Southworth directed that his personal property be sold, and that out of the proceeds thereof his sister, Lydia H. Rountree, should be paid the sum of $10,000, and his wife the sum of $15,000. The estate proved insufficient to satisfy either of these bequests after the payment of

the expenses of administration, and accordingly they were not paid. In addition to this bequest to his wife the will of Southworth devised to her a life interest in the lands in controversy, with remainder to her issue, and in the event of no issue, remainder over to the children of Lydia H. Rountree, the sister of Southworth.

On March 12, 1908, some 50 years after the making of the will, Mrs. Southworth (who subsequently became the wife of the defendant) died without issue. The plaintiffs in the action are the children and grandchild of Lydia H. Rountree. Upon ascertainment the fact of Mrs. Montague's death and before the commencement of this action the plaintiffs made a written demand upon the defendant W. W. Montague as an individual and as executor of the will of Elizabeth M. Montague, deceased, for the surrender of the possession to the plaintiffs of the 200 acres of land in suit. Montague refused to comply with the demand, and thereupon the plaintiffs brought this action.

The refusal of the defendant to comply with the demands of the plaintiffs was based upon the rendition and entry of certain decrees in probate made during the administration of the estate of Philip Southworth, wherein all of the lands in suit excepting 32½ acres (title to which was disclaimed by the defendant) were either segregated and set apart to Southworth's widow as a homestead, or were sold to pay the expenses of the administration of the estate and the debts of the deceased. The portions of the land in suit so sold were purchased by Montague and subsequently by him conveyed to his wife, from whom he now derives his claim of title. The defendant, as an additional source of title, also claims that upon the death of Southworth the entire 200 acres vested absolutely in his widow under the Homestead Act in force at that time. As a further defense to the action the defendant insists that it is barred either by the statute of limitations or under the doctrine of laches. In opposition to these claims of the defendant the plaintiffs assert and insist that Mrs. Montague, as the surviving wife of Southworth, took under the terms of the will a life estate in a portion of the premises; and accordingly they contend that when Mrs. Montague accepted this life estate she was, under the familiar doctrine that a person cannot take under and against the terms of the same will, precluded from acquiring the fee in any portion of the 200 acres under the subsequently acquired homestead; and, further, that by accepting the life estate under the will she thereby created the relation of life tenant and remaindermen between herself and the plaintiffs in the entire 200 acres, and was thereafter forever precluded from converting her life estate in any portion of the premises into a fee, with the resultant destruction of their rights in the estate as remaindermen. It is further urged upon behalf of the plaintiffs that any right or estate beyond the life estate acquired by Mrs. Montague inured to the benefit of plaintiffs as remaindermen; that Mrs. Montague's possession under the will was the only rightful one; and that the plaintiffs, being merely contingent remaindermen, not only had no right during her lifetime to the possession of the premises, but had no cause of action therefor until Mrs. Montague died without issue.

The probate decrees under which the defendant Montague claims title to the lands in suit are assailed by the plaintiffs as being void and ineffectual for any purpose upon several grounds. In this behalf it is asserted that the decree attempting to segregate the homestead was void as being in excess of the probate court's jurisdiction, which excess, it is claimed, appears upon the face of the decree itself; that the probate decrees directing and confirming the sales of certain portions of the property for the purpose of paying the debts and expenses of administration, were in fact had for the payment of Mrs. Montague's claim for family allowance which had accrued after her marriage to Montague, and that said sales were void because of the alleged collusion of the executor and his attorney and Mr. and Mrs. Montague in procuring the sales and decrees to be made for the purpose of paying such claim. In this connection it is argued for the plaintiffs that their right of action for the possession of the lands in suit under these alleged circumstances was not barred by the statute of limitations nor by the doctrine of laches, irrespective of any relationship of life tenant and remaindermen existing between Mrs. Montague and the plaintiffs.

Under the first of these contentions, viz., that the Montagues were estopped from advancing a claim to a fee in any part of the 200 acres under the probate decrees after she took the benefit of a life estate under the will, plaintiffs in no wise attack those decrees, but on the contrary, and for the purpose of their argument, assume them to be valid and free from defect. They base their right to recover, in addition to the claim of fraud (which they also urge in an independent argument against the validity of the decrees), upon the ground that Mrs. Montague's equitable obligations and duties to the remaindermen precluded her from taking advantage of them, and that the defendant, as her representative and successor in interest, is likewise estopped from interposing the bar of the statute. These are in substance the issues which were presented to the trial court for determination; and they are now before this court for review.

We will first discuss the effect of the decree of the probate court in segregating and setting apart to Mrs. Montague while she was the widow of Southworth a probate homestead of 51.98 acres, and also the effect of the decrees ordering and confirming the sales

of the two parcels of 78 and 32½ acres, respectively, for the payment of claims against the estate of Southworth, and the title acquired thereunder by his widow.

With reference to the probate homestead it will be noted that on the 25th of February, 1861, Mrs. Southworth, by her attorney, J. Alexander Yoell, filed her petition in due form in the probate court for an order setting apart to her a probate homestead. In the petition she recited the fact that she claimed to have a homestead in the whole of the 200 acres, which had been appraised at $15,000. The reason for the application for the probate homestead was no doubt due to the fact that claims against the estate had been presented far in excess of its value, and that the estate was apparently hopelessly insolvent. Two days after the filing of her petition the probate court made an order setting apart to her as the widow of Southworth "so much of said premises in a compact form together with the dwelling house of said deceased situate thereon, as are of the value of $5,000," and in the same order the court appointed the county surveyor and two other persons to set apart, survey off, and segregate said homestead out of the premises here in question—the 200 acres being specifically described in the order. In May of the same year the surveyors made a report to the effect that they had surveyed and segregated 51.98 acres of the 200-acre parcel, which report was accompanied by a map describing and locating it, and the report added that the portion so segregated did not exceed in value the sum of $5,000. Thereafter one J. W. Owen, an attorney appointed by the probate court to represent absent heirs, made and filed his objections in writing to the report of the appraisers upon the ground that the widow could not take the homestead, for the reason that she was given a life estate in the premises under the will, and therefore it would be inconsistent to permit her to take the 51.98 acres as a homestead. No action, it seems, was ever taken upon this objection further than to transmit it to the superior court for hearing and determination. After considerable delay—the reason for which is not disclosed by the record—the court, on the 4th day of October, 1862, made an order confirming the report of the appraisers, in which it referred to the former action of the court setting aside the homestead. Some two months prior to the making of the order last referred to Mrs. Southworth had married the defendant W. W. Montague, and the court in confirming the order referred to her as "Elizabeth Mary Montague, widow of said Philip Southworth." The order of confirmation described the premises as contained in the report of the appraisers, and made no change in the homestead boundaries.

As before stated, it is the claim of the defendant Montague that the title to the 51.98 acres vested in Elizabeth Mary Southworth by reason of this decree, and he claims through her thereunder. Plaintiffs deny that any title was created in the 51.98 acres so segregated and set apart by or under this order, for the reason that the rights of the applicant had lapsed under the general homestead act at its date; and for the further reason that, viewed as a decree purporting to segregate a probate homestead under the probate act, it was void in two essentials, viz.: (1) That it was not set apart to the widow of Southworth, the applicant being married at the time to the defendant Montague; and (2) that the land so segregated was not limited to an area of 20 acres, both of which essentials were required by the statute.

This argument is predicated upon the theory that the probate homestead was not finally set apart until the order confirming the report of the appraisers had been made; and it was upon this theory that the trial court found and concluded that the homestead was set apart under the probate act, and not under the act of 1860, which had been repealed.

[1] If the applicant took title under the original order of the probate court, there is no question but that the title vested in her absolutely. At the date of the death of Southworth and at the time the petition for a probate homestead was filed the act of 1860 (Stats. 1860, p. 311), providing for a probate homestead, was in force. Sections 1 and 4 of the act provide for a homestead consisting of a quantity of land, together with the dwelling house thereon, not exceeding in value the sum of $5,000. When the widow of Southworth filed her petition for a probate homestead, and after the original order was made granting it, and when the appraisers had segregated and set it apart, she was beyond question entitled to a probate homestead under this act. No objection was raised at that time, and none could be raised, as to the sufficiency of her petition. She was then the widow of Southworth and was residing upon the land in question. The act of 1860 contained no limitation as to the quantity of land that might be segregated and set apart; the only limitation at that time being that the value of the land set apart should not exceed the sum of $5,000. The language of the order was that the homestead "be set apart"; and the effect of such order was to vest title thenceforth in the widow; and in our opinion the order confirming the survey and appraisement merely ascertained and fixed the boundaries to which the original order of the court applied.

[2, 3] Irrespective of this question, and assuming, as counsel contends and as the trial court found, that the final order confirming the report was the one under which title vested, and that it was made under the probate act limiting a homestead to the widow, and providing that it should not exceed 20 acres in extent, still the fact that the appli-

cant had ceased to be the widow of Southworth at the time the final order was made, though she was such widow at the time of her application and the making of the original order, and that the quantity of land set apart was an amount in excess of that which the act permitted, cannot at this late date deprive her of the benefits she received under the decree of the probate court. The order was never appealed from; and it has been held in numerous cases by our Supreme Court that an order setting apart a homestead is appealable, and that the right to have it reversed for error is lost by failure to appeal. Proceedings in probate for the settlement of estates of deceased persons are in the nature of proceedings in rem; and judgments therein so far as they relate to the disposition of the property of the estate are binding upon the parties interested. Kearney v. Kearney, 72 Cal. 591, 15 Pac. 769.

[4, 5] The only question to be considered upon the hearing of an application for a probate homestead is: Did the court have authority to determine the subject-matter of the controversy and jurisdiction over the thing proceeded against? Jurisdiction is the power to hear and determine, and it does not depend upon the correctness of the decision made. The court having jurisdiction, mere error in its judgment will not vitiate the decree. The court, in the matter of the application for the probate homestead under consideration here, had power to make the order, and its decree can only be reviewed by a direct appeal therefrom. It has accordingly been held that an order setting apart to a widow without limitation a part of a farm as a homestead, which was in fact the separate property of the deceased, is erroneous but not void; and if the time for an appeal from the order has expired and no appeal has been taken, the title to the homestead under the order vests in the widow in fee-simple absolute. Estate of Bette, 153 Pac. 949; Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938; In re Moore, 96 Cal. 522; Estate of Huelsman, 127 Cal. 275, 59 Pac. 776.

[6, 7] Nor does the fact that error appears upon the face of the decree alter or change the rule; and there is no merit in the contention that the widow was not entitled to a homestead for the reason that the premises out of which it was carved were specifically devised to her for life. Estate of Lahiff, 86 Cal. 151, 24 Pac. 850; Estate of Vance, 100 Cal. 425, 34 Pac. 1087; Estate of Firth, 145 Cal. 236, 239, 78 Pac. 643; Estate of Huelsman, supra. There is nothing in the will of Southworth to show that he intended the specific devise of a life estate to his wife to be in lieu of any rights which she might acquire under the statutes making provision for a probate homestead to her as his widow. The right of a surviving wife to a probate homestead is an independent right which she has in addition to any other right of property which the law gives her, whether acquired under her husband's will or otherwise. Estate of Firth, supra. And the power of Southworth to create a life estate in or to any part of his property was subject and subordinate to the right of the widow to a homestead. Sulzberger v. Sulzberger, 50 Cal. 385.

We come now to a consideration of the legal effect of the sales in probate of those portions of the lands in controversy that were sold in payment of debts, consisting of two parcels of the 200-acre tract, viz., one of 78.57 acres, and the other of 35.50 acres.

[8] The theory of the plaintiffs in attacking these sales is that had the late Mrs. Montague not insisted upon the payment of the family allowance accruing subsequent to her marriage, the sales would have been unnecessary. Assuming this to be true (although the record does not support this contention), no appeal was ever taken from the orders granting the family allowance, or from the orders authorizing or confirming the sales made for the purpose of the payment of debts of the estate, of which the amount due for family allowance was but a part. What we have said concerning the decree setting apart a probate homestead applies with equal force to the decrees confirming the sales. If any errors were committed in the granting of the same, appropriate action should have been taken at the time of their making, and failing in this the effect of the orders cannot now be assailed. Estate of Nolan, 145 Cal. 559, 79 Pac. 428; Tobelman v. Hildebrandt, 72 Cal. 315, 14 Pac. 20.

The matter of the necessity of the sale was shown in the petition, and such necessity was a matter for the court's determination. It must be held, therefore, that the title that Mrs. Montague thus acquired to the three hereinbefore mentioned portions of the premises in controversy divested the contingent remaindermen of any interest therein, unless it can be said that such title was founded in fraud and conspiracy, as alleged by the plaintiffs.

[9-11] The charge of fraud is rested primarily upon the fact that the award of the family allowance to Mrs. Montague was made after her marriage to the defendant Montague. In support of the charge of fraud and conspiracy it is argued that the record of the administration of the estate of Southworth shows upon its face that the executor, his attorney and the defendant Montague were all guilty of collusion with the life tenant to defeat the remaindermen when they recognized her demand for a family allowance after she had ceased to be the widow of Southworth. The fact that the family allowance was kept alive after her marriage to Montague does not tend in itself to prove the fraud and conspiracy claimed, for at that early time no decision had ever been rendered by our Supreme Court to the effect that

an order for the payment of family allowance ceased upon the marriage of the widow. Moreover, as opposed to the charge of fraud is the significant fact that the marriage of Mrs. Montague was not concealed from the probate judge making the order. To the contrary, it affirmatively appears that the order was made with full knowledge of this fact, for she is referred to therein as the wife of Montague. As we have previously indicated, no witnesses were called to substantiate the charge of fraud or conspiracy set forth in the plaintiff's complaint; and if there is any foundation for those charges and the findings of the court supporting them, it must appear from the probate records of the Southworth estate which are before us. No other evidence of any kind of fraud was offered to show that either the widow or her attorney ever willfully, wrongfully, and fraudulently conspired to acquire title in fee simple to the lands in controversy. Alleged suspicious circumstances without number appearing, it is claimed, upon the face of the probate record and showing fraud, are enumerated in the briefs of counsel for the plaintiffs, and from these it is argued that fraud is conclusively shown. But fraud when charged must be clearly proven; and we see no force in the deductions made by counsel for plaintiffs from the record of the administration of the estate of Southworth, and in our opinion no foundation exists for the inferences drawn therefrom and upon which the charges of fraud and conspiracy are based. It would be an idle, endless, and ineffectual task to narrate in detail and then discuss the many circumstances relied upon to support the charge of fraud and conspiracy. It will suffice to say that beyond any question, as the widow of Southworth, Mrs. Montague cannot be condemned for procuring unto herself every benefit and protection from the estate of Southworth which the law gave her. This she had a perfect legal right to do. Both a widow's claim to family allowance and a probate homestead are strongly favored in our law. In re Lux, 100 Cal. 593, 603, 35 Pac. 341; Estate of Welch, 106 Cal. 427, 39 Pac. 805; Estate of Cowell, 164 Cal. 636, 130 Pac. 209. The estate originally left by Southworth was not a large one, and indeed it appeared to be hopelessly insolvent. Under these circumstances it may be suggested that very little motive existed for the perpetration of the fraud and conspiracy charged to the defendant Montague and his wife. Especially is this so when we stop to consider that the interest of the parties against whom the alleged fraud was directed could never receive any benefit until the death of Mrs. Montague, who was at that time a young woman, and then only in the event that she should die childless.

[12] In short, we are of the opinion that the finding of the trial court that the defendant Montague and others fraudulently conspired to defeat the interest of the remaindermen is without support in the evidence. Moreover the fraud charged was based upon facts that are clearly apparent from the record itself and only from the record. This is not the character of fraud which will justify the setting aside of judgments and decrees. It was not extrinsic or collateral to the questions examined, or determined upon the hearing of the petitions for the orders. A judgment or decree of a court of competent jurisdiction can be set aside for fraud only when the fraud alleged is shown to be extrinsic or collateral to the matter which was tried and determined by such court. Hanley v. Hanley, 114 Cal. 693, 46 Pac. 736. Instancing what extrinsic fraud consists of, our Supreme Court has said that it may result from (1) keeping the unsuccessful party away from the court by a false promise of a compromise; (2) purposely keeping him in ignorance of the suit; (3) where an attorney fraudulently pretends to represent a party and connives at his defeat; (4) being regularly employed, corruptly sells out his client's interest. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. In instances of this character the defrauded party is prevented by the act of his adversary from having a trial. No such situation was presented by the evidence in the present case. The claim of fraud now urged could and should have been litigated at the time of the hearing of the various decrees in controversy.

[13, 14] Equally untenable is the claim of plaintiffs that the devise of a life estate in the premises was a specific devise, and that therefore Mrs. Montague was estopped—and likewise the defendant Montague—from claiming that after she took a life estate in any part of the premises under the will she acquired the fee in the area segregated as a homestead against the will. Neither by the terms of the will nor otherwise was the widow expressly put to an election, nor can any direction to make an election be implied therefrom. In the very recent case of the Estate of Whitney, 154 Pac. 855, it is said:

"The right of testamentary disposition, and the right of beneficiaries to take under the will, are alike statutory, and are both subject to the power of the court having jurisdiction of the estate to make a provision for the support of the widow (or minor children) out of the estate. Estate of Bump, 152 Cal. 274 [92 Pac. 643]. A family allowance is, in this respect, analogous to a probate homestead, which, as has been held, may be ordered * * * out of property specifically devised. Estate of Huelsman, 127 Cal. 275 [59 Pac. 776]."

While this case recognizes the right of a testator to so draw his will as to put his widow to an election, no such right was attempted to be exercised in the will under consideration here. Moreover, there is no evidence in the record that the widow ever entered into possession of any part of the premises as a life tenant under the will or that she held possession as such. If she was put to an election under the law, she certainly

exercised it and took under the law and not under the will immediately following the death of her husband, when she instituted proceedings to gain a homestead and secure a family allowance. The fact that the remaining portion of the tract, consisting of 32½ acres, was attempted to be distributed to her under what seems to be conceded a void decree of distribution, does not operate as an estoppel against her. At that time, according to the testimony, she believed that she had acquired the entire premises under the homestead and the decree of sale. The finding that she took a portion of the premises under the will is contrary to and inconsistent with the evidence adduced upon the entire case.

The conclusion which we have reached upon the question immediately under consideration renders it unnecessary to discuss and decide the question of the statute of limitations or the doctrine of laches; and likewise and for the same reason we are not called upon to discuss and decide the question of the right of succession to the conventional homestead alleged to exist in favor of the widow as surviving wife of Southworth.

From what we have said it follows that the plaintiffs as a matter of law have no title to or interest in any part of the land in suit except the 32½ acres to which disclaimer is made.

The judgment and order appealed from are reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

30 Cal. App. 190

WILSON v. DISTRICT COUNCIL OF SHEET METAL WORKERS OF STATE OF CALIFORNIA et al. (Civ. 1691.)

(District Court of Appeal, First District, California. March 23, 1916. Rehearing Denied by Supreme Court May 22, 1916.)

BENEFICIAL ASSOCIATIONS ⟹10(2)—PAYMENT OF DUES—RIGHTS OF BENEFICIARY.

Plaintiff's husband, on March 25, 1912, became a member of an unincorporated association of sheet metal workers, and up to his death on December 4, 1912, had been somewhat irregular in the payment of his dues, but during October fully paid up his dues, including those for that month, and had always been reported as a member in good standing. The rules of the association provided that members should pay dues in advance, and that when over three months in arrears they should be suspended; and the by-laws of the union provided that members owing three months' dues should be considered delinquent, and that the union would pay all members' death benefits and keep the member in good standing as long as he had not been suspended. *Held*, that plaintiff's husband at the time of his death was a member of the union in good standing, and that she was entitled to receive the benefits payable on the death of a member.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. § 13; Dec. Dig. ⟹ 10(2).]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Lathia W. Wilson against the District Council of Sheet Metal Workers of the State of California and others. Judgment for defendants, and plaintiff appeals. Reversed.

W. B. Rinehart, of Oakland, for appellant. Cleveland L. Dam and George Appell, both of San Francisco, for respondents.

RICHARDS, J. This is an appeal by the plaintiff in an action brought to recover from the defendants the sum of $800, alleged to be due as a death benefit payable to the plaintiff upon the death of her husband, by virtue of his membership in the two organizations made parties defendant in this action. The facts are practically undisputed and may be summarized as follows:

Local Union No. 216 of the Amalgamated Sheet Metal Workers' International Alliance is an unincorporated association of a number of craftsmen, and is, as its name indicates, a branch of the international organization, to whose general laws it is subject, and which has for its principal purpose the securing of those rights and advantages for its members for the better maintenance of which similar labor organizations are created. The defendant District Council of Sheet Metal Workers of the State of California is also an unincorporated association, called into being by the several local unions of the general order within a certain district, and having for its chief object the collection and payment of death benefits to the widows or other beneficiaries of deceased members of the several local unions comprising its membership within the designated district. By the rules and regulations of this district organization the funds from which its death benefits were to be paid were raised and repleted by means of assessments of the members of the local unions to the extent of $1 for each member "in good standing" and who had been such member "in good standing" for the period of six months prior to the death of the member for whose benefit the assessment was to be paid. The names of such members as were in good standing and entitled to these benefits were to be forwarded from time to time by the financial secretary of the local union to the secretary of the district council. Upon the death of any member of the local union entitled to a death benefit the said financial secretary of the local union was to communicate with the secretary of the district council, stating that the deceased member was in good standing for the period of six consecutive months prior to his death, whereupon the treasurer of the district council was to forward to the said secretary of the local union the amount of the death benefit which was to be paid over to the widow or other beneficiaries of the deceased member.

Charles Wilson, the deceased husband of the plaintiff, became a member of Local Union No. 216 on March 25, 1912, and remained a member thereof until his death on December 4, 1912. He had not been very regular in the payment of his dues and assessments, but the record shows that from time to time he paid varying amounts on account thereof and that during the month of October he had fully paid up his obligations to the order, including his dues for that month. The record also affirmatively shows that, although at times delinquent in respect to those obligations, he had never been suspended, nor in any manner called to account for his arrears, nor had his name ever been reported to the district council as a member not in good standing in his local union, but, on the contrary, had been reported thereto as in good standing.

The rules and regulations of the International Alliance, of which the local union is a member, upon the subject of dues, delinquencies, and suspensions, contain the following provisions:

"Art. VIII, § 4. All members shall pay dues in advance, and are not in arrears until the end of the current quarter."

"Art. X, § 1. Members may be admitted into the hall until they are three months in arrears. When over three months in arrears they shall be suspended, and must pay all arrears and receive a clear card before being admitted."

"Art. II, § 6. The financial secretary * * * shall keep a correct account of each member, with full name and residence, and shall notify all members three months in arrears. He shall furnish the general secretary-treasurer a list of all expelled or suspended members."

The by-laws of Local Union No. 216 contain the following provisions:

"Art. V, § 2. Members owing this union three months' dues shall be considered delinquent.

"Sec. 14. Local 216 shall pay all members death benefit at time of each report of death, keeping him in good standing for his insurance as long as he has not been suspended, and same must be charged to brother for dues by Local 216, and should be good as long as he is not suspended."

It would seem to be very clear from a reading of these provisions of the governing rules of the International Alliance and of the local union that the mere delinquency of a member of the latter in the matter of keeping promptly paid his dues and assessments would not be sufficient to render him a member not in good standing, but that, in order to deprive such member of that good standing in his local union which would debar his widow or other beneficiaries of the right to receive the death benefit upon his decease, it was necessary that affirmative action amounting to his suspension should be taken by the local union of which he was a member, and that in the absence of such action he was entitled to be reported to the district council as a member in good standing, and hence according to its rules entitled to have its death benefit paid upon his decease to his widow or other beneficiaries. This was apparently the construction which the officers of the local union had placed upon their rules and regulations prior to Mr. Wilson's death, according to the evidence of its secretary; and it may be said that it is a rule of justice and reason as applicable to such organizations wherein the fact of a delinquency in dues might often arise out of the very conditions which would have placed the delinquent member in need of its beneficial objects and aids. The provision in the rules of the local union to the effect that the death benefit assessments, if not paid by a member, should be kept paid up by the union itself, so as to keep such delinquent member in good standing with the district council so long as he had not been suspended by his local union, is exactly in line with this interpretation of the rules and regulations of the International Alliance and of Local Union No. 216.

Applying these rules and regulations as thus interpreted to the case in hand, it must be concluded that at the time of his death the plaintiff's husband was a member of Local Union No. 216 in good standing, and as such was entitled to have his widow receive from the District Council, through the treasurer of said local union, the death benefit for which she was compelled to bring this action. The trial court, in denying the plaintiff this right and in rendering its judgment in the defendant's favor, was in error. The distinction to be drawn between the cases cited by respondent's counsel and the case at bar is the obvious one that in none of those cases was the suspension of a member made a prerequisite to the deprivation of his rights as a member in good standing in his local union.

Judgment reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

30 Cal. App. 209

FLITTNER v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES.

(Civ. 1629.)

(District Court of Appeal, First District, California. March 27, 1916. Rehearing Denied by Supreme Court May 25, 1916.)

1. INFANTS ⟸58(2)—CONTRACTS—DISAFFIRMANCE—RESTORATION OF CONSIDERATION.
A minor under the age of 18 years may disaffirm a contract, without restoring or offering to restore the consideration.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 157; Dec. Dig. ⟸58(2).]

2. INSURANCE ⟸125(2) — CONTRACT — WHAT LAW GOVERNS.
Where insured received his policy in California upon his payment therein of the first year's premium in advance, the last act essential to consummation of the contract being done in California, the contract was made there.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 174; Dec. Dig. ⟸125(2).]

3. INSURANCE ⇐125(4)—CONTRACTS—WHAT LAW GOVERNS—PLACE OF PERFORMANCE.

Where a contract of insurance was made in California, but the policy provided that the payment of the benefits should be at the insurer's home office in New York, and that the premiums should also be payable there, and also provided that premiums might be paid to any agent or agency cashier of the insurer upon delivery of a receipt signed by an executive officer, but nowhere provided that agents authorized to receive premiums should be appointed or maintained in California, the contract was to be performed in New York, and was governed by the law of that state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 175; Dec. Dig. ⇐125(4).]

4. INSURANCE ⇐147(3)—CONTRACT—WHAT LAW GOVERNS—PLACE OF PERFORMANCE.

The law of the place of performance of an insurance contract governs as to its construction and legal effect, and as to all matters connected with its performance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 293; Dec. Dig. ⇐147(3).]

5. INSURANCE ⇐125(2)—CONTRACTS—WHAT LAW GOVERNS—PLACE OF CONTRACT.

The law of the place where an insurance contract is made governs as to all matters bearing on the execution, interpretation, and validity of the contract, including the capacity of the parties to contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 174; Dec. Dig. ⇐125(2).]

6. INFANTS ⇐58(1)—CONTRACTS—DISAFFIRMANCE—RECOVERY OF CONSIDERATION.

Where plaintiff, a minor, under the age of 18, disaffirmed a contract without restoring or offering to restore the consideration and entered into an insurance contract in this state to be performed in the state of New York, the contract, though not void, was potentially void, and plaintiff, on disaffirmance thereof, might maintain an action to recover the amount of the premiums paid.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 149–156, 158–160; Dec. Dig. ⇐58(1).]

Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by Frank W. Flittner by Frank L. Trimble, his guardian ad litem, against the Equitable Life Assurance Society of the United States. Judgment for plaintiff, and defendant appeals. Affirmed.

Pillsbury, Madison & Sutro and Almon E. Roth, all of San Francisco, for appellant. Louis H. Brownstone, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendant from a judgment in favor of the plaintiff in an action in which the plaintiff, having disaffirmed a contract of insurance entered into by him with the defendant while a minor under the age of 18 years, sought to recover the amount of premiums paid thereunder prior to the commencement of this suit.

On the 11th day of February, 1910, the defendant, a corporation organized and existing under the laws of the state of New York, issued to the plaintiff, Frank W. Flittner, a policy of insurance insuring his life in favor of his mother for the sum of $10,000. At the time of the issuance of the policy the plaintiff was 16 years old and resided in San Francisco, where the application for the insurance was made. After the usual medical examination, which was also had in San Francisco, the application was sent to the home office of the company in New York, where, upon it being found satisfactory, a policy was prepared and executed by the defendant, which then sent it to its general agent in San Francisco, and it was there delivered by such agent to the plaintiff; the latter at that time paying to the agent the first annual premium. This payment was in pursuance of one of the provisions of the policy, which not only required that the first year's premium should be paid in advance, but also that the policy should not take effect until such premium had been paid during the good health of the assured.

The provisions of the policy in respect to payment of loss were as follows:

"The Equitable Life Assurance Society of the United States agrees to pay at its home office in the city of New York ten thousand dollars upon receipt of due proofs of the death of the insured, provided this policy is then in force and is then surrendered properly released to his mother Mary Flittner, beneficiary, with the right on the part of the insured to change the beneficiary."

With respect to the payment of premiums the policy provided as follows:

"All premiums are payable in advance at said home office or to any agent or agency cashier of the society upon delivery, on or before their due date, of a receipt signed by an executive officer of the society; that is, the president, a vice president, secretary, assistant secretary, comptroller, deputy comptroller, treasurer, or an assistant treasurer, and countersigned by said agent or agency cashier."

Horace C. Donnels, the agency cashier and traveling auditor of the defendant, also testified that upon policies issued to residents of San Francisco premiums are usually received and death benefits actually paid there. In case of receipts, he testified that they were prepared at the home office, but sent to and countersigned at San Francisco; the signatures of the officers upon such receipts being merely fac similes. In the case of death benefits, the checks were prepared in New York, but usually forwarded to the agent in San Francisco, and there delivered to the beneficiary.

Prior to the commencement of this action the plaintiff, by his attorney, wrote a letter to the defendant purporting to disaffirm the contract of insurance, and demanding the return of the premiums paid. The demand was based upon the ground that the plaintiff was a minor 16 years of age at the time he entered into the contract of insurance, and hence under the law of this state was entitled to disaffirm it. The defendant denied this right on the part of the plaintiff, and refused to return the premiums paid, whereupon this action was brought by the plain-

tiff through his guardian ad litem to recover said premiums, and to have a certain note canceled which he had given in payment of a further premium.

[1] A minor under the age of 18 years may disaffirm a contract without restoring or offering to restore the consideration. But the defendant claims that the contract of insurance in the case at bar was made by the parties under and subject to the laws of the state of New York, and that, as it was to be performed in that state, it was subject to its laws. The law of New York touching this subject reads:

"In respect of insurance heretofore or hereafter by any person not of the full age of twenty-one years, but of the age of fifteen years or upwards, effected upon the life of such minor for the benefit of such minor, or for the benefit of the father, mother, husband, wife, brother or sister such minor, the assured, by reason only of such minority, shall not be deemed competent to contract for such insurance or for the surrender of such insurance, or to give a valid discharge for any benefit accruing or for money payable under the contract."

The trial court in part found:

"That said contract was delivered by the defendant in the city and county of San Francisco, state of California, and the first premium therefor was paid to the defendant, in the city and county of San Francisco, state of California, and that said contract was not made under and by virtue of the laws of the state of New York and was never and is not now subject to or was it made in contemplation by the parties hereto of the laws of the state of New York, but on the contrary said policy was made in contemplation of the laws of the state of California, and was intended by both parties thereto to be delivered and performed in the city and county of San Francisco, state of California, and said contract was made in the said city and county of San Francisco, said state."

The court also found that the New York statute hereinabove referred to "does not apply to this case, and the plaintiff can rescind and disaffirm the" contract evidenced by the policy of insurance referred to "and recover the premiums paid thereon, and that the said contract is not now a valid and subsisting and binding contract of insurance between the parties thereto, with the same force and effect as if said contract or policy was entered into while said Frank W. Flittner was over the age of 21 years."

[2] In this case, as intended by the parties, the plaintiff received the policy in California upon the payment by him of the first year's premium in advance. The last act, therefore, essential to the consummation of the contract of insurance was done in California; and it follows under the authorities that the contract was made in California. Civ. Code, § 1626; Eq. Life Ins. Co. v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; Cal. Sav. Bank v. Am. Society Co. (C. C.) 87 Fed. 120; N. W. Mut. Life Ins. Co. v. McCue, 223 U. S. 234, 245, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57; Cooley on Ins., vol. 1, pp. 649 and 658.

[3] The contract, therefore, would be governed by the laws of this state if it did not contemplate, as we think it does, that the place of performance shall be in New York.

The policy provided that the payment of the benefit should be at the home office of the defendant in New York; and as to the premiums, they, too, were to be paid at the home office. It is true that the policy also provided that they might be paid to any agent or agency cashier of the society upon delivery of a receipt signed by an executive officer thereof; but in this regard it is to be noted, as pointed out in the case of Fidelity Mut. Life Ins. Co. v. Harris, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813, that the policy nowhere provided that agents authorized to receive premiums should be appointed, or if appointed that they should be maintained in California or in any other place. Under the terms of the policy, then, if no agent or agency cashier of the defendant society were appointed or maintained in California, the premiums must of necessity have been paid in New York.

The rule that a contract made in one state to be performed in another is to be governed by the law of the state of performance is well established. The rule is well stated in the recent case of Bartlett v. Collins, 109 Wis. 477, at page 481, 85 N. W. 703, at page 704, 83 Am. St. Rep. 928, in which the court says:

"As a general rule the construction and validity of a purely personal contract depend on the law of the place where made (citing Story, Conflict of Laws). If, however, the contract is made in one place, to be performed in another, then, as a general rule, the place of payment and performance is the place of contract (citing 2 Parsons on Contracts [8th Ed.] p. 583). This rule is founded on the idea that, in making a * * * contract to be fully performed in another state, the parties must have had * * * that other state in view."

The rule is stated as follows, in the case of Southern Express Co. v. Gibbs, 155 Ala. 303, at page 309, 46 South. 465, at page 467, 18 L. R. A. (N. S.) 874, 130 Am. St. Rep. 24:

"A contract, as to its nature, obligation, and validity, is governed by the law of the state where made, unless it is performed in another state, in which case it will be governed by the law of the state of performance. * * * When it appears that the place of performance was different from the place of making the contract, it is to be construed according to the laws of the place where it is to be performed."

In Short v. Trabue, 4 Metc. (61 Ky.) 299, the court says:

"An agreement to perform an act at a particular place is presumed to be made with reference to the law of that place; and an agreement to perform an act, without designating a place of performance, is presumed to be made with reference to the law of the place at which the agreement is made. These presumptions are conclusive. The same rule applies to both parties to the contract."

In the case of Seiders v. Merchants' Life Association, 93 Tex. 194, 54 S. W. 753, the Supreme Court of Texas passed upon the point here involved. The defendant was incorporated under the laws of Missouri and had its principal place of business in the city

of St. Louis in that state. The plaintiff made application in the state of Texas, through an agent of the defendant, for a policy of insurance. The policy was executed at the home office of the company and sent to its agent in Texas, and by him delivered to the plaintiff upon receipt of the first premium. The contract provided that the loss, if any, should be payable at the home office of the company within 30 days after the receipt and approval by it of satisfactory proofs of the death of the plaintiff. The court says:

"The question in this case is: Does the law of the state of Missouri apply to this contract? * * * Conceding that the contract of insurance was made in Texas, it is made payable at the home office, in the state of Missouri, and all premiums are likewise made payable there. It does not provide for any act to be done elsewhere by the company. A tender of the money at the home office would have been valid. Unless there be something in the circumstances which indicate that the parties contracted with reference to the law of Texas the legal effect of the contract must be determined according to the laws of the state of Missouri."

See, also, Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73; Fidelity Mutual Life Ins. Co. v. Harris, 94 Tex. 20, 57 S. W. 635, 86 Am. St. Rep. 813; First Nat. Bank of Waverly v. Hall, 150 Pa. 466, 24 Atl. 666, 30 Am. St. Rep. 823.

[4, 5] While the law of the place of the performance of the insurance contract governs as to its construction and legal effect, nevertheless, as a general proposition, the law of the place where the contract is made controls as to its execution and validity, including the capacity of the parties to make the contract.

All matters connected with the performance of a contract are regulated by the law of the place where the contract by its terms is to be performed. All matters bearing upon the execution, the interpretation and the validity of contracts, including the capacity of the parties to contract, are determined by the law where the contract is made. Union Nat. Bank v. Chapman, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614; Phœnix Mut. Life Ins. Co. v. Simons, 52 Mo. App. 357; 2 Wharton on Conflict of Laws, § 401; Note in Mayer v. Roche, 26 L. R. A. (N. S.) 767; Hauck Clo. Co. v. Sharpe, 83 Mo. App. 385.

As a general proposition the capacity of parties to contract is to be determined by the law of the place where the contract is made. 2 Elliott on Contracts, 1114 et seq.; Union Trust Co. of N. J. v. Knabe (Md.) 89 Atl. 1107, 1115; 22 Am. & Eng. Ency. of Law, 1327, 1328; Campbell v. Crampton (C. C.) 2 Fed. 417, 423; Story on Conflict of Laws, § 103; Matthews v. Murchison (C. C.) 17 Fed. 760, 768. Matters that relate to the preliminary question whether a contract has been made are in general governed by a fixed law, which is independent of and cannot be varied by the intention of the parties. Such matters include the capacity of the parties to contract, conditions or restrictions upon the right to contract, and the formal validity of the contract. The governing law, on the other hand, with respect to the obligation of the contract, is as a general proposition dependent upon the intention of the parties, expressed or presumed. 2 Wharton on Conflict of Laws, § 427e, p. 900.

[6] If the plaintiff, being a minor, had given a delegation of power, his act in that regard would have been void; so would his contract relating to real property if he were, at the time of its execution under the age of 18 (Civ. Code, § 34); and in either of those instances the case would fall squarely within the rule declared in the authorities just cited. In the case at bar while the contract of the plaintiff was not void, nevertheless he did not on account of infancy have the power at the time of its execution to enter into an absolutely binding contract. The contract at that time was potentially void; the law of the place of its execution having placed it within the power of one of the parties thereto to annul it by the mere announcement of his will and pleasure. When that announcement was made the contract was in no better condition than if it had been void ab initio. "'It is the prerogative,' so the rule has been well stated in Mississippi, 'of the sovereignty of every country to define the condition of its members, not merely its resident inhabitants, but others temporarily there, as to capacity and incapacity. But capacity or incapacity, as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid or not in the forum of his domicile, as they may infringe or not its interests, laws and policies.'" 1 Wharton on Conflict of Laws, p. 232. If, then, the capacity of a person domiciled in California, with relation to an act to be performed outside its boundaries, when examined in the forum of his domicile, will be tested as to its validity by the law of that forum, a fortiori will it be so in the case of a contract actually entered into within its jurisdiction, although to be performed beyond its territorial boundaries?

The law in its wisdom shields minors from their lack of judgment and experience, and vests in them under certain conditions the right to disaffirm their contracts. That right the plaintiff in this case invoked, and he was thereupon entitled to recover the premiums theretofore paid by him. This position may seem, under all the circumstances of the case, to be a hardship on the defendant, but "the right of an infant to avoid his contracts is one conferred by law for his protection against his own improvidence and the designs of others; and though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the for-

mer cannot complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter, nor charge that the infant in exercising the right is guilty of fraud."

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

30 Cal. App. 223

EAST SAN MATEO LAND CO. v. SOUTHERN PAC. R. CO. (Civ. 1736.)

(District Court of Appeal, First District, California. March 29, 1916. Rehearing Denied by Supreme Court May 25, 1916.)

1. RAILROADS ⇐69—DEED OF RIGHT OF WAY —CONSTRUCTION—STATUTE.

Under Civ. Code, § 1638, providing that the language of a contract, if clear and explicit, is to govern its interpretation, where a deed to a railway company recited that in consideration of promoting its construction the grantor conveyed certain land to the road and its successors, "during the legal existence of such company, solely upon the following conditions * * * and upon the breach * * * of any of the aforesaid conditions, this grant shall become void and the estate hereby conveyed * * * shall cease and determine and the said lands shall absolutely revert to the (grantor), his heirs or assigns in fee simple, * * * and shall in like manner at the expiration of the legal existence of such company revert to (the grantor), his heirs and assigns, notwithstanding anything herein contained to the contrary," the railroad being incorporated for a term of 60 years, it granted an estate or easement definite and precise in duration, limited for years, and not in fee.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 161–165; Dec. Dig. ⇐69.]

2. RAILROADS ⇐69—DEED OF RIGHT OF WAY —CONSTRUCTION.

Where a deed by an heir contained enumerated exceptions or reservations, one of which touched the land granted by the ancestor to a railroad for the term of years for which it was incorporated, and provided that it was the purpose of the grantor to convey all lands owned by her, together with all interests, estates in remainder and reversion and rights of forfeiture of the land described in the exceptions, it conveyed all the reversionary interest the grantor owned in the land previously granted to the railroad.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 161–165; Dec. Dig. ⇐69.]

3. DEEDS ⇐93—CONSTRUCTION—INTENTION OF GRANTOR—STATUTE.

Under Civ. Code, § 1641, providing that the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other, the intention of the grantor as gathered from the entire deed, taking it by its four corners, must prevail, and such intention may be expressed anywhere in the instrument and by any words.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. ⇐93.]

4. DEEDS ⇐90—CONSTRUCTION—STATUTES.

Under Civ. Code, §§ 1066, 1636, and 1641, touching the interpretation of deeds, a clause of a deed whereby the grantor explains that she intends to convey all her right in lands previously excepted or reserved, though containing no operative words of grant, must be construed in connection with the rest of the deed, which contains such words.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234–237, 247, 248; Dec. Dig. ⇐90.]

5. EMINENT DOMAIN ⇐268—COMPENSATION AFTER TAKING.

Where land has been taken for a public use without compensation being first made, and its continued possession is necessary to the use, the owner cannot recover possession, but only compel payment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 697, 736–740, 742; Dec. Dig. ⇐268.]

6. EMINENT DOMAIN ⇐153—RIGHT TO COMPENSATION—PERSONAL CHARACTER.

The right to compensation for land taken for public use accrues at the time the land is taken, and is a personal right, not running with the land and not passing by conveyance thereof after the right accrued.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 407–416; Dec. Dig. ⇐153.]

7. RAILROADS ⇐72(1) — RIGHT OF WAY — GRANT.

A railroad may accept a conveyance of land upon any condition that may lawfully be annexed to an original grant, and such a contract may create an estate less than a fee in land taken for a right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168, 169; Dec. Dig. ⇐72(1).]

8. EMINENT DOMAIN ⇐270 — COMPENSATION —RIGHT OF OWNER OF REVERSION.

Where land was granted to a railroad for a right of way for the term of years of its incorporation, and the road or its successor elected to continue its use after the expiration of the time limited by the grant, the owner of the estate in reversion was entitled to compensation at such time.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 706–716, 741; Dec. Dig. ⇐270.]

9. PLEADING ⇐311—REFERENCE TO EXHIBITS—INCORPORATION IN COMPLAINT.

In an action to recover the value of land used as a right of way by defendant railroad, where the complaint recited that exhibits were made a part of it, and certain deeds were attached as exhibits, such recitals made them part of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 54, 55, 118, 945; Dec. Dig. ⇐311.]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the East San Mateo Land Company against the Southern Pacific Railroad Company. From a judgment for defendant, plaintiff appeals. Judgment reversed.

Henry Conlin, of San Francisco, for appellant. Frank McGowan and Evan J. Foulds, both of San Francisco, for respondent. Garret W. McEnerney, of San Francisco, amicus curiæ.

KERRIGAN, J. This action was brought by plaintiff to recover the sum of $77,800, the alleged value of about four acres of land, used as a portion of the right of way of the defendant corporation. The defendant, after answering plaintiff's amended complaint,

moved for judgment on the pleadings. The trial court granted the defendant's motion, and judgment was thereupon entered in favor of the defendant. This appeal is from such judgment.

The plaintiff alleges in its complaint that the San Francisco & San Jose Railroad Company, the predecessor of defendant, was incorporated under the laws of the state of California on August 18, 1860, for the term of 50 years, for the purpose of constructing and operating a railroad as a common carrier; that on June 6, 1862, Alvinza Hayward, then the owner of the land here involved, for the purpose of encouraging and promoting the construction of such railroad, conveyed to it and its successors an estate for years in said land, limited in duration to the period for which the said San Francisco & San Jose Railroad Company was incorporated, reserving by such deed unto the grantor, his heirs and assigns, the fee in said real estate and a vested estate in remainder therein, to take effect in possession upon the expiration and termination of the estate for years. The plaintiff further alleges that pursuant to said deed the company entered into possession of said real estate, and constructed a railroad thereon, which it operated and which its successor still operates, and that the defendant the Southern Pacific Company, by mesne consolidations and transfers, succeeded to and became the owner of all the rights of the San Francisco & San Jose Railroad Company under the Hayward deed; that one Emma Rose was on the 8th day of September, 1908, the owner of the property here involved, having succeeded to the same by mesne conveyances from Hayward, and that on such day she conveyed to the plaintiff all her right, title, and interest therein, including her interest in remainder and reversion reserved under the Hayward deed. It is then alleged that the period of the corporate, legal existence of the San Francisco & San Jose Railroad Company expired by limitation on the 18th day of August, 1910, and that the estate for years so granted to it and its successors ceased and terminated on said date, and that the estate in remainder and reversion reverted to and became vested in plaintiff, and that the defendant has appropriated and continues to use the land for its benefit as a right of way without having paid plaintiff compensation for such appropriation and use.

In addition to these direct recitals a copy of the deed from Hayward to the railroad company marked Exhibit A, and that of Emma Rose to the plaintiff, marked Exhibit B, are attached to and made a part of the complaint and are referred to therein. Then follows the prayer for judgment for the value of the land.

The defendant answering alleged in substance: (1) That the deeds of Hayward to the San Francisco & San Jose Railroad Company attached to the complaint and marked Exhibit A, conveyed a fee to the grantee therein named upon a condition subsequent, with a reversionary interest in the grantor; (2) that there is no allegation that any act was ever done by Hayward or any other person showing an intent to exercise the right of reversion, and hence the title conveyed is still in the defendant as the successor in interest by consolidation with the grantee under the Hayward deed; (3) that the deed of Emma Rose to the plaintiff, dated August 20, 1908, did not convey to it the land described in the complaint and mentioned in the Hayward deed, but by express terms excluded the same from the operation thereof, hence that plaintiff is not the owner, and cannot recover in this action; (4) that Alvinza Hayward was, at the time of the taking of the land described in the complaint, the owner thereof, and that any damage that accrued by reason of the taking was the personal property of Hayward as such, and would not pass to any of his grantees by a mere conveyance of the land.

The judgment given upon the pleadings was based upon the construction given these two deeds by the trial court, and the meaning and effect of these two instruments present the main questions for our consideration upon this appeal.

[1] We will first discuss the deed given by Hayward to the San Francisco & San Jose Railroad Company in the year 1862 attached to the complaint and marked Exhibit A. This deed recited that for and in consideration of encouraging and promoting the construction of a railroad from San Francisco to San Jose, and for other considerations, the grantor conveyed the land in question to said railroad company and its successors "during the legal existence of said company, solely upon the following conditions (here follow certain conditions); * * * and upon the breach * * * of any of the aforesaid conditions, this grant shall become void, and the estate hereby conveyed * * * shall cease and determine, and the said land shall absolutely revert to the said party of the first part (grantor), his heirs or assigns, in fee simple * * * and shall in like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, notwithstanding anything herein contained to the contrary."

Here by clear and unequivocal language the grantor limits the duration of the grant to the time during which the grantee corporation could exist under the Constitution; and in the same manner and with equal precision exacted that "at the expiration of the legal existence of said company (such land shall) revert to" the grantor, his heirs or assigns.

It is claimed by the defendant, however, that the deed clearly shows that it was the intention of the grantor to irrevocably dedicate the land to railroad use upon a condi-

tion subsequent; and as no act was ever done to divest the defendant as successor in interest of the grantee thereunder, that it follows that the Southern Pacific Company is still the owner of the legal title and estate.

No question is here presented of a breach of any condition subsequent. The right here claimed is based upon the estate in reversion to take effect in possession on the expiration of the particular estate granted by the deed. There is a broad distinction between this right and one based upon forfeiture and reentry for breach of a condition subsequent. Board of Freeholders v. Buck, 79 N. J. Eq. 472, 82 Atl. 418. The deed in question, it is true, created certain conditions subsequent, and provided upon a breach of any of the conditions that the estate conveyed should cease and determine; but, as we have seen, it also contained the additional clause:

"And shall in like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, anything herein contained to the contrary notwithstanding."

Nothing could be added to more clearly express the intention of the grantor. "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Civ. Code, § 1638. It seems plain to us, therefore, that the duration of the estate or easement granted was definite and precise, and was one limited for years and not in fee. Robinson v. Missiquoi R. R. Co., 59 Vt. 426, 10 Atl. 522; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Weller v. Brown, 160 Cal. 515, 117 Pac. 517; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; 14 Cyc. 1161; Pavkovich v. S. P. Co., 150 Cal. 39, 87 Pac. 1097.

[2] Equally clear is the intention of the grantor, Emma Rose, in the character and quantity of the estate conveyed by her to the East San Mateo Land Company, the plaintiff. The deed dated August 20, 1908, is in the ordinary form of grant, bargain, and sale, by which she conveyed to the plaintiff, for the expressed consideration of $10, certain property in San Mateo county, of which the land in controversy is a part. In this deed are some 21 enumerated exceptions or reservations, the only one here involved, however, being the eleventh, which reserves the land in question, describing it with reference to the deed by which it was conveyed to the San Francisco & San Jose Railroad Company. Following the enumeration of those exceptions is an explanatory clause or provision in this language:

"It being the intent and purpose of the party of the first part by this grant to convey to the said party of the second part all the lands and their appurtenances owned at the date of these presents by the said party of the first part, situate in and adjacent to the town of San Mateo, county of San Mateo, state of California, lying east of the Southern Pacific Railroad right of way, containing 700 acres, more or less, together with all the interests, estates in remainder and reversion, rights of forfeiture and re-entry thereof, in and to any and all lands described in the foregoing exceptions numbered 1 to 21, inclusive, belonging to the said party of the first part, first, personally; second, as heir at law of Alvinza Hayward, deceased; third, as heir at law, grantee, and devisee of Charity Hayward."

There can be no question as to the intention of Emma Rose to convey to plaintiff by her deed the reversionary interest reserved by Hayward from the San Francisco & San Jose Railroad Company and to which she had succeeded. Such intention is clearly expressed in the explanatory clause just quoted. The reservation of the 21 excepted parcels was beyond all doubt for the purpose of saving herself harmless from any liability upon the warranties implied from the form of her deed, in view of the previous conveyance of different parcels or interests once forming a part of the tract covered by her present conveyance, and perhaps also because it was deemed that this was the simplest and most convenient manner to describe the land to be conveyed. That she intended to convey all of the right, title, and interest that she owned in the land is plainly evident.

[3] Notwithstanding the clearly expressed intention of Emma Rose it is insisted by defendant that, having by the granting clause retained the title in herself to the property described in the 21 exceptions, no subsequent provision of the deed could effect a change. This may have been the early rule of construction; but the modern doctrine is that the intention of the grantor as gathered from the entire instrument, taking it by its four corners, must prevail, and that that intention may be expressed anywhere in the instrument and by any words. This is the rule laid down in our Civil Code. It is there provided:

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641.

Accordingly the Supreme Court of this state has held that every provision, clause, and word shall be taken into consideration in ascertaining the meaning of the party, whether words of grant, of description, or words of qualification, restraint, exception, or explanation, and that every word shall be presumed to have such force and effect as it can have. Pavkovich v. S. P. Co., supra. See, also, Barnett v. Barnett, supra, where it is said (104 Cal. 300, 37 Pac. 1050):

"The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein, but for the purpose of ascertaining this intention the entire instrument, the habendum as well as the premises, are to be considered, and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause the habendum will prevail over the granting clause. Faivre v. Daley, 93 Cal. 664, 670 [29 Pac. 256]; Pellissier v. Corker, 103 Cal. 516 [37 Pac. 465], 'It is in such case to be considered as an addendum or proviso to the conveyancing clause, which by a well-settled rule of construction must control the conveyancing clause or premises,

even to the extent of destroying the effect of the same.' Bodine v. Arthur, 91 Ky. 53 [14 S. W. 904], 34 Am. St. Rep. 162."

[4] Nor is there any merit in the argument advanced by the defendant that the clause does not contain operative words of grant, but only exhibits an intention and purpose which are not carried into present effect. As before stated, this clause is to be construed in connection with the rest of the deed. Civ. Code, §§ 1066, 1636, 1641.

Aside from the question of the construction of the deed defendant advances the argument in support of the judgment that when a public service corporation takes possession of land for public use the right to compensation accrues and takes effect at the time of the taking, and that such compensation belongs to the person who is the owner of the land at that time, and does not without express stipulation pass to the purchaser by subsequent conveyance, that as such right is a personal one it is governed by the general rule that personal rights do not pass by conveyance of the land, and hence the right of action remained in Hayward, and that the purpose for which the land was taken prevented the railroad company from taking less than a fee, and that this fact destroyed and rendered nugatory the right of reversion reserved in the deed.

[5-8] It is true that where land has been taken for a public use without compensation being first made, and its continued possession is necessary to such use, the owner cannot recover possession of the land itself, but can only compel payment for the same, and that the right to compensation accrues at the time the land is taken, and belongs to the owner at the time of the taking; also that this right to compensation is a personal one which does not run with the land, nor does it pass by conveyance thereof after the right accrues. Those doctrines, however, in no way affect or abridge the right of railroad corporations to enter a binding obligation or contract with reference to land taken by them for rights of way, and such agreements when made stand on the same footing as any other contract for the conveyance of land. Lewis on Eminent Domain (3d Ed.) §§ 462, 464. In such cases public policy does not enter into it, nor is it at all concerned with the private contracts of railroads unless they interfere with the public welfare. 2 Elliott on Railroads (2d Ed.) 934. A railroad therefore may accept a conveyance of land upon any condition that may lawfully be annexed to an ordinary grant; and such a contract may create an estate less than a fee in land taken for a right of way. The contract here provided for a limited estate only. If at the expiration of the estate granted the land was necessary for the railroad for railroad purposes, and the corporation or its successor elected to continue its use for a right of way, it could do so by compensating the reversioner. Otherwise it must abandon this portion of its right of way and surrender possession to the owner of the estate in reversion. Pool v. Butler, 141 Cal. 46–49, 74 Pac. 444; McCowen v. Pew, 153 Cal. 735, 744, 96 Pac. 893, 21 L. R. A. (N. S.) 800, 15 Ann. Cas. 630; Gurnsey v. N. C. Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185. If it elected to continue in the use after the 18th day of August, 1910, the time limited by the grant, the owner of the estate in reversion was entitled to compensation at that time.

[9] As to the point that the complaint must be tested by its direct allegations without reference to the language of the deeds attached as exhibits, we think the complaint, reciting, as it does, that the exhibits are made a part of the complaint, the effect of such recital is to make every part and parcel of the instrument a portion of the complaint. Georges v. Kessler, 131 Cal. 183, 63 Pac. 466. We conclude therefore that the deeds, according to their legal effect, support the allegations of the complaint.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

30 Cal. App. 252

SIMMONS v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

(Civ. 2053.)

(District Court of Appeal, Second District, California. April 6, 1916. Rehearing Denied by Supreme Court June 1, 1916.)

1. JUSTICES OF THE PEACE ⟸158(3)—APPEAL —FEES—TIME FOR PAYMENT—STATUTE.

Where the fees to be paid the county clerk for filing an appeal from justice court and placing the action on the calendar in the superior court were not paid the justice at the time of presenting the notice of appeal for filing, but were nevertheless paid within the 30 days allowed for taking the appeal, so as to enable him to transmit the fees, together with the papers on appeal, to the county clerk, there was a compliance with Code Civ. Proc. § 981, requiring payment of the fees to the justice for the county clerk at the time of filing notice of appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 545; Dec. Dig. ⟸ 158(3).]

2. JUSTICES OF THE PEACE ⟸160(4)—APPEAL —NOTICE—FILING.

While notice of appeal to the superior court from a justice could not be deemed filed with him until payment of the fees of the county clerk, but the notice was left with the justice, whose duty it was to file it upon payment of the fees, it will be deemed filed as of the date on which the fees were paid.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 582–584; Dec. Dig. ⟸160(4).]

Petition for prohibition by Martha B. Simmons against the Superior Court in and for the County of San Diego and W. A. Sloane, Judge thereof. Application denied.

Albert J. Lee, of San Diego, for petitioner. Rodgers & Rodgers, of San Diego, and Ford & Hammon and Percy V. Hammon, all of Los Angeles, for respondents.

SHAW, J. Upon notice duly given petitioner applies to this court for a peremptory writ of prohibition, the purpose of which is to restrain the superior court of San Diego county from proceeding with the trial of a certain case pending in that court on a purported appeal rrom the justice's court of San Diego township. The application was heard upon respondents' general demurrer interposed to the petition.

[1] It appears from the petition that on November 11, 1915, in a certain case wherein petitioner was plaintiff and one Elizabeth G. Clarke was defendant, a judgment was rendered in the justice's court of San Diego township in favor of the plaintiff; that on November 20, 1915, defendant in said action filed with the justice of the peace a notice of appeal from said judgment to the superior court of San Diego county. At the time of filing this notice of appeal defendant did not pay to the justice of the peace the fees provided by law to be paid to the county clerk for filing the appeal and placing the action on the calendar in the superior court; but a few days thereafter, and within the time specified by law for perfecting the appeal, she did pay to the justice of the peace such fees, which were transmitted to the county clerk, together with the papers on appeal. Section 981, Code of Civil Procedure, provides:

"No appeal taken from a judgment rendered in a police or justice court in civil matters shall be effectual for any purpose whatever unless the appellant shall, at the time of filing the notice of appeal, pay in addition to the fee payable to the justice of the peace on appeal, the fees provided by law to be paid to the county clerk for filing the appeal and for placing the action on the calendar in the superior court. Upon transmitting the papers on appeal, the justice or judge shall transmit to the county clerk the sum thus deposited for filing the appeal in the superior court and for placing the action on the calendar. No notice of appeal shall be filed unless the fees herein provided for are paid in accordance with the provisions of this section."

The contention of petitioner, urged in support of a motion made in the lower court to dismiss the appeal, as well as that urged in support of this application, is that, inasmuch as the appellant neglected to pay the clerk's fees to the justice of the peace at the precise time when she presented and had filed her notice of appeal, the appeal so taken was ineffectual for any purpose. In Rigby v. Superior Court, 162 Cal. 338, 122 Pac. 960, it is said:

"The provisions conferring the right of appeal and prescribing the procedure are remedial, and should not be unduly hampered with constructive restrictions which will cast doubt upon the jurisdiction of the appellate court."

The purpose of the enactment of section 981, Code Civil Procedure, was to provide for the payment of the clerk's fees at the time of transmitting to the superior court the papers on appeal; and where the fees, though not paid to the justice at the time of presenting for filing the notice of appeal, are nevertheless paid within the 30 days allowed for taking the appeal so as to enable him to transmit the fees, together with the papers on appeal, it is, in our opinion, a sufficient compliance with the statutory provision. By this we do not, however, intend to say that the justice is required to accept for filing any notice of appeal not accompanied with payment of said fees. The case of Johnson v. Superior Court, 153 Pac. 404, cited by petitioner, is not in point, for the reason in that case the fees were not paid until after the expiration of 30 days; and, since clearly the appeal had not been perfected within the 30 days, it was held the superior court had no jurisdiction to entertain it, and a writ of prohibition was granted.

[2] Assuming, as claimed by petitioner, that the notice of appeal could not be deemed filed until payment of the fees in question was made, then, since it was left with the justice whose duty it was to file it upon payment of the fees, it should be deemed filed as of the date on which the fees were paid, and since this was within the 30 days after the rendi-

tion of judgment, it would seem to be a sufficient compliance.

In our opinion, the application for the writ should be, and it is, denied.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 194

MORRELL et al. v. SAN TOMAS DRYING & PACKING CO. et al.

(Civ. 1758.)

(District Court of Appeal, First District, California. March 24, 1916.)

1. APPEAL AND ERROR ⟸1097(1)—REVIEW—LAW OF CASE.

A decision made on a former appeal in the same action is the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358, 4359, 4363, 4427; Dec. Dig. ⟸1097(1).]

2. SALES ⟸339—RIGHTS OF BUYER—REJECTION.

Defendant purchased plaintiff's entire crop of prunes, and requested extension of time before accepting delivery. Plaintiff, being desirous of effecting the sale, had defendant's manager examine the prunes then on hand, and the manager agreed to take all but a small quantity, and agreed to take them also if they could be dried. Plaintiff dried the prunes, and thereafter tendered the whole lot for delivery. The prunes were rejected. *Held* that, as defendant had agreed to take part of the prunes, and the remainder if they were in proper condition, plaintiff was justified on defendant's refusal in selling the entire lot in open market and recovering from defendant the difference between the sale price and the contract price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 924, 926; Dec. Dig. ⟸339.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by J. B. Morrell and others against the San Tomas Drying & Packing Company and another. From a judgment for plaintiff and an order denying new trial, the first-named defendant appeals. Affirmed.

Beggs & McComish, of San Jose, for appellant. S. G. Tompkins, of San Jose, for respondents.

KERRIGAN, J. This is an appeal from an order denying a new trial in an action for damages for the alleged failure of the defendant San Tomas Drying & Packing Company to accept and pay for a certain lot of prunes under the terms of a written contract between the parties to the action.

[1] This case was before this court upon a former appeal, the decision of which is reported in 13 Cal. App. 305, 109 Pac. 632, and in which the facts of the case are quite fully and correctly set forth. Upon the retrial of the cause the errors of pleading and attempted proofs adverted to in that decision were in the main corrected or avoided by the plaintiffs; and, while the appellant still contends that the action was prematurely brought, the adverse views of this court upon the former appeal as to that issue must be adhered to as the law of the case.

[2] As to the appellant's contention that the rejected prunes did not meet in point of quality the requirements of the contract, and that for that reason they were entitled to reject them as a whole when offered as a whole, the evidence shows the following to be the facts: The prunes were grown upon several orchards owned or leased by the plaintiffs in the vicinity of Wright's station, in the Santa Cruz mountains, during the season of 1907. The contract for the purchase by the defendant of the crop when dried by the plaintiffs was entered into in the month of July of that year, while the prunes were still upon the trees. Such contract requires "all fruit to be sound and merchantable and well dried, free from slab, of choice quality, and delivered f. o. b. packing house situated on the Infirmary road, Santa Clara county, California; delivery to be made as directed, final delivery before November 30, 1907." The total amount of prunes grown was, when dried, 172,698 pounds, and of this amount 134,132 pounds were delivered to and accepted by the defendant within the time fixed by the contract. The reason the remainder of the crop, amounting to 38,566 pounds, was not also offered for acceptance during said time was, as testified by the plaintiffs, that the defendant requested that such further delivery be delayed for the reason that its bins were full. In accordance with this request the time for shipment and receipt of the remainder of the prunes was extended until January 1, 1908, when a further extension was requested by the defendant, but before granting it the plaintiffs insisted that the defendant's manager should inspect this remainder of the prunes upon plaintiffs' premises in order, apparently, that they might be assured that the prunes would be accepted when finally delivered. The defendant's manager accordingly went during December, 1907, to the plaintiffs' premises, and there fully examined the undelivered fruit, and after doing so said that the prunes were all right, with the exception of one separate pile of about a ton, which contained a few soft prunes; and he then stated that, if the soft ones were in condition when he received the balance of them, he would accept them also. On January 14, 1908, the defendant requested that the time limit of plaintiffs' delivery under the contract be further extended to May 1, 1908, for the reason evidently that its bins were still overcrowded. In its letter requesting such extension the following language was used: "Regarding the pile I expressed my doubts about as to its condition, same will be accepted subject to their being in suitable condition when the time comes for delivery." The plaintiffs upon receipt of this letter put the ton of prunes which had been objected to through an evaporating process, that being the only method of further drying them available at that season of the year, and thereafter, and

in the month of April, 1908, tendered for delivery the aforesaid remainder of his crop as a whole. The defendant refused to accept the prunes as a whole, but made no offer to accept less than the whole or to take the admittedly good prunes if the one ton of evaporated prunes were eliminated from the lot. The plaintiff thereupon sold the entire lot at auction in the nearest available market, and then brought suit to recover the difference between the proceeds of such sale and the contract price.

The foregoing statement of the record impels us to the conclusion that, while it was the right and duty of the plaintiffs to make a tender of this remainder of their crop of prunes for delivery to the defendant as a whole, and while it would have been the right of the defendant, had all of the prunes been up to the standard specified in the contract, to require such delivery of the whole of this remainder of the prunes, and to refuse to accept them unless thus offered as a whole, it was not the right of the defendant to refuse to accept any of those prunes for the reason that the one ton to which he had formerly objected were not in proper condition. At the time of the inspection of these prunes by the defendant's manager in December, 1907, and after his objection to this single and severable small lot of them, he plainly led the plaintiffs to believe that the remainder of their prunes, with the exception of this single ton, would be received and accepted whenever offered for delivery; and the express intimation of his letter of January 14, 1908, is to the same effect. Under these circumstances, having already received and accepted the larger portion of the plaintiffs' crop when delivered in November, and having requested the extension of time for the delivery of the remainder of the crop, and having been accorded such extension only after its manager had personally inspected the remainder of the crop, and been satisfied with all of it except the single ton, and having suggested that the latter, if put in condition by the plaintiffs, would also be accepted, and the plaintiffs having then and there and at that season of the year adopted the only available method of putting such single ton of prunes in condition, and having apparently claimed and believed that they had done so, and then tendered this remainder of their prunes for delivery as a whole, the defendant should have offered to accept all of the prunes which were admittedly up to the contract requirement, and should have confined its rejection to the single ton which it still claimed was not in like condition, and which was separate and severable from the rest. In other words, having already received and accepted the larger portion of these prunes, and having already expressed itself satisfied with all of the remainder with the exception of the single and severable ton, and having stated that these, when put in condition, would be accepted also, it was the duty of the defendant to have confined its rejection of the plaintiffs' final tender to the single, severable small lot of evaporated prunes, and by so doing have enabled the plaintiffs, by delivering the rest, to limit the dispute between them to the only portion of these prunes to which the defendant had a valid objection. Not having done this, the defendant is in no position to complain because the plaintiffs acted upon its unqualified and unjustifiable rejection of the remainder of their prunes as a whole, and took the only method of ascertaining their damage which is provided by law.

The other contentions of the defendant we find to be without merit.

The order is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

30 Cal. App. 188

Ex parte WILLIS. (Cr. 480.)

(District Court of Appeal, Second District, California. March 22, 1916.)

INFANTS ⟸16—DELINQUENTS—MINORS.

Juvenile Court Act (St. 1909, p. 213), and as amended by St. 1915, p. 1225, gives the juvenile court jurisdiction over all persons under the age of 21 years, irrespective of minority. Petitioner was adjudged by the juvenile court to be a delinquent person, the charge against her being that of vagrancy. At this time, petitioner was a married woman and she was ordered to be placed under probation until she arrived at the age of 21 years. Subsequently, petitioner reached the age of 18 years. *Held*, that the juvenile court had jurisdiction over petitioner until she reached the age of 21 years; there being nothing in the act to indicate that it did not extend to persons under that age, though they were not minors, or that by reason of marriage such persons escaped from the purview of the act.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. ⟸16.]

Petition by Clara Viola Willis for a writ of habeas corpus. Writ discharged, and petitioner remanded.

Louis Kleindienst, of Los Angeles, for petitioner. Thomas Lee Woolwine, Dist. Atty., and H. S. G. McCartney, Deputy Dist. Atty., both of Los Angeles, for respondent.

JAMES, J. A writ of habeas corpus was issued herein on petition of Clara Viola Willis. In August, 1915, petitioner, then being 17 years of age, was adjudged by the superior court of the county of Los Angeles, sitting as a juvenile court, to be a delinquent person, the particular charge being that she was guilty of vagrancy as that crime is defined in some of the provisions of section 647 of the Penal Code. At the time of this adjudication petitioner was a married woman. A final order in the matter was made on the 10th day of February, 1916, when the juvenile court ordered that petitioner be placed under probation until she arrived at the age of 21

years, or until further order of court, and that she be allowed to reside with her mother under the supervision of a probationary officer. On the 19th day of February, 1916, petitioner became of the age of 18 years. It was set out in the return that while a ward of the juvenile court petitioner had, without the consent of the court, but with the consent of her mother, married one Willis, but she deserted said Willis after living with him but a "short" period of time. The particular ground upon which petitioner asks to be discharged is that the juvenile court has no jurisdiction over persons other than minors and unmarried infants. Under the terms of the juvenile act, as its text stood both in the year 1909 (Stats. 1909, p. 213), and as amended in 1915 (Stats. 1915, p. 1225), the juvenile court is given jurisdiction over all "persons" under the age of 21 years, irrespective of the question of their minority. We can find no authority which deprives the Legislature of the right to confer jurisdiction upon the juvenile court in the manner and form described by the act. In order to sustain the contention of petitioner the court would be compelled to conclude that it was only competent for the Legislature to vest jurisdiction in the juvenile court over minors alone. There is no constitutional limitation that our attention has been called to which so restricts the legislative power.

The writ is discharged, and petitioner remanded.

We concur: CONREY, P. J.; SHAW, J.

(30 Cal. App. 162)

FOX v. WINDEMERE HOTEL APARTMENT CO. et al. (Civ. 1589.)

(District Court of Appeal, First District, California. March 20, 1916.)

1. LANDLORD AND TENANT ⇐5(2) — "LODGING HOUSE"—"APARTMENT"—"LODGERS."

Where a house is under the direct control and supervision of the owners, rooms are furnished and attended to by them, and they or their servants retain the keys thereto, although the word "apartment" appears as a portion of the designation of the premises, a person renting a room therein becomes a lodger, and not a tenant, since a "lodging house" is none the less such because it contains furnished apartments that are let by the week or month.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 9; Dec. Dig. ⇐5(2).

For other definitions, see Words and Phrases, First and Second Series, Apartment; Lodger; Lodging House.]

2. TRIAL ⇐397(1)—LIEN—FINDINGS.

In an action to recover a trunk detained by the defendants under Civ. Code, § 1861, giving lodging house keepers a lien upon baggage and other property of lodgers for charges due, failure of the court to find upon what theory the lien was denied, being a material issue, was reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 940; Dec. Dig. ⇐397(1).]

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by D. L. Fox against the Windemere Hotel Apartment Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Hiram E. Casey, of San Francisco, for appellants. Wm. G. Weiss, of San Francisco, for respondent.

KERRIGAN, J. This is an action in claim and delivery brought by plaintiff to recover a certain trunk and its contents in possession of the defendants of which plaintiff claimed to be the owner. The defendants, answering, alleged that they came into possession of the property as lodging house keepers, and that they detained it by virtue of a lien, given to them as such by the provisions of section 1861 of the Civil Code, as security for the payment of the sum of $13.60 claimed to be due to them from plaintiff.

The case went to trial, and the plaintiff recovered judgment for the return of the property, or its value in case its return could not be had; the value being found by the court to be $750. Defendants appeal.

It appears that the plaintiff occupied three rooms, paying therefor $55 per month, in the certain premises conducted by the defendants known as the Windemere Hotel Apartments; that he quit possession of his rooms owing to the defendants the sum of $13.60, and the latter refused to allow him to remove the personal property in question from the premises, claiming, as above indicated, that they had a lien thereon to secure payment of the amount due them. Plaintiff offered testimony to show that he had tendered this amount to the defendants, but that they had refused to accept it. The testimony, however, upon this question was conflicting, and the court failed to make any finding whatever upon the subject, but rendered judgment in favor of plaintiff. In support of the judgment it is the contention of plaintiff that the defendants were not lodging house keepers within the meaning of section 1861 of the Civil Code, and were therefore not entitled to a lien.

Upon this question the evidence shows that the defendants resided upon the premises and at all times had control and supervision over the same; that they had a hotel keeper's license; that they offered for rent and rented rooms by the day, week, or month, or from month to month; that the premises consisted of 58 apartments or suites of rooms; that all rooms, including those let to the plaintiff, were rented completely furnished; that the defendants retained keys to all the suites or apartments, and had access to them at all times for the purpose of keeping them in order; that they furnished the necessary linen, kept the carpets and windows clean, swept the hallways and removed the garbage, and, in fact, it may be inferred from the record that they also furnished the necessary light

and heat, and did everything that lodging house keepers usually do in the maintenance of a lodging house.

[1] Such was the showing made by the defendants. On the other hand, there was no attempt made by the plaintiff to distinguish the defendants' business as thus conducted from the ordinary lodging house; in other words, there was no showing, for example, that the building was divided into separate sets of apartments or suites of rooms intended as homes or for the residence of families living independently of one another, and in which each family or household is provided with rooms, including kitchen, bathroom, and toilet. These are elements which would tend to constitute an apartment house. 3 Corpus Juris. 251. If such evidence had been produced a different question would have been presented for determination. Under the circumstances of this case the mere fact that the word "apartment" appears as a portion of the designation of the premises is not sufficient to overcome the evidence in the case tending to show that the premises were in fact a lodging house. A lodging house is none the less such because it contains furnished apartments that are let out by the week or month. Cromwell v. Stephens, 2 Daly (N. Y.) 15. Where, as here, the testimony shows that the house was under the direct control and supervision of the owners, that the rooms were furnished and attended to by them, and that they or their servants retained the keys thereto, a person renting such a room makes himself a lodger and not a tenant. Messerly v. Mercer, 45 Mo. App. 327; Wilson v. Martin, 1 Denio (N. Y.) 602; Toms v. Luckett, 5 C. B. 23; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576; Pullman Car Co. v. Lowe, 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. Rep. 325; Smith v. St. Michael, 3 El. & El. 383, 107 E. C. L. 383; Stamper v. Sunderland-near-the-Sea, L. R. 7 Q. B. 90.

[2] It does not appear from the record before us upon what theory the lien was denied; it may have been on the theory that a legal tender was made to the defendants of the amount due. This was a material issue upon which there should have been a finding.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

30 Cal. App. 206

HAVENS et al. v. ALAMEDA COUNTY.

(Civ. 1658.)

(District Court of Appeal, First District, California. March 25, 1916.)

1. VENDOR AND PURCHASER ⊂=54 — EXECUTORY CONTRACT OF SALE—EFFECT.

An executory contract of purchase and sale does not ordinarily have the effect of diverting the legal title to the property from the vendor and transferring it to the vendee, and the vendee ordinarily has only an equitable title, and so is not entitled, as a matter of right, to possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 85; Dec. Dig. ⊂=54.]

2. VENDOR AND PURCHASER ⊂=54—CONTRACTS —EFFECT.

Where a contract for the purchase and sale of land provided that the vendee should be admitted into possession, the vendee's title, though it be only equitable, carries with it some of the rights of absolute ownership, as to occupy and to lease.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 85; Dec. Dig. ⊂=54.]

3. TAXATION ⊂=244—EXEMPTIONS—PERSONS ENTITLED—"RENT."

A church congregation sold property, reserving the right of possession for a stipulated time, without payment of rent or any charge. The contract further provided that the church should pay the vendee interest on those installments of the purchase price which were paid. Const. art. 13, § 1½, declares that all buildings and property used for religious worship shall be exempt from taxation. *Held*, that the interest paid by the church should be construed as "rent," the contract evidencing the vendee's right to possession, and therefore the premises, being leased, were not exempt from taxation on the ground that they were used for religious worship.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 405–414; Dec. Dig. ⊂=244.

For other definitions, see Words and Phrases, First and Second Series, Rent.]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Wickham Havens and another against the County of Alameda. From a judgment for defendant, plaintiffs appeal. Affirmed.

John J. Allen, of Oakland (H. G. Tardy, of Oakland, of counsel), for appellants. W. H. L. Hynes, Dist. Atty., and W. J. Burpee, Dep. Dist. Atty., both of Oakland, for respondent.

LENNON, P. J. Section 1½, art. 13, of the Constitution of California provides that:

"All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship shall be free from taxation; provided, that no building so used which may be rented for religious purposes and rent received by the owner therefor, shall be exempt from taxation."

The plaintiff in this action sought to recover the sum of $1,683.60 paid under protest to the tax collector of the county of Alameda as state and county taxes for the year 1912, assessed against certain real property, which it was alleged was being used at the time of the levy exclusively for religious purposes. The defendant's defense of the action was rested primarily upon the affirmative allegations of its answer to the effect that, although the property in question was being used exclusively for religious purposes by the First Methodist Episcopal Church of Oakland, nevertheless prior to and at the date of the assessment (Monday, March 12, 1912) the

beneficial ownership of the property was, by virtue of a pre-existing executory contract of sale, in the plaintiffs, and that the church's occupation and use of the property was in fact that of a tenant, for which it had agreed to pay, and did pay, to the plaintiffs a stipulated rental. The appeal, which is from a judgment entered in favor of the defendant, comes here upon the judgment roll accompanied by an agreed statement of facts in lieu of formal findings, which shows that the facts of the case upon which the judgment rests are substantially these: The subject-matter of the assessment in controversy consisted of certain real property situated in the city of Oakland, upon which there had been erected by the First Methodist Episcopal Church a building which, at the time of the assessment and for a long time prior thereto, had been used by the church exclusively for religious purposes. On the 18th day of January, 1911, plaintiffs' assignors entered into an executory contract of purchase and sale with the First Methodist Episcopal Church, by which the former agreed to purchase and the latter agreed to sell the property in question for the sum of $275,000. Said contract, after reciting the terms and conditions upon which the several installments of the purchase price should be paid, provided that:

"The party of the first part [the church] is to have full and exclusive possession and enjoyment of all of the above-described real property and premises up to and until the 1st day of April, 1912, * * * without paying any rent or charge therefor except as herein provided, and that said party of the first part, in consideration thereof and of the covenants and agreements on the part of the said party of the second part herein contained, does hereby agree to pay to said party of the second part, his heirs and assigns, on the 1st day of April, 1912, interest at the rate of four per cent. per annum on all of the aforesaid payments from the date when the same are made to the 31st day of March, 1912."

[1, 2] The only point made in support of the appeal is that the judgment is not supported by the facts found in the agreed statement; and in this behalf it is conceded that the judgment must stand or fall upon the construction to be given to the executory contract of sale, and particularly to that clause thereof hereinbefore quoted relating to the church's use and occupation of the property for a designated period upon the payment in lieu of rent of a stipulated rate of interest upon the paid-up installments of the purchase price. The plaintiffs insist that the executory contract in question did not confer the beneficial ownership upon the vendee pending payment of the purchase price, and that therefore that clause of the contract giving the possession, use, and occupation of the property to the church pending performance of the contract, in consideration of its payment of interest upon the paid-up installments of the purchase price, cannot be construed to mean that the church's possession at the time of the assessment was in effect that of a tenant. This contention cannot be sustained. It will be conceded that it is the rule generally that an executory contract of purchase and sale does not have the effect of diverting the legal title to the property which may be the subject of the contract from the vendor, and transferring it to the vendee. Under such a contract the vendee acquires only an equitable title to the property, and consequently is not entitled, as a matter of right, to the possession of the property. Willis v. Wozencraft, 22 Cal. 608; Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695; Deputy v. Mooney, 97 Ind. 463; Teller v. Schulz, 123 App. Div. 883, 108 N. Y. Supp. 325. The right of possession remains in the vendor pending performance of the contract unless it be expressly or impliedly provided that the vendee shall have possession. Fitch v. Windram, 184 Mass. 68, 67 N. E. 965; Corning v. Loomis, 111 Mich. 23, 69 N. W. 85; Olson v. Minnesota Ry. Co., 89 Minn. 280, 94 N. W. 871; Sample v. Lyons, 59 App. Div. 456, 69 N. Y. Supp. 378; Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121, 4 Ann. Cas. 1016. And where the contract so provides, the vendee is entitled to the beneficial use of the property, and therefore even though his title be only equitable, it carries some of the incidents of an absolute ownership, such as personal occupation and the right of leasing the property to others. Fitch v. Windram, supra; Nearing v. Coop, 6 N. D. 345, 70 N. W. 1044.

[3] While the contract in controversy here does not expressly give the plaintiffs' assignor the right to the possession, use, and occupation of the property pending the performance of the contract, nevertheless the granting of that right may be fairly inferred from that clause of the contract which provides that the church shall retain the possession, etc., without paying rent save in the form of interest upon the paid-up installments of the purchase price. This clause of the contract compels the conclusion, we think, that it was the intent of the parties that pending performance the vendees were to have the possession and beneficial ownership of the property, with all of the incidents ordinarily appertaining thereto. Consequently it must be held that the church's use and occupation of the property was in effect that of a tenant; and it is idle to argue that the interest which the church was required to pay upon the paid-up installments of the purchase price cannot be considered as rent. Such interest was to be paid as a return or compensation for the use of the property, and was therefore rent in the broad legal sense of the term. Bouvier's Law Dict.; Schuricht v. Broadwell, 4 Mo. App. 160.

For the reasons stated, we are of the opinion that the contractual relation of the church and the vendee was, at the time of the assessment, and at all times subsequent thereto, to all intents and purposes that of landlord and tenant. Consequently the prop-

erty in question was not exempt from taxation.

The judgment appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

30 Cal. App. 198

THOMAS v. ANTHONY. (Civ. 1642.)

(District Court of Appeal, First District, California. March 28, 1916.)

1. DAMAGES ⇐163(3)—LIQUIDATED DAMAGES —BURDEN OF PROOF.

Civ. Code, §§ 1670, 1671, declares that every contract, by which the amount of damages to be paid or other compensation to be made for breach of an obligation is determined in anticipation thereof, is to that extent void, except that the parties may agree upon an amount which shall be presumed to be the amount of damage sustained by breach of contract when from the nature of the case it would be impracticable or extremely difficult to fix the damage. A contract for the purchase of automobiles for sale on commission provided that plaintiff should in event of his breach forfeit a sum deposited with defendant. *Held* that, as there was nothing in the contract to show that the damages could not be assessed, defendant was bound, in an action to recover the deposit, to plead and prove that the contract fell within the exception; therefore proof by plaintiff of his breach and his demand for return of the deposit makes out a prima facie case.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 458; Dec. Dig. ⇐163(3).]

2. PRINCIPAL AND AGENT ⇐101(1)—AUTHORITY OF AGENT.

Presumptively, an agent is employed to make contracts and not modify them, and has no power to rescind, although a general agent may act under such a broad power to contract in his own name as to overcome the presumption.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 255, 330, 346; Dec. Dig. ⇐101(1).]

3. CONTRACTS ⇐241—VALIDITY.

A contract for the purchase of automobiles which were to be resold on commission is not void because it reserved to the manufacturer the right to change the price at which the machines were to be sold, subject to the variations in the market; it appearing in no case that the agent's commission was to be changed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1126; Dec. Dig. ⇐241.]

4. CONTRACTS ⇐10(1)—VALIDITY—MUTUALITY.

A contract which reserved to defendant the right to cancel it upon 15 days' notice, and to return to plaintiff unused deposits, is not void for lack of mutuality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 26; Dec. Dig. ⇐10(1).]

Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by W. D. Thomas against Earl C. Anthony, doing business as the Western Motor Car Company. From a judgment entered on a nonsuit, plaintiff appeals. Reversed and remanded.

Edwin H. Williams, of San Francisco, for appellant. James P. Sweeney, of San Francisco, for respondent.

KERRIGAN, J. This is an action brought to recover from the defendant $1,000 deposited with him by the plaintiff in conformity with the terms of a written agreement entered into between them. When plaintiff's case was concluded, defendant moved for a nonsuit, which was granted, and judgment was rendered and entered thereon. The appeal is from such judgment.

The testimony introduced shows that the plaintiff entered into a contract in writing with the Western Motor Car Company, the trade-name under which the defendant Anthony did business. The contract was a lengthy instrument, providing substantially that Thomas should purchase from the defendant 50 Saxon motor cars between the date of the agreement, February 20, 1914, and January 1, 1915. The cars were to be sold to him at "San Francisco list prices," and a brokerage or discount of $40 on each car so sold was allowed to him off of said list price. The defendant reserved the right "to change the list and net prices of these cars at any time by giving the plaintiff at least two weeks' notice of the proposed change." The latter agreed to open an establishment for the sale of the cars at Fresno, keep a demonstrator for exhibition purposes, and resell the cars to such customers as he could secure under the conditions named in the contract. He also deposited with the defendant $1,000, which, in case of cancellation of the contract before its expiration, or in the event that its terms should not be fully complied with by the plaintiff, was to be retained by the defendant as damages, or be applied by him to the liquidation of accounts that might then be due to him under the contract. The right was reserved by defendant of "canceling the above contract upon 15 days' notice and returning unused deposits."

At the trial the plaintiff testified as follows:

"After the contract was executed and I had paid this thousand dollars, I had a conversation with Mr. Sells, the manager of the Western Motor Car Company. That was about March 3d. Mr. Sells told me I had better go down to Fresno and open up an office and take orders for the cars. I asked him how he wanted me to handle the cars. I said, 'You promised me a demonstrator the first of the month.' I informed him that under the conditions I could not handle the car on a paying basis, and I asked him if he would release me if I got another job. He said, 'Most certainly.' So I went away and came back next morning, and told him I had another job and asked him for my deposit, and he said, 'Mr. Thomas, it will have to come from the Los Angeles office, and it will be the end of the week before I can give it to you.' And he asked me to come back and get it then. I did come back then and several times later, and he kept putting me off. I had a conversation with Mr. Sells when Mr. Cheney was present. Mr. Cheney asked him how long it would be before I got my money, and he stated the end of the week. Mr. Cheney wanted to know if it would help matters if we paid the expenses of wiring to Los Angeles, and he said, 'No, it would not,' and that he

would have to write. He said, 'You know we have a signed contract with Mr. Thomas and can hold him to it if we want to, but we don't intend to do it. Without a doubt he will have his money at the end of the week.'"

When the plaintiff rested his case, besides the contract he had introduced evidence which, according to his view, entitled him to the return of the $1,000 deposit upon the theory that there had been an oral mutual abandonment or rescission of the written contract. Whether or not that position is sound need not now be determined, but it is certain that there was no evidence before the court from which it could infer that the defendant was actually damaged in the sum of $1,000, or that any of the other contingencies mentioned in the contract had arisen upon which the defendant was entitled to keep the whole deposit.

[1] As before stated, the contract enumerates, in case of a cancellation or breach thereof by the plaintiff, various situations under which the defendant might be entitled to damages, and specifies in each instance of what the damage shall consist. Hence when the plaintiff had concluded his case, and assuming that his evidence showed that he had himself breached the contract, still at that point in the trial he was entitled to the return of the $1,000 unless the defendant should show any damage which he was entitled to recoup out of the deposit, or was entitled to the whole deposit, upon the showing made by plaintiff, by virtue of any of the provisions of the contract authorizing the defendant to retain it as liquidated damages.

Under the terms of sections 1670 and 1671 of the Civil Code, a provision in a contract fixing in advance the damage for a breach thereof is void, except when from the nature of the case it would be impracticable or extremely difficult to determine the actual damage.

It is clear that plaintiff's case disclosed nothing that brought it within the purview of the second of these two sections. Assuming that the plaintiff's evidence showed a breach of the contract, this alone would not warrant the granting of a nonsuit and the denial of all relief. In order to entitle a defendant to retain a sum deposited with him as contingent liquidated damages for the breach of an obligation, it is incumbent upon him to show not only by averment but also by proof that his case is within the exception contained in section 1671; for without an allegation bringing his case within the exception the pleading in that regard is insufficient, the presumption being, in the absence of such allegation, that such agreement is void. Long Beach, etc., Dist. v. Dodge, 135 Cal. 401, 405, 67 Pac. 499; Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890; Pacific Factor Co. v. Adler, 90 Cal. 110, 120, 27 Pac. 36, 25 Am. St. Rep. 102:

"If a suit be brought on the contract for the actual, and not the liquidated, damages, as a matter of defense defendant must show to the court that it is erroneously instituted. It must be shown to the court by proper pleadings and competent proof that the contract falls within" the law permitting liquidated damages. "This does not depend entirely upon the contract itself. Facts must be pleaded and proven from which the court can say as a matter of law that the contract for liquidated damages is valid because 'from the nature of the case it would be impracticable or extremely difficult to fix the actual damages.' The mere stipulations of the contract are insufficient for that purpose." Deuninck v. West Gal. Irr. Co., 28 Mont. 261, 72 Pac. 620.

While the judgment must be reversed for the error of the court in granting the defendant's motion for nonsuit, it is proper to notice several other contentions of the appellant.

[2] The nonsuit seems to have been granted upon the ground that the claimed oral, mutual rescission, being of and concerning a written contract, was not proven as required by the provisions of section 1698 of the Civil Code, which reads:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

The appellant, however, contends that the rescission, being agreed to by the parties to the contract, constituted a mutual oral agreement of substitution for the written contract, and hence is not a modification thereof within the meaning of the section just quoted. Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159; 35 Cyc. 128; Credit Clearance Bureau v. Hochbann, 25 Cal. App. 546, 144 Pac. 315; 20 Cyc. 219; 74 Am. Dec. 658, note; 1 Greenl. on Ev. § 303. As the evidence may be substantially different upon a retrial of the cause we do not deem it necessary to determine the legal question thus presented. Moreover, assuming that the law is as stated by the plaintiff, we still very much doubt whether he proved a rescission by agreement; for in plaintiff's evidence there seems to be an intimation that while the agent of the defendant, E. N. Sells, had authority to enter into a contract, he was not vested with the power of consenting to its cancellation or rescission. In addition to this inference from the evidence, the presumption under the authorities seems to be, in the absence of a showing to the contrary, that an agent empowered to make contracts is not authorized to rescind or modify them.

"Presumptively an agent is employed to make contracts, not to rescind or modify them; to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal * * * unless the principal knew or approved of such modifications by the agent. However, a general agent may act under such broad power to contract in his own name, or to make terms or to settle upon his own discretion, as to overcome this presumption and bind the principal by the modification, rescission or release of his agent." 31 Cyc. 1387.

[3] As we have seen, the contract reserved to the defendant the right to change the price

of the cars at any time by giving to the plaintiff at least two weeks' notice of the proposed change, it being the duty of the plaintiff to sell at the list price. His brokerage or discount, however, was not altered by this change in the list.

We do not think that the contract by reason of this provision is void for failure to state the price at which the cars were to be sold. The costs of transportation or of the manufacture of an automobile are doubtless subject to variation as conditions change; and as the plaintiff and all other subagents were to be treated alike, and the sale covered a period of nearly a year, we think this provision of the contract a reasonable one. If it were not reasonable, and allowed the defendant to arbitrarily change the list price, the validity of the contract would be doubtful.

[4] The contract also reserved to the defendant the right to cancel it upon 15 days' notice, unused deposits to be thereupon returned. We do not think, as urged by the appellant, that this provision of the contract makes it void for lack of mutuality. In Page on Contracts, § 306, the author in treating of this phase of the law says:

"If A. and B. make mutual promises to each other, and A. is to have the right at his election to withdraw from the contract and relieve himself from all liability thereunder at his pleasure, some courts hold that such contract is without consideration. * * * If, however, A. must give notice for a substantial period of time before ending his liability under the contract, and such liability is to last until the end of time for which the notice is given, A.'s promise is a consideration. Thus if A. has the right to end the contract at the end of any year, or on ten days' notice, or on two weeks' notice, A.'s promise is a consideration."

For the error of the court in granting the defendant's motion for nonsuit, the judgment must be reversed, and it is so ordered.

We concur: LENNON, P. J.; RICHARDS, J.

(30 Cal. App. 198)

PORTER v. GENERAL ACC., FIRE & LIFE ASSUR. CORP., Limited. (Civ. 1692.)

(District Court of Appeal, Second District, California. March 24, 1916.)

1. INSURANCE ⟸136(1) — AGENTS — POWERS OF.

One having authority to take applications, receive and receipt for premiums, and deliver policies after countersigning them has no power to bind the company by a contract of insurance in any other way than by delivery of a policy issued by the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219, 225; Dec. Dig. ⟸136(1).]

2. INSURANCE ⟸88 — AGENTS — "GENERAL AGENT."

A "general agent" is one having all the powers of his principal as to the business in which he is engaged, but an agent having such powers within a specified locality authorized to appoint local agents, is deemed a general agent of an insurer, though his power is not coextensive with the insurer's business.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 117, 118; Dec. Dig. ⟸88.

For other definitions, see Words and Phrases, First and Second Series, General Agency or Agent.]

3. INSURANCE ⟸136(5) — AUTHORITY OF AGENT—LIMITATION.

An insurance company may limit the powers of its agent, and where the limitation is incorporated in the policy, an applicant by accepting the policy becomes charged with such limitation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 222–224, 229, 230; Dec. Dig. ⟸136(5).]

4. INSURANCE ⟸376(3) — POLICIES—WAIVER OF CONDITIONS.

Ordinarily an insurance agent cannot effect a waiver in the face of a limitation in the policy, denying his power to waive warranties or conditions, unless he is authorized to conclude contracts of insurance without referring them to the insurer, and to issue and deliver policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 952–955; Dec. Dig. ⟸376(3).]

5. INSURANCE ⟸379(4) — APPLICATION — STATEMENTS.

Where an applicant for insurance signs an application certifying to the truth of statements therein contained material to the risk, those statements become his solemn representations, though they be filled out by the insurer's agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1011–1015; Dec. Dig. ⟸379(4).]

6. INSURANCE ⟸256(2)—APPLICATION—REPRESENTATIONS.

Where an applicant for an insurance signs an application, which is made a part of the policy, he is bound by its terms, and cannot question representations therein appearing on the ground that he did not read the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 540; Dec. Dig. ⟸256(2).]

7. INSURANCE ⟸291(4)—ACCIDENT AND LIFE INSURANCE—REPRESENTATION.

Where an insurer required an applicant for a health and accident policy to state whether he had suffered from diseases of his eyes, answers to such questions are material.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 687; Dec. Dig. ⟸291(4).]

8. INSURANCE ⟸291(2)—HEALTH AND ACCIDENT INSURANCE—REPRESENTATIONS.

Civ. Code, § 2607, declares that a statement in a policy relating to the person or thing insured, or to the risk, is an express warranty thereof, while section 2612 provides that a breach of a warranty where it is broken in its inception prevents the policy from attaching. An applicant for a health and accident policy was questioned as to any diseases of the eyes. The answers were written by the insurer's agent and were false. The policy was not issued by such agent but by the insurer's general agent on the answers contained in the application which was made a part of the policy. The policy was duly accepted by the insured. *Held*, that he was bound by the representations contained in his application, and therefore, the representations being false, no recovery could be had under the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⟸291(2).]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by R. C. Porter against the General Accident, Fire & Life Assurance Corporation, Limited. From a judgment for plaintiff, defendant appeals. Reversed.

Herbert W. Kidd and Perry F. Backus, both of Los Angeles, for appellant. T. A. Williams, of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from a judgment which awarded to plaintiff the sum of $560 allowed as compensation for a four-month period of disability of the plaintiff, found to have resulted from an accident covered by the terms of an insurance policy issued by the defendant to the plaintiff.

At a time prior to the issuance of the policy, plaintiff signed an application to the defendant for a policy of insurance, and delivered it at Dallas, Tex., to J. H. Wilson, an agent of the defendant. The application was upon a form the blanks in which were filled in writing by the agent, the information being furnished by the plaintiff. A portion of the application reads as follows:

"(C) *I have* never *been* ruptured *or otherwise injured* or suffered the loss of a limb or *the sight of either eye.* (D) *My* hearing or *vision is not impaired.* (E) I have not had any medical or surgical treatment during the past five years, except as here stated. No exceptions.

"I am not subject to, do not now have, nor have I ever had fits of any kind, vertigo, hernia, paralysis, rheumatism, sciatica, lumbago, nor any disease or infirmity, mental, physical, nervous, venereal, chronic or inherited, except as here stated. No exceptions.

"*I understand and agree that* the insurance is not effective until the policy has actually been issued by the company and the premium paid, that *the company is not bound by any knowledge of or statements made by or to any agent unless written hereon. I further agree to accept the policy subject to all its conditions* and pay the monthly premium of two dollars in advance without notice."

A policy bearing date September 4, 1908, was thereafter issued pursuant to this application. It contains, among other things, the following terms:

"* * * General Accident, Fire & Life Assurance Corp., Ltd., of Perth, Scotland. Kelly & Norie-Miller, United States managers. United States offices, 55 John street, New York. (Hereinafter called the company.)

"In consideration of the premium, and the statements in the application for this policy, a copy of which is attached hereto and made a part hereof, which statements the assured, on the acceptance of this policy, warrants to be true, does hereby insure R. C. Porter * * * subject to all conditions and limitations hereinafter contained, * * * against accidental death and dismemberment * * * and disability due to either accident or illness, as hereinafter respectively defined, limited and specified.

"(R) This policy, with a copy of the application therefor signed by the assured, and any riders or indorsements signed by or on behalf of the United States managers and indorsed hereon or attached hereto shall constitute the entire contract of insurance except only as the same may be affected by any table of rates and classification of risks filed prior to the issuance of this policy with the insurance department of the state in which it is issued or delivered, and no statement made by the assured not incorporated in or indorsed on this policy shall avoid it or be used in evidence, and no provision of the charter, constitution or by-laws of the company shall be used in defense of any claim arising under this policy. *No agent has authority* to change this policy or *waive any of its provisions, and no* assignment, change or *waiver hereof shall be valid unless agreed to in writing by or on behalf of the United States managers of the company and indorsed hereon.*

"In witness whereof, the General Accident, Fire and Life Assurance Corporation, Limited, by its United States managers, has executed and attested these presents, but this policy shall not be valid unless countersigned by the duly authorized representatives of the company.

"The premium on this policy is two dollars per month. This policy is dated the 4th day of September, 1908. Countersigned at Dallas, Texas, this 4th day of September, 1908. J. H. Wilson, Authorized and Commissioned Representative. Kelly & Norie-Miller, United States Managers."

It is undisputed that the foregoing policy was in force during the period of time for which compensation has been awarded by the judgment herein, unless it be held that the validity of the policy was affected by an alleged breach of warranty on the part of plaintiff, in that his application for the policy contained certain misrepresentations of fact. The defendant by its answer alleged that the statements contained in the application were false in certain particulars, and by the plaintiff were known to be false; and especially that prior to the making of said application for insurance plaintiff had suffered for many years with eye trouble, and that prior to the execution by plaintiff of said application and the issuance of said policy of insurance plaintiff had suffered for many years from defective vision. Defendant further alleged that each of the representations so made was relied upon, and the policy issued by the defendant by reason of said statements contained in the application and in full reliance thereon and not otherwise.

The disability for which plaintiff claims compensation began on or about the 14th day of July, 1912. In presenting to defendant his proofs of claim, and in his complaint in this action until it was amended at the close of the trial, the claim was based upon alleged illness, and not upon the occurrence of any accident. This illness consisted principally in an infection of the left eye, and was described as purulent conjunctivitis. Notwithstanding the representation in the application for insurance that the applicant had never suffered any injury to the sight of either eye, and that he had not been disabled by accident or illness during the five years preceding the time of making the application, it is admitted by the plaintiff in his testimony and in the proofs of claim submitted by him that these representations were not true. In a letter written by plaintiff to the defendant, under date of November 11, 1912, he stated that about 15 years before that date a broken part of a dental instrument had been left in one of his eye teeth which affected the nerve of the tooth extending up to the eye, and he

had not discovered the presence of the piece of metal in this tooth until January or February, 1912, when the tooth was extracted. He said:

"This had affected the nerve of my tooth extending up to the eye, and the dentist and the specialist then declared to me that the trouble which I suffered with about 8 years ago was caused by this broken instrument in my tooth."

In an earlier part of the letter, he referred to the former trouble with his eye as follows:

"I had a former attack of my eye about 7 or 8 years ago, and the trouble I had then was of an entirely different nature from the attack which I have recently suffered with. The specialist at that time could give no reason for the trouble which I was suffering with."

Thus it is definitely admitted that less than 5 years before applying for this policy the plaintiff had suffered an illness pertaining to the left eye, and of such seriousness that for that trouble he consulted or was treated by a specialist. With this same letter the plaintiff forwarded to the defendant two certificates of physicians, in one of which it was stated that the claimant "had similar attacks several years ago," and the other referred to a similar disability as occurring about "7 years ago." The plaintiff further admitted that at that time his eye was treated daily for several weeks, by a physician.

On behalf of respondent it is contended that, while the application was being prepared, he stated to the agent Wilson the facts concerning his former trouble with his left eye; that the agent omitted to include those facts while filling out the application; and that the relation of Wilson to the company was that of a general agent whose knowledge of the facts was binding upon the company, notwithstanding the defect in the written application. In its findings the court below stated the facts in accordance with this contention, by finding:

"That the defendant delivered said policy and accepted the premiums from the plaintiff with full knowledge of all medical or surgical treatment received by the plaintiff for more than five years prior to the issuance and delivery of said contract or policy; that the defendant likewise at said time had full knowledge of any real or pretended impairment of the plaintiff's vision, and, being fully advised, itself filled out the application for the said contract or policy and delivered the same and accepted the premiums from the plaintiff thereon."

[1, 2] The evidence is sufficient to show that the actual facts concerning plaintiff's former illnesses and eye trouble were stated by the plaintiff to Wilson at the time of making the application. The sufficiency of the evidence to support the finding, quoted above, therefore, turns upon the nature and extent of Wilson's agency and the limitations upon his authority to waive the statement in writing by the plaintiff of facts material to the risk. Although Wilson was designated a general agent, there is no evidence showing any business done by him except at the city of Dallas, and the only services shown to have been performed by him in relation to this policy appear to have consisted in receiving and forwarding the application, countersigning and delivering the policy, collecting the premiums, and, 4 years later, receiving and forwarding the proofs of claim of plaintiff concerning the illness for which, in presenting the proofs of claim, he sought compensation.

"One who has authority to take applications, receive, and receipt for premiums, forward them, receive policies from the company, and deliver them after countersigning them, has no power to bind the company by a contract of insurance in any other way than by delivery of a policy issued by the company." May on Insurance (4th Ed.) § 126a.

"A general agent, in the strict legal sense, is one who has all the powers of his principal as to the business in which he is engaged—an extent of authority not often conferred in insurance. In that business an agent is termed a general agent rather with reference to the geographical extent of his authority, in contradistinction to a local agent, who may have original powers, though exercising them within more restricted limits; and the general agent may appoint local and subagents, which a local agent cannot." May on Insurance, § 126.

[3] An insurance company, like any other principal, may limit the powers of its agents. Iverson v. Metropolitan Ins. Co., 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866. Where this is done by clear and plain terms in the policy and the applicant accepts the policy, it becomes the contract between him and the company and he is charged with knowledge of its terms, among others, the limitations upon the power of the agent of the company.

[4] The authority of an agent to effect a waiver in the face of a limitation denying his power to waive warranties or conditions is not vested in every agent who may represent the company. Unless such authority be given to some particular agent to do so, then, as a general rule, it is only agents of the company who are empowered to issue and deliver policies who may be regarded as having the power to waive conditions and forfeitures. As to the character of agents authorized to waive such conditions, the rule includes all persons empowered to conclude contracts of insurance without first referring the negotiations to their principals, such as those which have full power to effect contracts of insurance, to fix rates of premiums, to consent to changes, to make indorsements and to cancel policies. Sharman v. Continental Ins. Co., 167 Cal. 117, 124, 138 Pac. 708, 52 L. R. A. (N. S.) 670; Enos v. Sun Ins. Co., 67 Cal. 621, 8 Pac. 379.

[5] Where the applicant for an insurance policy signs an application certifying to the truth of statements therein contained material to the risk and delivers it to the defendant, those statements become his solemn representations. And even though the statements be filled out by an agent upon a form furnished by the company, they are (at least in the absence of any fraud practiced upon the applicant) of the same binding force upon the applicant as though he had himself written them out in longhand and signed them. Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734, 738, 151 Pac. 159.

"Of course, if the insured stipulate in his application that the insurer shall not be bound by any act done or statement made to or by the agent, not contained in the application, he cannot shelter himself under a plea of equitable estoppel, by reason of the agent's fraud or negligence. The knowledge by the agent of a fact not stated in the application in that case becomes entirely immaterial, unless possibly when the statement of the fact may have been fraudulently prevented by the agent." May on Insurance, § 137.

[6-8] In the case at bar no question of fraud or lack of good faith on the part of the company is presented. The plaintiff does not even deny that he personally read the application before he signed it. A copy of this application as signed by him was attached to and made part of the policy.

"By accepting and retaining the contract without objection, plaintiff was bound by its terms, and cannot now be heard to say that he did not read it or know its terms." Madsen v. Maryland Casualty Co. of Baltimore, 168 Cal. 204, 206, 142 Pac. 51, 52.

The fact that the statements contained in the application, and which the evidence in this case shows to have been untrue, were material to the risk, and are closely related to the very matter involved in plaintiff's claim herein, is beyond question. The further fact that the insurer exacted and the applicant gave a statement as to previous injuries to his eyes or defects of vision proves that the parties considered and agreed that this matter was material. Having so agreed, the fact of its materiality is binding upon them. Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734, 151 Pac. 159; McEwen v. New York Life Ins. Co., 23 Cal. App. 694, 139 Pac. 242.

"A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof." Civ. Code, § 2607.

"A breach of warranty, * * * where it is broken in its inception, prevents the policy from attaching to the risk." Civ. Code, § 2612.

This policy, although countersigned and delivered by the agent at Dallas, was in fact issued from the office of the United States managers of the corporation, where the matter of accepting or refusing the application was determined. The recitals in the policy clearly indicate this fact, and there is no evidence or claim to the contrary. The fact that the policy was delivered to plaintiff through the agent to whom it had been sent, and was required to be countersigned by him, is not sufficient to give him the general powers of the company in the face of the limitations written into the application and policy. Aside from the plaintiff's testimony that he had truly described his former illnesses to the agent when the application for policy was prepared, it is not claimed that the defendant ever received any information of the former illnesses of plaintiff to which we have referred, until he presented proofs of claim on account of the illness or injury to which this action relates. Upon the facts herein stated, and the law as above set forth, we conclude that the defendant has incurred no liability upon the policy.

Several other questions of some importance are presented in support of the appeal, but in view of our decision upon what we consider the main issue, we deem it unnecessary to discuss other phases of the case.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

30 Cal. App. 165

BARRY et al. v. JACKSON, Commissioner of Public Health and Safety, etc. (Civ. 1799.)

(District Court of Appeal, First District, California. March 21, 1916.)

MUNICIPAL CORPORATIONS ⟹218(6) — CREATION AND ABOLITION OF OFFICE — CIVIL SERVICE LAWS.

Where a new city administration passed an ordinance abolishing certain old positions under the classified civil service system of the city, and creating new positions, and notified incumbents of the old positions that their employment was terminated by abolition of their positions, and applied to the civil service board for classification of the new positions, and the board, after investigation found the duties of the new positions identical with those of the old, although the positions bore different titles, and no evidence was introduced contrary to the board's conclusion, the incumbents of the old positions were entitled, on their application for peremptory writ of mandate therefor, to be restored to the positions from which removed.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. ⟹218(6).]

Appeal from Superior Court, Alameda County; Wm. H. Donahue, Judge.

Application for writ of mandate by J. J. Barry and others against F. F. Jackson, as Commissioner of Public Health and Safety, etc. From a judgment for petitioners, defendant appeals. Affirmed.

Paul C. Morf, City Atty., of Oakland, and George E. Jackson, Asst. City Atty., of Oakland, for appellant. Charles A. Beardsley, of Oakland, for respondents.

KERRIGAN, J. This is an appeal from a judgment ordering a peremptory writ of mandate to issue, directing the appellant, as commissioner of public health and safety of the city of Oakland, to reinstate the respondents, petitioners in the trial court, to certain positions in the health department, under and in conformity with the findings and decision of the civil service board of that city. The city of Oakland is governed by a freeholders' charter, which took effect July 1, 1911. That charter introduced into the government of the city for the first time a civil service system. Four years after the city had been operating under that system a new mayor and two new commissioners were elected, and they constituted a majority of the city council. The appellant was one of the new commissioners, and he was assigned to the department of public health and safety as

commissioner thereof. On the first day of its term the new administration introduced into the city council an ordinance, numbered 885 N. S., which repealed Ordinance No. 350. The new ordinance abolished many of the old places of employment in the department of public health, and created, or attempted to create, new ones, the final result being a reduction in the number of employés of this department from 34 to 33, and a saving in expense to the city of $600 per annum. The new ordinance was finally passed and took effect July 20, 1915. Sections 5 and 6 of this ordinance provided as follows:

"Sec. 5. There are hereby created two positions of deputy sanitary and plumbing inspector, and the salary of each thereof is hereby fixed at not less than one thousand five hundred ($1,500) dollars and not more than one thousand six hundred and twenty ($1620) dollars per year payable in equal monthly installments.

"Sec. 6. There are hereby created two positions of deputy sanitary and plumbing inspectors, and the salary of each thereof is hereby fixed at twelve hundred ($1200) dollars per year, payable in equal monthly installments."

It will be noted that the four places of employment provided for in these two sections bear identically the same names, but the salaries are materially different. The old ordinance had provided for two positions of deputy plumbing inspector, and for four positions of assistant sanitary inspector, and provided for a supervising officer known as "chief plumbing and sanitary inspector," who was not subject to civil service regulation. Under the new ordinance provision was made for a chief plumbing inspector and also for a chief sanitary inspector, both of whom were exempt from civil service rules. On and prior to the passage of the new ordinance respondents Barry and Cordan were deputy plumbing inspectors, and respondent Poole was an assistant sanitary inspector, which positions were among those contained in the classified civil service of the city, and were postitions created by the old ordinance. Immediately upon the passage of the new ordinance the defendant notified petitioners that their respective positions had been abolished, and that their employment had terminated by the repeal of Ordinance No. 350. The defendant also at once advised the civil service board of the passage of Ordinance No. 885 N. S. and of the notice given to petitioners terminating their employment; and, acting upon the theory that there was no eligible list for the positions provided for in sections 5 and 6 of Ordinance 885, requested the approval of the civil service board of temporary appointments made by him of three men without civil service standing, two being for positions provided for in section 5, and one for one of the places provided for in section 6 of the new ordinance.

Under the city charter if the places of employment created by sections 5 and 6 of Ordinance 885 did not fall within the classified civil service, then, with the consent of the civil service board, the appointing power could make temporary appointments for a period not exceeding eight months. It was under this provision of the charter that the appellant sought approval of the temporary appointments just adverted to. In order to determine whether there was any eligible list applicable to the places of employment provided for in these sections of the new ordinance, and in order to determine whether the temporary appointees were fitted for the positions, the civil service board made an investigation, received and considered evidence, and found in accordance therewith that the duties attached to the places of employment provided for in section 5 of Ordinance 885 N. S., and designated "deputy plumbing and sanitary inspectors," were identical with those of the positions designated as "deputy plumbing inspectors" by Ordinance No. 350 N. S., which latter positions were held by petitioners Barry and Cordan. The board also found that the duties attached to the places of employment provided for in section 6 of Ordinance No. 885 N. S., and designated by the same name of "deputy plumbing and sanitary inspectors," were the same as the duties attached to the places of employment designated in Ordinance No. 350 N. S. as "assistant sanitary inspectors," one of which positions was held by the petitioner Poole.

Again, the petitioners, availing themselves of a provision of the charter, prosecuted an appeal before the civil service board, claiming to have been wrongfully discharged from their positions. This was a proceeding more formal than the investigation held by the board to ascertain the duties of the so-called new positions and to classify the same, and upon the trial both sides were represented by counsel, testimony was introduced, and the board again unanimously found in a formal resolution that the duties under both ordinances were the same, and that the petitioners were entitled to reinstatement.

From the record before us it appears that the civil service board, both in its investigation undertaken for the purpose of classifying the so-called new positions, and upon the formal hearing of the appeal of the petitioners, received all available testimony, and decided in both proceedings that the positions under the old and new ordinances were substantially the same, and directed that the petitioners be restored to their employment. They called before them and received the testimony of the two men who were appointed under the new ordinance by the appellant as the heads of the plumbing and sanitary departments respectively. They also took the testimony of Joseph S. Biven, who was assistant sanitary inspector under the old ordinance, and who remained in the employ of the city under the new one, rendering the same services as he performed theretofore. They examined the daily report cards of the work done by the new employés who filled the positions of the removed men. The city

efficiency expert, together with others, also testified before the board, and after full hearing, and after duly considering all the testimony introduced by the parties, the board found that while the positions provided for in the two ordinances bore different titles, the duties thereunder were the same.

It is not claimed—or in any event no evidence was introduced at the trial in the superior court to show—that the conclusions reached by the civil service board were not sustained by sufficient evidence, and hence this court, in common with the trial court, is bound by the conclusions of the civil service board. While the language of the new ordinance may indicate that the positions under the two ordinances are essentially different, it certainly does not, as asserted by the appellant, overcome the presumption that the evidence received by the civil service board showed that the difference between the places of employment under the two ordinances was merely one of name, and that the duties under them were similar. According to the findings of the civil service board, it would appear that in effect the city council was endeavoring to circumvent the object and purpose of the civil service system. On this phase of the case the trial court in an oral opinion pertinently said:

"There are something like 1,200 or more employés of the city of Oakland that come under civil service. Of that number in the neighborhood of 25 are what might be termed "created by the charter." That leaves 1,100 or more places of employment where the tenure of office is, in some respects, similar to the tenure of office of the petitioners here. Civil service in its true sense means the substitution of business principles and methods in the conduct of the business of government, and especially the merit system, instead of the spoils system, in the matter of appointment to office, in order to obtain competency and greater efficiency by continued employment of faithful employés. Whether a person may feel that civil service is good, or whether he feels that it is bad, the only way that anything can be obtained by civil service is to carry out the intention of the framers of the charter as set forth in article 13, and have the provisions thereof enforced. If respondent's contention in this matter should prevail, it would mean, in my view, that all the council would have to do would be to repeal the ordinance creating the positions of the 1,100 employés and enact new ordinances, giving the respective positions different names, and by that means civil service could be destroyed."

The appellant also claims that under the provisions of the charter the civil service board has authority to hear an appeal only when an employé has been discharged, and not in a case where his position has been abolished. The board, on the investigation made by it for the purpose of classifying the places provided for by the new ordinance, found that the positions of the petitioners had not been abolished. But even if it can be said that in repealing the old ordinance the old positions were, technically at least, abolished, and hence that the board had no jurisdiction to hear the appeal, still it is not questioned that the civil service board, when it made its investigation for the purpose of classification, determined that the places of employment were the same under the new ordinance as under the old, from which it follows that the petitioners were entitled to be restored to the position from which they were removed.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

30 Cal. App. 255

ROCHE v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

(Civ. 2018.)

(District Court of Appeal, Second District, California. April 10, 1916.)

1. INTOXICATING LIQUORS ⇐37 — ELECTION CONTEST—JURISDICTION TO DETERMINE.

Jurisdiction over election contests arising under Local Option Act (St. 1911, p. 601) § 9, is conferred on the superior court by Const. art. 6, § 5, conferring jurisdiction on superior courts over all special cases or proceedings not otherwise provided for.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. ⇐37.]

2. INTOXICATING LIQUORS ⇐37—LOCAL OPTION CONTESTS—PROCEDURE.

Under Local Option Act, § 9, providing that election contests shall be subject to laws regulating contesting of elections in general in so far as applicable, Code Civ. Proc. § 1119, providing notice to contestee being inapplicable, the court, under section 187, has express authority to adopt such process or mode of procedure as may appear most conformable to the spirit of the Code.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. ⇐37.]

3. INTOXICATING LIQUORS ⇐37—LOCAL OPTION—CONTEST—PROCEDURE.

Under Code Civ. Proc. § 187, giving the court express authority to adopt special procedure in cases where no other means are provided to carry into effect its jurisdiction, the publication of notice of hearing in a local option contest and service of citation on officers of the city was proper.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. ⇐37.]

Petition by W. A. Roche for a writ of prohibition against the Superior Court in and for the County of San Diego and W. A. Sloane, judge thereof. Petition denied.

Wright, Winnek & McKee, of San Diego, for petitioner. Luce & Luce, of San Diego, for defendants.

CONREY, P. J. In this proceeding the plaintiff, an elector of the city of Oceanside, asks for a writ of prohibition directing that the defendants refrain from proceeding to enter judgment on the merits in a certain election contest, and from taking any further steps concerning said contest save and except to dismiss that proceeding.

On the 14th day of October, 1915, in the city of Oceanside, a city of the sixth class, an election was held to vote upon the ques-

tion whether the sale of alcoholic liquors should be licensed in that city. This election was held pursuant to the provisions of a statute enacted in 1911 (Stats. 1911, p. 599), to provide for the regulation of the traffic in alcoholic liquors by establishing local option. On October 19th the returns of that election were duly canvassed by the board of trustees of the city, who declared the result to be 217 votes against and 221 votes in favor of licensing such sales. On November 6, 1915, one C. G. Borden, an elector of the city, filed in the superior court of the county of San Diego a complaint in a proceeding entitled "In the matter of the election held in the city of Oceanside, county of San Diego, State of California, on the 14th day of October, 1915, in pursuance of that certain act of the Legislature of the state of California known as the 'Wylie Local Option Act,'" for the purpose of contesting the election upon certain stated grounds of contest, praying for a recount of the ballots and for judgment that the result of the election was not in favor of license, "and that the said board of trustees of said city of Oceanside be ordered to make an entry in its records declaring that the said city of Oceanside is no-license territory." On November 16, 1915, an order was made for a special session of the superior court to be held on the 3d day of December for the purpose of hearing said election contest. No citation was then issued to any defendant or respondent in that case (none being named in the complaint); but a direction was incorporated in the order that a copy thereof be published in two successive issues of a designated weekly newspaper published in the city of Oceanside, and that publication was made in accordance with the order. On December 3d the court continued the hearing of the contest until December 6th, and on December 4th caused to be issued a citation directed to David Rorick, president of the board of trustees of the city of Oceanside, citing him to appear before the court on December 6th to show cause, if any he had, why contestant should not be granted judgment as prayed for in his petition of contest. The citation was duly served upon Rorick on December 4th, and at the hearing on December 6th Rorick filed an answer protesting that the court had no jurisdiction for any purpose in that case. The court, having overruled all objections to its jurisdiction, proceeded to hear the evidence in the matter of said election contest, and will proceed to enter judgment thereon unless prevented by means of the writ demanded in this proceeding.

The petitioner claims that the superior court is without jurisdiction in the case brought before it, that such jurisdiction does not exist, except so far as conferred by statute, and that the statutory provisions upon which respondents must rely are insufficient to confer the jurisdiction which the superior court is attempting to exercise in that proceeding.

[1] The original jurisdiction of superior courts extends to sundry subjects declared in the Constitution, and to "all such special cases and proceedings as are not otherwise provided for." Const. Cal. art. 6, § 5. This means necessarily that, wherever a case or cause exists which is outside the scope of those directly mentioned in the provisions vesting jurisdiction in the superior court, and jurisdiction thereof has not been vested in any other court or official body authorized to exercise judicial functions, the jurisdiction to hear and determine such special case is vested in the superior court. In section 9 of the local option election law above cited, we find that:

"Any elector of the territory in which an election under this act is held may contest such election for malconduct on the part of the election board or of any member thereof or on account of illegal votes. Such contest shall be subject to all the provisions of law relating to the contesting of elections, so far as the same may be applicable. * * *"

[2] The right of contest being thus created, and there being no other court vested with jurisdiction over the matter, it follows that by virtue of the Constitution and the statute the subject-matter of any contest arising under the local option act is a special case within the jurisdiction of the superior court. There are no statutory provisions outlining a procedure for election contests, except as found in section 1111 et seq. of the Code of Civil Procedure. Those sections furnish a procedure for contesting the right of any person declared elected to an office to be exercised in any county, city and county, city, or any political subdivision of either. They contemplate an adversary proceeding in which the contestee is one who has been declared elected to an office, and he is to be brought before the superior court by means of a citation issued and served after an order providing for a special session of court to hear the contest. The petitioner herein contends that the provisions of the Code of Civil Procedure are not applicable to a contest relating to a question submitted to the electors other than one including the election of a public officer; that, there being no contestee, the provisions for citation and service as set forth in section 1119 of the Code of Civil Procedure cannot be applied to the case. He directs attention to the fact that the public is the real party in interest in such a proceeding, and claims that, because there is no provision anywhere made by statute prescribing who shall represent the public, or how the representative of the public shall be cited or served with process, the attempted contest must fail for want of legal parties or procedure. Cases are not wanting which tend to support the argument thus made. Among these, and very strongly relied upon, are Beason v. Shaw, 148 Ala. 544, 42 South. 611, 18 L. R. A. (N. S.) 566;

Kehr v. City of Columbia, 136 Mo. App. 322, 116 S. W. 428. While appreciating the force of these decisions, it is our opinion that, in view of a further provision of statutory law in California, they should not have controlling effect here. If the Code sections concerning election contests do not apply to the case presented by a local option question, it does not follow that there is no possible procedure. The right to contest the election has been conferred by the same statute which authorized the election to be held. An elector claims to have been aggrieved (as one of the public therein concerned) by an erroneous declaration of the result of the election. The alleged grievance is therefore a special case entitled to be heard, and the jurisdiction to hear and determine that case is vested in the superior court. The only obstacle remaining in his way is found in the fact that no procedure applicable to the case has been prescribed by statute. Under such circumstances it is necessary to inquire what are the powers of the superior court with respect to the mode of proceeding.

[3] Section 187 of the Code of Civil Procedure provides as follows:

"When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of procedure be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

We are inclined to agree with counsel for petitioner that the Code provisions on election contests to which we have referred are in some respects not applicable to the contest of an election held under the provisions of the so-called Wylie Act. But we do not think that, in order to make effective the right of contest, it is necessary that some statute shall designate a contestee selected to represent the public, and who must be cited to appear before the court in such contest proceeding. It is not in the ordinary sense an adversary proceeding. The public—that is to say, the people of the city of Oceanside—are interested in having a correct determination of the result of the election, and, since it is provided that any elector may contest the declared result of the election, it is implied that the court will permit any other elector to oppose such contest so far as necessary for a just and lawful disposition of that proceeding. Under section 187, Code of Civil Procedure, it devolves upon the court in such a case to adopt a suitable procedure which will furnish an opportunity for any interested person to appear at the hearing. This the court attempted to do by providing for the publication in a newspaper of the city of a notice of the time and place when the case would be heard. This alone, in our opinion, was a sufficient compliance with the law as to procedure. The court acquired its jurisdiction of the case upon the filing of the complaint, and it was entitled to exercise that jurisdiction by the appropriate means which it selected. The court further recognized the existence of the city government as a body in some respects representing the people of the city, and caused service of a citation to be made in a manner similar to that which is required for the service of a summons where the city is a party defendant in an action. Code Civ. Proc. § 411, subd. 5. Where the power of judging of the election of city officers is vested in a city council, and there is no statute prescribing any details of procedure to be followed by the council, that body may adopt any mode which preserves to the parties the fundamental essentials of notice and hearing. McGregor v. Board of Trustees, 159 Cal. 441, 445, 114 Pac. 566. If this power to prescribe details of procedure is so liberally allowed to a municipal body when exercising functions of a judicial nature, it would be difficult to understand why like discretion should be denied to a superior court. The contention on behalf of petitioner seems to be that, even if the court had jurisdiction of the subject-matter of the contest, there was a lack of necessary parties and of jurisdiction acquired over those parties, and that the provisions of section 187 of the Code of Civil Procedure do not include any grant of authority to adopt process for the purpose of bringing before the court the necessary parties. But we think that, since the court had jurisdiction of the subject-matter, and since the necessary parties, namely, the local public and its members, were clearly pointed out by the nature of the case, the authority given by section 187 included the right to bring those parties before the court by any suitable process which appeared to be most conformable to the spirit of the Code. This having been done, the court had jurisdiction to proceed with the case.

The petition is denied.

We concur: JAMES, J.; SHAW, J.

30 Cal. App. 237

STANDARD AMERICAN DREDGING CO. v. CITY OF OAKLAND. (Civ. 1470.)

(District Court of Appeal, Third District, California. March 31, 1916. On Rehearing, April 29, 1916. Rehearing Denied by Supreme Court May 29, 1916.)

1. CONTRACTS ⟸231(2) — CONSTRUCTION — DREDGING CONTRACT.

The specifications of a contract between a city and a dredging company provided that for convenience of reference the area to be dredged was divided into three sections, A, B, and C, that section A should be dredged to a depth of 20 feet below low tide, with a bottom width of 500 feet, the side slopes to be those assumed by the material during the dredging operations, and that material dredged from below the specified depths, or beyond the specified areas as marked by the city engineer, and side slopes therefrom at rates not flatter than one vertical to four horizontal, would be estimated at half the actual volume of excavation, and paid for accordingly, but that no payment would be made for material dredged from below a depth of one foot beyond the specified depth, nor a distance of more than ten feet beyond the flattest limits of slope for the specified area to be dredged. *Held*, that three classes of material were to be subjected to half measurement and paid for accordingly: First, material dredged from below specified depths, definitely fixed as in the channel; second, material dredged from the specified area as marked by the city engineer beyond the fixed limits of the channel; and, third, the side slopes from the specified area at the specified rates of flatness.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1048–1051; Dec. Dig. ⟸231(2).]

2. EVIDENCE ⟸516—EXPERT TESTIMONY IN REBUTTAL.

In an action on a dredging contract against a city, it was proper to ask a witness, a civil engineer, in rebuttal of plaintiff's evidence that there was such a custom, whether a general custom existed of paying full price for the actual value of material dredged up to the specified limits of the side slopes of channels to be dredged.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2325; Dec. Dig. ⟸516.]

3. WITNESSES ⟸268(1)—CROSS-EXAMINATION —SCOPE.

In an action on a dredging contract against a city, the question, on cross-examination, to a witness, a civil engineer, whether he would not consider that under the custom of the trade he should pay for all material dredged if the specifications did not mention side slopes at all, etc., was not proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931, 938, 939; Dec. Dig. ⟸268(1).]

4. EVIDENCE ⟸553(4)—EXPERT TESTIMONY.

In an action on a dredging contract against a city, objection to question to a witness, a civil engineer, calling for his opinion upon the assumption that a custom existed which he had just denied did exist, was properly sustained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2373; Dec. Dig. ⟸553(4).]

5. EVIDENCE ⟸506 — EXPERT TESTIMONY — SUBJECT-MATTER.

In an action against a city on a dredging contract, a question to a witness, a civil engineer, whether he would not consider that under the custom of the trade he should pay for all material dredged, if the specifications did not mention side slopes, etc.; was improper, as calling for the opinion of the witness in a matter within the province of the court to decide.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. ⟸506.]

6. CUSTOMS AND USAGES ⟸20—ADMISSIBILITY OF EVIDENCE.

In an action against a city on a dredging contract, where the trial court held that a general custom of the dredging trade was not satisfactorily proven, it is not error to allow the city to show by testimony of its attorney, who aided in preparing the contract, that he had no knowledge of what was merely a special or local custom.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 41–46; Dec. Dig. ⟸20.]

7. APPEAL AND ERROR ⟸1047(1)—HARMLESS ERROR.

In an action against a city on a dredging contract, where the contract was susceptible of a reasonable interpretation without incorporating in it any extrinsic provisions by evidence of usage of the dredging business, error committed in ruling upon the question of usage was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4146, 4150–4152; Dec. Dig. ⟸1047(1).]

8. CONTRACTS ⟸350(1)—PERFORMANCE—SUFFICIENCY OF EVIDENCE.

In an action against a city on a dredging contract, evidence *held* sufficient to support the findings relative to the quantity of material dredged.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1819, 1822, 1823; Dec. Dig. ⟸350(1).]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by the Standard American Dredging Company against the City of Oakland. From a judgment for defendant, and an order denying its motion for new trial, plaintiff appeals. Judgment and order affirmed.

Snook & Church, of Oakland, for appellant. Paul C. Morf and John J. Earle, both of Oakland, for respondent.

CHIPMAN, P. J. This is an action to recover a balance alleged to be due on a written contract between plaintiff and defendant for certain dredging work done by plaintiff in a portion of Oakland harbor. The contract called for work specified as sections A, B, and C. The controversy arises out of the work done in the area designated in the contract as section A, the approach channel. The facts as to the amount of the material dredged and the amount of money actually paid are not disputed. The portion of the specifications of the contract called in question is as follows:

"*Areas.* For convenience of reference the area to be dredged is divided into 3 sections, section A being the approach channel, section B lying alongside the proposed bulkhead parallel to the Oakland Mole, and section C lying along the main bulkhead running in a general northeast and southwest direction.

"*Depth and Areas to be Dredged.*

"Section A. the approach channel, shall be dredged to a depth of twenty (20) feet below low tide. The bottom width shall be five hundred (500) feet and side slopes shall be those assumed by the material during the dredging opera-

tions in said Section A. * * * Material dredged from below the specified depths or from beyond the specified areas as marked out by the city engineer, and side slopes therefrom at rates not flatter than one vertical to four horizontal, will be estimated at half the actual volume of excavation and paid for accordingly: Provided, however, that no payment will be made for material dredged from below a depth of one foot below the specified depth nor from a distance of more than ten (10) feet beyond said flattest limits of slope for said specified areas to be dredged. All material must be removed down to the depths specified over the whole area to be dredged. If soundings taken at the completion of any one section show a silting up to a depth of two (2) feet over a length of 200 feet, the board of public works may order such material removed by the contractor, and the city will pay for said work at the price bid for dredging."

This contract is dated January 31, 1911. On May 13, 1912, some modifications of the original contract were made and, among others, it was provided:

"Section A, the approach channel, shall be dredged to a depth of twenty-five (25) feet below low tide, and the bottom width thereof shall be not less than three hundred and fifty (350) feet."

Some changes were made in the dimensions of sections B and C, and it was stated: "Top width of said sections shall be such as slopes may assume." The principal change made by this last contract was to reduce the width of the channel from 500 feet to 350 feet, and increase the depth from 20 feet to 25 feet.

There were 140,506 cubic yards of material excavated on the side slopes, "not flatter than one vertical to four horizontal," which was "estimated at half the actual volume of excavation and paid for accordingly." Plaintiff claimed that it was entitled to full rates. The court found the facts and gave judgment in favor of defendant. Plaintiff appeals from the judgment, and from the order denying its motion for a new trial.

Counsel for defendant have printed in their brief a rough diagram, Figure 1, which we use. Of this diagram plaintiff's counsel say in their reply brief:

"It is a little difficult to portray in language alone the situation as it exists. Counsel for the other side have given a very clear diagram showing the nature of the dredging operations, and we can do no better than respectfully to refer the court to the same for a picture of the situation."

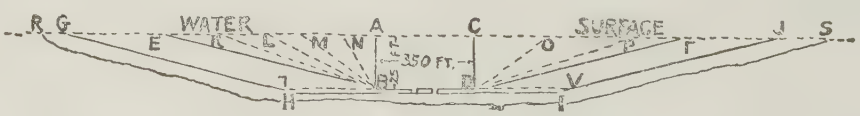


FIGURE 1

The explanation of this diagram is thus given in respondent's brief:

"The cut represents a section of a vertical plane of the channel. The rectangle ABCD represents the specified area as marked out by the engineer, having a width of 350 feet and vertical sides 25 feet in height. Theoretically the dredging is to be performed within this area and the material is to be removed therefrom; the side slopes being such as the material naturally assumes in the course of the operations. Were the material constituting the side walls of the channel composed of hardpan, or some substance which would stand in a vertical position, or without any tendency to slip, slide, or roll, there would be no side slopes, and the channel would be confined within the lines AB, BD, CD. However, on account of the character of the material involved, some sloughing is inevitable, and side slopes form. The lines EB, KB, LB, MB, NB, OD, PD, FD, represent some of the side slopes from the specified area assumed by the material in the course of the dredging operations; BE and FD being lines at the angle of one vertical to four horizontal, the flattest limits for which payment is allowed. The actual side slopes, however, may lie without this limit, and the lines GH, HI, IJ, represent the extreme limit of pay work; that is to say, an excess depth of one foot and an excess width on each side of the channel of ten feet beyond the one to four slope. The line RS is drawn to indicate the actual channel, dredged, as was in places the case, beyond the horizontal and vertical limits for which payment could be made.

"In the phraseology of the certificate of completion shown at folio 240 of the transcript, and in the language of witness Peck in his testimony as set forth at folios 237 to 245, 'main channel' is represented by the rectangle, ABCD; 'slopes' by any of the triangles, NBA, CDO, etc., within the limits, EBA, CDF; 'excess depth' by the one-foot space between the lines TBDV and HI; and 'excess slope' by the spaces inclosed within the areas EBTG, FDVJ.

"There is no dispute as to the fact that for the excavation performed within the specified area of main channel, ABCD, plaintiff is entitled to payment at the rate of $.099 per cubic yard for the entire quantity of material removed. It is also agreed that for work upon the excess slopes and excess depths—that is, between the lines EBDF, GHIJ—plaintiff was to be paid for only one-half the actual volume of excavation performed. It is further stipulated that plaintiff was not to be compensated for removal of any material from beyond the limits GHIJ. The sole controversy is over the question whether, for material dredged from the side slopes—that is, any slope within the lines, EBA, CDF, the payment should be made upon the basis of full measurement or half measurement of the quantity removed."

It will thus be seen that the material involved was dredged from the area on the slopes above the lines EBA, CDF, representing lines at the angle of 1 vertical to 4 horizontal. Soundings of the area to be dredged had been made by the city engineer for the information of his department and to aid him in the preparation of specifications for the work. A profile of the borings and field notes thereof were filed in the engineer's office and were examined by plaintiff's engineers. The contractors, however, made their own soundings. The specifications contained the following provision:

"Bidders are expected to visit and inspect the site of the work and the character of the material therein, and will be furnished all available information in the office of the city engineer."

These soundings showed that there was much variation in the character of the material on the slopes. Some of the cross-sections had less depths of soft and more of hard or tough material than others, from which it was apparent that there would necessarily be less material to remove along the slopes at some places than at others. The dredging of the channel of the dimensions required with permanent vertical sides was not possible, for it was well known to all parties that the adjacent soft material would inevitably to greater or less extent, slide into the channel unless removed, and it was less expensive to dredge this soft material as the work progressed than after it had slipped into the channel. The city was not concerned about this slope, further than that it should be dredged to a depth sufficient to avoid the channel's filling in with material from that source. All the city desired was an open waterway of depth and width specified. Knowing, however, that the character of the material underlying the water, as all parties did, it became necessary to provide in the contract for the dredging on the slopes as well as in the channel.

Except as to the channel there could be and were no "specified areas as marked out by the city engineer." Necessarily the side slopes were "those assumed naturally by the material during the dredging operations in said section A, but the exterior boundaries and the depth of these slopes varied as the character of the material varied. Where, for example, there was little soft material, with hardpan or clay underneath, the slope might be one to one, and running back but a short distance; but, where the material was soft for considerable depth, the slope might and did extend back many feet.

Another feature of the work should be noticed—that the head or cutter was often allowed to reach beyond the vertical lines in excavating the specified area or channel. One of plaintiff's witnesses testified:

"Q. Why was it necessary, if you know, to dredge outside the limits of the dredging area for which pay was allowed? A. Two reasons. In the first place it is impossible to locate the head of the cutter exactly. The only thing the man running the dredger has to go by is this line of piles along here and some stakes set outside (indicating on the blackboard). He cannot see the head of the cutter. The dredge swings on a vertical axis. He cannot tell where the head of the cutter is, and in order to be on the safe side, and dredge enough, he goes a little outside the line. Another reason is that it is practically a universal experience that the slope does not say [stay] as dredged; that is, the chances are that, while depending on the time and the material, the slope will flatten off by the material sliding into the channel. For fear that material will slide, it is necessary to dredge the bottom wider, because the original side slope is likely to flatten in the course of time."

The contention of plaintiff is thus briefly stated:

"It is apparent that the channel in the Key Route Basin, where the tide ebbs and flows, could not be dredged to a depth of 25 feet below low tide, with vertical banks, and that side slopes were unavoidable, and that this was contemplated by all the parties to the contract; that material dredged from side slopes between the vertical line and the 1 vertical to 4 horizontal lines was within the specified area to be dredged; that material dredged from below the specified depths, and from beyond the specified area, that is, beyond the side slopes therefrom, at rates flatter than 1 vertical to 4 horizontal, would be estimated and paid for at one-half the actual volume of excavation; and that material dredged from the channel and side slopes therefrom at rates not flatter than 1 vertical to 4 horizontal were all to be paid for at full price of 9.9 cents per cubic yard, estimated at the actual volume of excavation."

Plaintiff's assumption is that the "specified areas as marked out by the city engineer" included the "side slopes not flatter than one vertical to four horizontal," as well as the channel itself, and hence the material from both these areas was to be paid for at full rates. The contract provided that the contractor was to be paid:

"Nine and nine-tenths (9.9) cents per cubic yard for all materials dredged as required by the plans and specifications therefor and this contract."

We must turn to the specifications above quoted to ascertain the intention of the parties. The only lines which the city engineer could mark out with any degree of certainty were the vertical lines of the channel. As already noticed, the material on the slopes was of such variable character that no one could tell definitely the depth or extent of the soft material or of the hard material, or where the exterior lines of the slopes would be. In some parts the hardpan was found near the surface of the ground beneath the water, and the slope at such point would extend back but a short distance, and the material dredged be easily removed. At other points the slopes extended back some distance, because of a greater quantity of soft material encountered before reaching hardpan or firm earth that would not slip into the channel.

[1] It seems to us that the natural and grammatical construction of the specifications is, as claimed by defendant and as was held by the lower court, that three classes of material were to be subjected to half measurement and paid for accordingly, namely: "(1) Material dredged from below the specified depths;" that is, depths that were definitely fixed—as in the channel. "(2) Material dredged from the specified area as marked out by the city engineer;" that is, beyond the fixed lines of the channel. "(3) Side slopes therefrom (from the specified area) at rates not flatter than one vertical to four horizontal, with a proviso that no payment would be made for material dredged beyond certain vertical and horizontal lines;" that is, the phrase "will be estimated at half the actual volume of excavation" is qualified by what precedes it, and relates to dredging "below specified depths"—to dredging "from beyond the specified areas" and to "side slopes therefrom (from the specified area) at rates not flatter than one vertical to four

horizontal." And the limiting clause which follows seems to confirm this view, for it expressly provides:

"That no payment will be made for material dredged from a depth of one foot below the specified depth nor from a distance of more than ten feet beyond said flattest limits of slope for said specified areas to be dredged."

The parties understood that side slopes were inevitable, and dredging to some extent below specified depths, for the exact depth could not always be maintained, and so a limit as to depth beyond which no payment would be made was provided for and a one-half rate was fixed for dredging on slopes not flatter than one to four, and no payment would be made for material dredged "from a distance of more than ten feet beyond" this slope of one to four. We are unable to accept plaintiff's construction, for by it there would be no material subject to half measurement, except such as was situated beyond the area specified by the city engineer and also beyond "the side slopes therefrom." Grammatically, as the specifications are phrased and punctuated, the verb "will be estimated" had for its subject material "from beyond the specified depths" and "from beyond the specified areas," and, as a further subject, the "side slopes." In determining what was intended by the one to four line, we must assume that the parties contemplated that it was to subserve some function. Naturally, if not necessarily, there had to be some provision limiting the excavation which was subject to half measurement rather than to establish a boundary line. The method adopted of prescribing what should be treated as the flattest limit of slope and fixing the exterior boundary line at a prescribed distance from such line, it seems to us, was as fair as could have been suggested under all the circumstances. As respondent puts the matter:

"The exterior boundary was to be either the wall of the side slope naturally assumed by the material as the dredging progressed, if steeper than or equal to one vertical to four horizontal, or, if that slope were flatter than one to four, then an imaginary line parallel with and distant ten feet horizontally beyond the one to four slope from the specified area. For any dredging outside that imaginary line no payment was to be made. In other words, if the material were to assume a slope of one to five, or one to ten, it would be measured just as if it had assumed a slope of one to four, the allowance of ten feet would be made, and for any excavation performed beyond that limit plaintiff would not be entitled to compensation. On the other hand, where the slope of the material should remain at an incline of one to one, or one to three, the measurement would be of the side slope actually assumed. The one to four line is described as a necessary factor in establishing the limit of the slope and the exterior boundary of the excavation for which payment was to be made, and is not defined or described or established, and does not purport to be defined or described or established, for any other reason or purpose whatsoever."

Without further pursuing the inquiry, we think this is a reasonable view to take of the provisions of the contract in question. Respondent suggests that if any uncertainty exists in the contract it must be assumed that such uncertainty was caused by the private party, the contract being with a public officer or body as such (Civ. Code, § 1654; Miller v. Grunsky, 141 Cal. 451, 453, 66 Pac. 858, 75 Pac. 48); and if in the contract there be any word, phrase, or clause of doubtful meaning, "it is to be presumed that the private party was responsible for the insertion and use thereof, and the language of the instrument is to be interpreted most strongly against him or it."

Certain alleged errors in rulings by the court are assigned as prejudicial. Plaintiff's witness Peck, a civil engineer, testified that he had examined the final certificate of the city engineer with reference to the channel dredged known as section A. The following question was then put to him:

"Do you know from your investigation and your own knowledge of the certificate whether or not it states the facts with reference to the amount of material dredged?"

An objection was sustained on the ground that the question called for the conclusion of the witness, and that the certificate is the best evidence; further, also, that it was in form an omnibus question, and did not call the attention of the witness to any particular thing. Later, in response to a question as to what investigation he made concerning the various items in the city engineer's final certificate, he stated that he "checked over these quantities as given by the soundings, cross-section soundings, by the field force of the city engineer, and found the quantities correct as stated here." The court granted a motion to strike out the words "and found the quantities correct." He stated that he assumed the soundings to be correct, but that he made his calculations with the city engineer's force; "we checked each other on these calculations." He was not allowed to "state what the figures there represent." However, he was allowed to state what he found after making these calculations, which was that "these figures as stated here give the actual amount excavated * * * in section A within the limits of the channel as defined by the specifications;" and he also included the work on the slopes. The witness was finally allowed to state the facts as to the amount of material excavated and that "the figures as stated give the actual amount." This, it seems to us, met the purpose of the questions objected to. Besides, the parties stipulated as to the quantity of material dredged by plaintiff. The court sustained objections to questions concerning the custom with reference to the payment for the excavation of side slopes. The matter sought to be elicited came out and was testified to without objection. Questions were objected to, and objections sustained, seeking the opinion of the witness whether or not "a civil engineer, who is a city engineer of a city having a water front, should have

knowledge of a general custom or usage of paying at full price for the volume of material dredged up to the specified limit of the side slope of the channel, to be dredged in waters adjacent to the city, provided said city has done work of dredging in the waters along said water front;" also, "Should a civil engineer, who has had practical experience of ten years or more, and who has prepared specifications for dredging in the waters of San Francisco Bay," have such knowledge? It may be doubted whether the questions involved matter the subject of opinion or expert testimony. However, the witness was permitted to testify that civil engineers having seven years of practical experience in the vicinity of Oakland, of dredging work, would have knowledge of the general custom of paying full price for the actual value of material dredged up to the specified limits of the side slopes of channels to be dredged.

[2-5] A witness for defendant, who was a civil engineer and a member of the board of public works of Oakland when the contract was let, and who drew the specifications, was asked by defendant: "Did you know of any such custom? Was there custom or usage upon the subject?" Referring to the custom as had been testified to, did he know of any such custom? Plaintiff's objection to its relevancy and incompetency was overruled. The witness answered the question: "I would answer it 'No,' because that subject is usually covered by the specifications." On cross-examination, this witness was asked the following question: "If the specifications did not mention side slopes at all, and they provided the dimensions and depth of channel, and provided that the top width should be such as might be assumed by the side slopes, would you not consider that, under the custom of the trade or usage of the trade, you should pay for all material dredged?" Objection by plaintiff was sustained, on the ground that it was not cross-examination.

The answer to the first of the last two questions was that there was no such custom. He did not answer whether he knew of such custom. It was permissible to ask the witness whether such a custom existed, in rebuttal of plaintiff's evidence that there was such a custom. He gave no other testimony in chief. The next question was obnoxious to the objection made as not cross-examination. Besides, it called for an opinion upon the assumption that a custom existed which he had just denied did exist. The question also called for the opinion of the witness in a matter essentially within the province of the court to decide.

[6] Mr. Woolner, city attorney, who advised the board in preparing the contract, over plaintiff's objection, was permitted to testify that he did not "know of any custom in regard to paying full price for material dredged in channels from the side slopes of those channels." The ruling is urged as prejudicial, for the reason that it was immaterial whether or not the witness knew of such custom at the time the contract was entered into, and did not tend to prove or disprove the existence of such a custom. Appellant concedes that a local or special custom must be known to the parties in order to be construed as a part of the contract; but it is contended, and cases are cited supporting the contention, "if it appears that the custom is so general that the parties will be presumed to have knowledge of it, then the parties to the contract are bound by its terms, even though one or the other of the parties may claim to have had no actual knowledge of such custom." On the other hand, cases are cited by respondent holding that, where the custom is restricted to a particular business, it is permissible to show that one of the parties did not know of its existence. The evidence on the subject was directed to a custom with regard to a particular feature connected with the dredging business generally, not only in the waters of the bay of San Francisco, but elsewhere, rather than to a custom as to a particular business in the sense treated in the cases cited by respondent. Upon the question, however, whether such a general custom existed, there was some conflict in the evidence which the court had the right to consider in making its ruling. If the court held, as we may assume it did, that the general custom was not satisfactorily proven, it was not error to allow defendant to show want of knowledge of what was but a special or local custom.

It is to be observed that this question of custom is usually invoked to supply something as to which the contract is silent, or, as Mr. Greenleaf says, the true office is to "interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulation, but from mere implications and presumptions, and acts of a doubtful and equivocal character; and to fix and explain the meaning of words and expressions of doubtful or various senses." Greenleaf on Evidence, § 251. The Supreme Court said, in Burns v. Sennett & Miller, 99 Cal. 363, 371, 33 Pac. 916, 919:

"A usage, of course, cannot be given in evidence to relieve a party from his express stipulation, or to vary a contract certain in its terms; but it has a legitimate office in aiding to interpret the intentions of parties to a contract, the real character of which is to be ascertained, not from express stipulations, but from general implications and presumptions."

[7] It appeared from the testimony of some of the witnesses that it was quite common for specifications in dredging contracts to provide for payment of side slopes at full rates, and other witnesses testified to the usage being that way, because provision was generally made in the contract for such payment. We do not think that any just inference could be drawn from express provisions of contracts relating to dredging that in the absence of such provisions there

would be implied agreement to make such payment. That it is the fact that a certain provision is generally inserted in a contract does not tend to prove that there is a usage that such a provision would be given effect where the contract is silent on the matter. The real question is: What is the usage apart from the contract? If the contract deals with the particular fact in a way to be reasonably clear as to the intention of the parties usage has no office to perform. We think the contract here is susceptible of a reasonable interpretation without incorporating in it any extrinsic provisions by evidence of usage and that whether or not error was committed in ruling upon this question of usage it was not prejudicial. In making its findings we think the court was justified in disregarding the evidence as to usage as we infer it did in not making any finding on that question. See a discussion of the subject in Hale Bros. v. Milliken, 5 Cal. App. 353, 90 Pac. 365.

Some of the findings are attacked, and particularly finding VI, which is:

"That it is not a fact that plaintiff dredged in the side slopes from said section A at rates not flatter than one vertical to four horizontal 144,506 cubic yards of material; and, in this connection, the court finds that no evidence was introduced at the said trial from which the court could determine the quantity of material dredged from said side slopes from said section A at rates not flatter than one vertical to four horizontal, and placing its finding upon that ground the court finds that it is not a fact that plaintiff dredged from said side slopes 144,506 cubic yards of material or any other quantity of material, or any other number of cubic yards of material."

Certificates of work done were made from time to time on which plaintiff was paid and from these certificates a final certificate was signed by the city engineer on which plaintiff received final payment. The account as finally certified to was as follows:

"Main channel 998340.9 cu. yds.		998340.9 cu. yds.
Slopes.....144506.0 cu. yds.		72253.0 cu. yds.
Excess slope... 41775.8 cu. yds.	less ½	20887.9 cu. yds.
Excess depth... 55989.4 cu. yds.		27994.7 cu. yds.
		1119476.5 cu. yds.
1119476.5 cu. yds. at $.099.....		$110828.17

At said city of Oakland, this 7th day of March, 1913.
Perry F. Brown, City Engineer.
Correct: T. E. Risley, Asst. Eng."

[8] Mr. Risley testified that the matter of the interpretation of the contract came up between the witness and plaintiff's representatives, Mr. Beardsley and Mr. Peck, and also Mr. Perry, president of plaintiff company, upon the point whether "the values outside of the vertical lines should be considered as full value or not. The matter of showing excess slopes was not taken up by Mr. Beardsley until the time the final estimate was made." The monthly statements for August and September, 1912, showed but a single item for dredging; but on and after October, 1912, the statement showed the work on main channel and the slopes, and when there was any work done on excess depth that also was shown. It was because of this early disagreement as to the interpretation of the contract that the certificates were made up in this way. Mr. Risley testified that "in figuring the quantity of material dredged and the amount due thereunder no allowance was made for full measurement or full payment, outside of the vertical lines." Payment was made and received under these certificates thus made out, but we understand that the question remained open as to the controverted interpretation of the contract. The court found (finding II):

"That defendant paid to plaintiff the sum of $7,153.05 for dredging 144,506 cubic yards of material outside of section A and outside of the specified area and between said specified area of said section A and a line sloping from said section A at the rate of one vertical to four horizontal, all estimated upon the basis of one-half of the actual quantity of excavation in full accordance with said plans and specifications."

The only dredging in controversy was that done between the lines thus designated. As to the dredging in the main channel and below the one to four line no controversy arises. The findings are so drawn, we think, as clearly to present the question at issue. They in effect hold that the specified area referred to in the contract is the area within the vertical lines—that is, the channel—and to be paid for at full rates, and that the area embraced between those lines and the lines of the slope of one vertical to four horizontal was to be paid for at half rates. Unless the contract may be interpreted in harmony with such findings the judgment has no support. Otherwise, the judgment must stand.

Our conclusion is that the findings are supported by the evidence. The judgment and order are therefore affirmed.

We concur: BURNETT, J.; HART, J.

On Rehearing.

PER CURIAM. We are asked to grant a rehearing, our attention being called particularly to two matters as to which it is suggested the opinion may be misleading:

First. In the second or amended agreement certain changes were made in the dimensions of sections A, B, and C and directions were given as to the dredging to be done. In that connection the following appears:

"Top widths of said sections shall be such as slopes may assume. And said contractors agree to dredge all material from such areas adjacent as may be ordered," etc.

We think the above paragraph refers to all three sections, and if the opinion leaves any doubt upon the subject this is to remove it.

Second. The point was suggested in respondent's brief that if there is any uncertainty in the contract it must be assumed that such uncertainty was caused by the private party, the contract being with a public officer or body as such (Civ. Code, § 1654), and the language of the instrument is to be interpreted most strongly against the private party.

In the opinion filed we stated the point made by respondent, but made no comment upon it, and in fact did not apply the statutory rule. To relieve the opinion from any implication that importance was given to the matter, the reference to respondent's brief may be disregarded. We still think that "the specified areas as marked out by the city engineer" were the areas embraced within the vertical sides of the channel, and that the said slopes therefrom, not flatter than one vertical to four horizontal, were to be estimated and paid for "at half the actual volume of excavation." We do not think that the provision in the agreement of May 13, 1912—"Top widths of said sections shall be such as slopes may assume"—affects the provision in the original contract.

The petition is denied.

29 Cal. App. 779

McINTOSH et al. v. HUNT. (Civ. 1733.)

(District Court of Appeal, First District, California. Feb. 28, 1916. On Rehearing, March 29, 1916. Rehearing Denied by Supreme Court April 28, 1916.)

1. TRUSTS ⊂⊃44(1)—ACTION TO ESTABLISH—SUFFICIENCY OF EVIDENCE.

In an action brought by a daughter and a son against defendant, their father, to have a trust declared in respect to real estate conveyed to him by their mother a short time before her death, evidence *held* to support a judgment that there was a contemporaneous understanding between the defendant and his wife that his title was to be in the nature of a life estate, with the right to the income, with the fee in remainder to their children at his death.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 66; Dec. Dig. ⊂⊃44(1).]

2. TRUSTS ⊂⊃44(1) — ACTION TO ESTABLISH —SUFFICIENCY OF EVIDENCE.

Evidence in such action *held* to sustain the finding that defendant was to enjoy only the "net" income.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 66; Dec. Dig. ⊂⊃44(1).]

3. APPEAL AND ERROR ⊂⊃692(1)—RECORD—SCOPE OF REVIEW—EVIDENCE.

Defendant's contention on appeal that his letter to the husband of one of the plaintiffs was admissible under Code Civ. Proc. § 1854, making the whole of a transaction admissible when any part has been put in evidence could not be determined, where the record contained no copy of such letter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905, 2906; Dec. Dig. ⊂⊃692(1).]

4. WITNESSES ⊂⊃188(1)—COMPETENCY—HUSBAND AND WIFE.

In an action to establish a trust in respect to certain real estate conveyed by plaintiffs' mother to defendant, their father, a short time before her death, defendant's testimony as to the conversations between himself and his wife at the time of her execution of the deeds to him were inadmissible, under Code Civ. Proc. § 1881, respecting communications between husband and wife.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 734; Dec. Dig. ⊂⊃188(1).]

Appeal from the Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Pearl M. McIntosh and another against Clarence M. Hunt. Judgment for plaintiffs, and defendant appeals. Affirmed.

For opinion denying rehearing in the Supreme Court, see 157 Pac. 842.

Wm. M. Cannon, of San Francisco, for appellant. C. H. McIntosh, of Reno, Nev., and Keeler, Powell & Dow, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in plaintiffs' favor in an action brought by them against the defendant, their father, to have a trust declared in respect to certain real estate conveyed by their mother to him a short time before her death.

The principal contention of the appellant is that the evidence is insufficient to sustain the findings and judgment of the trial court.

The record is voluminous, but there are certain facts of vital importance to the determination of this issue concerning which there is no dispute, and which may be briefly set forth as follows: The defendant Clarence M. Hunt and his wife were married about 37 years before the latter's death. Their life together had been happy, congenial, and mutually confidential during the whole of this period, and no differences or quarrels of any kind had ever arisen between them. Two children had been born of this marriage, the plaintiffs herein; and these had grown up in the home of their parents, and had in due time married and established themselves in homes of their own, the plaintiff Pearl M. having wedded C. H. McIntosh, a lawyer residing and practicing his profession in the state of Nevada, and the plaintiff Reuben H. having elected the profession of physician, with his residence and practice in San Francisco. During the earlier years of his married life the defendant Clarence M. Hunt had been engaged in various occupations, working generally upon a salary, and had been enabled thereby, not only to support his family comfortably, but to give to each of his two children the benefit of an excellent education, including for his daughter a course in the University of California, and for his son a degree from a local medical college. He had also laid aside some property of his own. A few years before the death of his wife, Hattie G. Hunt, which occurred in 1910, she received the sum of $31,000 as an inheritance from her parents' estate, which money was turned over to her husband for investment, and which was invested by him in several pieces of real estate in San Francisco and in Alameda county, the deeds to which being, in each instance, taken in the name of his wife. About this time the defendant gave up his other occupations, and thereafter devoted himself to the management of these invest-

ments and of his own properties. He attended to all of the details of purchasing his wife's property, arranging for the mortgages and insurance which were to be placed and carried thereon, caring for and renting the property, collecting the rents, and paying the interest and other charges. The income from the property of his wife and of himself was commingled in a common fund, from which the expenses of the family were taken, and from which also each received such money as either required, no account being ever had between them. In the summer of 1909 a small lump was found to be growing upon the breast of the wife, which occasioned some family alarm, but which did not seem to affect her general health, nor operate to interfere with her intention of taking a trip north to visit the Seattle Exposition. On the 8th day of July, 1909, just before she started upon said trip, she made, executed, and delivered to the defendant, her husband, three deeds, absolute in form, with an expressed consideration in each of $10, to the several pieces of real estate theretofore standing in her name and involved in this litigation. These deeds were acknowledged and delivered before and in the presence of Addie L. Ballou, a notary public of the city and county of San Francisco, who was a witness in the case, and who testified that no conversation relating to the creation of a trust or other limitation upon these conveyances occurred in her presence between the parties at the time of the delivery of the deeds. These deeds were retained by the defendant until some time in the month of November, 1910, when they were presented for record in the respective counties where the property was located. A few days after their recordation the insurance policies upon these properties were transferred from the name of Hattie G. Hunt to that of Clarence M. Hunt, his wife signing the necessary papers for such transfer in the form of which it was recited—

"ownership of the property herein insured having actually passed to Clarence M. Hunt, for value received I hereby transfer and assign to him all my title and interest in this policy."

In the meantime the lump which had been observed on the breast of Mrs. Hunt continued to grow until it was at length diagnosed as cancer, and two operations were undertaken for its removal. These proved unavailing, and after the second operation in August, 1910, she had failed rapidly until it became apparent that she was soon to die. In the month of December, 1910, the members of her family were collected at her home in anticipation of her near dissolution. On the 22d day of December they were all gathered in her room, the defendant and the trained nurse also being present, at which time the dying woman was engaged in distributing among them such trinkets and personal effects as she wished each to have.

Up to this point there is no disagreement as to the facts of the case; but from this moment forward the testimony of the plaintiffs and the defendant is in sharp and irreconcilable conflict. According to the testimony of the plaintiffs, of C. H. McIntosh, of Mrs. R. H. Hunt, and of Luella Walden, the trained nurse, the following statement of the conversation and conduct of the respective parties present may be fairly collated: After the gifts of her personal effects and property as above stated Mrs. Hunt, speaking to her son-in-law and to the defendant, and referring to the real estate in question, said:

"I have deeded this property to Clarence, but with the understanding that he is to have a life income, and that the property was to go to the children. I have always trusted 'Gorrie' (her pet name for her husband), but people change, and he may change or may get married again. That property belongs to me; it is my own property; came to me from my father. It was understood that it was to go to the children, and that Gorrie was to have the use and income of it during his lifetime to provide himself with what he needed and make himself comfortable; but people, as I say, change; he may get married again. I do not want any mistakes as to the understanding that was had between us with reference to the ownership of this property. I do not want some outside person, some stranger whom he might marry, to be in a position to claim or obtain any part of my property that it was intended and agreed belonged to my children. I want this in writing (speaking to her husband)—not that I don't trust you, but you might change."

Mr. Hunt replied, "Yes, Mamma;" and then he and McIntosh retired from the room into the hallway, where, according to the latter, the following conversation occurred:

"I said to him, 'Well, Gorrie, how is this thing to be arranged?' 'Well,' he said, 'I don't know just how it had best be fixed up.' 'Well,' I said, 'Gorrie, I can tell mother—she is waiting for some disposition of it—I can tell her that you have executed a declaration of trust, and then the matter can be fixed up in that way later.' He said 'All right; tell her that, and we will fix it up later.'"

They then returned to the bedroom when, according to Mr. McIntosh, Mrs. Hunt said:

"'Well, what is to be done? I want you to fix it, Bertie, now and in writing, so there can't be any misunderstanding or mistake.' 'Well,' I said, 'Mother, Gorrie has executed a declaration of trust in favor of the children covering this property.' She turned her head on the pillow toward Mr. Hunt and said, 'Clarence, is that true?' and he said: 'Yes, Mamma; that is correct. Everything will be all right.'"

This ended the matter for the time being. Mrs. Hunt died a few days later. During the month of January, 1911, as Mr. McIntosh relates, the subject was revived in a conversation between himself and Mr. Hunt, in which the former said, "It can either be done by a declaration of trust or by a trust deed, or by deed delivered in escrow with an agreement for the delivery of the instrument to the grantees upon your death," to which Mr. Hunt replied, "I believe I would prefer the escrow deeds;" and it was then agreed that Mr. Hunt was to get the data for the deeds and send it to Mr. McIntosh at Tonopah, who was to draw the papers and send them to Mr. Hunt for execution.

To practically all of the foregoing evidence with respect to what occurred at the bedside of his wife, with his son-in-law, and again later in the month of January, Mr. Hunt made a positive and categorical denial when upon the witness stand; but his testimony in that regard stands practically alone as against the statements of all the other members of the family who were present and of the trained nurse.

The record further shows that on January 18, 1911, Mr. Hunt wrote an affectionate letter to his son-in-law, then in Nevada, inclosing documents from which the latter could get descriptions of the property, and directing him to make out escrow deeds in favor of his son and daughter, which he stated he would sign and acknowledge and would have placed in escrow. In response to this letter he presently received from Mr. McIntosh drafts of several deeds, each covering a separate piece of the property in question, in which he was named as the grantor and his son and daughter as the grantees. He acknowledged receipt of these deeds by letter dated January 23, 1911, in which he asked several questions as to the manner and form of their execution, but made no objection to their granting clauses. In connection with these deeds, and either at the time of their transmission or a few days later, Mr. McIntosh had also forwarded to Mr. Hunt the draft of an escrow agreement, setting forth specifically, among other things, that:

"Whereas the undersigned Clarence M. Hunt accepted, took and holds title to said lands and premises above described for the benefit of said Reuben H. Hunt and said Pearl M. McIntosh jointly pursuant to and in virtue of an agreement between said Clarence M. Hunt and the late Hattie G. Hunt, his wife, the consideration of which agreement was that the undersigned Clarence M. Hunt should during his lifetime have and receive for his own sole uses, benefits and disposal all and singular the net rents and income of and from all of said lands and premises—Now therefore it is provided that the undersigned Clarence M. Hunt shall have and receive * * * the free and unrestricted use and enjoyment of all of said premises and property as to the rents and income thereof and therefrom for his own uses, purposes and benefits during his lifetime"

—and in which also an unnamed escrow trustee is directed to deliver the aforesaid deeds to the plaintiffs as the grantees thereof upon the death of Clarence M. Hunt. On February 1, 1911, Mr. McIntosh replied to the letter of the defendant of January 23d, explaining at considerable length the nature and effect of the execution and delivery of deeds in escrow. To this letter the defendant wrote a reply, which was not received in evidence, and which will be dealt with later. The whole matter seems to have rested at this point for a period of several months, although the defendant testifies that from the time of the receipt of the letter of Mr. McIntosh of February 1, 1911, explaining the nature and effect of an escrow deed, he had resolved not to sign the deeds. During the summer of 1911 Mr. Hunt's intention to marry again came to the attention of his children, and resulted in an increasing discord, during which the discussion of his intent to carry into effect the alleged understanding with his wife and children in regard to the property was renewed, and during which he definitely refused to make any dispostion of the property which would hamper in any way his control over it. After several vain efforts to adjust the matter the present action was brought.

[1] From the foregoing résumé of the evidence in the case, we are of the opinion that, notwithstanding the sharp and irreconcilable conflict in the statements of the respective parties, and notwithstanding that the defendant—the only living witness to the agreement, if any, between himself and his wife contemporaneously with the execution and delivery of the deeds from herself to him—swore positively that there was no understanding or agreement between them at the time these deeds were made, or at any other time, that they were to be other than absolute conveyances of the property, to him, we think there is sufficient evidence presented by the plaintiffs, if accepted by the court, to support its findings and judgment to the effect that such a contemporaneous understanding existed between the defendant and his wife that his title to the property was to be in the nature of a life estate with the right to its income, with the fee in remainder to his children at his death.

[2] The appellant urges that the finding of the court that it was the net income only which the defendant was to enjoy is unsupported by any evidence; but we think that the finding is fairly deducible from the record, and particularly from the terms of the escrow agreement prepared at the defendant's direction, and also from the proofs of the way in which the income of the property had been disposed of both before and after the defendant received the title to it from his wife.

[3] The appellant further insists that the court committed an error of law in its refusal to permit the defendant to put in evidence the letter which the defendant had written and sent to Mr. McIntosh about February 1, 1911, upon the receipt by him of the letter from Mr. McIntosh explaining the nature and effect of the escrow arrangement. In making this contention the appellant relies mainly upon the language of section 1854 of the Code of Civil Procedure, which reads as follows:

"When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence."

The appellant urges that under this section of the Code of Civil Procedure he was entitled to have this letter of his own admitted in evidence, both because it was a part of a series of conversations and negotiations between the parties, and because it was an answer to a letter of Mr. McIntosh, who was apparently acting on behalf of the plaintiffs in seeking to consummate the escrow arrangement. The difficulty with the question thus presented lies not so much with the law regarding it as it does in the fact that the record before us contains no copy of the letter which the appellant claims was thus wrongly excluded; and we are therefore unable to determine whether the letter in question was in any true sense such an answer to the letter of Mr. McIntosh as would entitle it to admission, or whether it had any reference or relevancy whatever either to the subject-matter of the McIntosh letter, or to the pending negotiations between the parties; and we are therefore unable to say that the trial court, which had the contents of the letter before it, was in error in refusing it admission in evidence.

[4] The appellant further contends that the court was in error in refusing to permit the defendant to testify as to the conversations occurring between himself and his wife at the time of the execution of the deeds to him. No authority is cited to support the appellant's contention in this regard; and we think the inhibition contained in section 1881, Code of Civil Procedure, respecting communications between husband and wife, covers exactly the case in hand, and furnishes a full justification for the ruling of the court in the exclusion of this evidence.

No other grounds of alleged error being urged by the appellant, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

On Rehearing.

PER CURIAM. The petition for a rehearing is denied. The only matter contained in the court's decision which might require correction is the statement therein that the defendant at the time of the bedside conversation answered, "Yes, Mamma," to his wife's statement of the agreement between them at the time of the execution of the deeds in question. The record does not show that this reply of the defendant was given at that time, but in our opinion a reading of the entire record shows the assent of the defendant to the correctness of his wife's assertion, as to the oral understanding attending the execution of the deeds. There is sufficient evidence upon this point to justify the trial court, hearing and seeing the witnesses before it, in the conclusion that the proof was clear and convincing as to the existence of the contemporaneous oral understanding upon which the plaintiffs rely.

29 Cal. App. 779

McINTOSH et al. v. HUNT. (S. F. 6836.)

(Supreme Court of California. April 28, 1916.)

APPEAL AND ERROR ⊂⊃1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error, if any, in excluding defendant's testimony as to a certain issue was not prejudicial, where he was subsequently permitted, over plaintiffs' objection, to give testimony as to the same subject-matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. ⊂⊃ 1058(2).]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Pearl M. McIntosh and another against Clarence M. Hunt. Judgment for plaintiffs was affirmed by the District Court of Appeal (157 Pac. 839). Application for hearing in the Supreme Court denied.

Wm. M. Cannon, of San Francisco, for appellant. C. H. McIntosh, of Reno, Nev., P. E. Keeler, of Long Beach, and Powell & Dow, of San Francisco, for respondents.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First District is denied. In denying the application we deem it proper to say that we are not prepared to give our assent to that portion of the opinion which substantially holds that the trial court did not err in refusing to allow the defendant to answer certain questions addressed to him as to what was said to him by his wife at and prior to the execution of the deeds to him. An examination of the record discloses that the object of defendant in this regard was substantially accomplished by his being permitted, over plaintiff's objections, to give testimony as to the same subject-matter. In view of the testimony thus given, the error, if any, cannot be held to have been prejudicial.

30 Cal. App. 265

AUSTIN v. STRANG, Justice of the Peace.

(Civ. 2059.)

(District Court of Appeal, Second District, California. April 12, 1916.)

JUSTICES OF THE PEACE ⟸16—FEES—STATUTE.

Under Pol. Code, § 4300e, as amended by St. 1913, p. 1442, to provide that for all services to be performed before trial in a civil action a justice shall be entitled to a fee of $2, for the trial and on proceedings subsequent thereto, and the entry of judgment and the issuance of execution thereon, $3, and for the rendition and entry of judgment by default, and execution and satisfaction thereof, $2, a justice of the peace, as a condition for entering a default judgment against defendant, was entitled to a fee of $2, in addition to the fee paid upon the filing of the complaint.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 25–27; Dec. Dig. ⟸ 16.]

Petition by W. C. Austin for a writ of mandate against Benjamin C. Strang, as Justice of the Peace of Pasadena township. Petition denied, and proceeding dismissed.

A. R. Jamieson, of Pasadena, for petitioner. Simpson, Moody & Simpson, of Pasadena, for respondent.

SHAW, J. In this proceeding the petitioner seeks a writ of mandate, directed to Benjamin C. Strang, in his official capacity as justice of the peace of Pasadena township, directing him to enter a judgment by default in favor of petitioner in a certain action pending in the court of said justice, wherein petitioner is plaintiff and J. R. Robinson and wife are defendants.

It appears that petitioner, at the time of filing his complaint in said justice's court, paid the filing fee of $2; that summons was issued and duly served upon defendants therein named; that the time for answering said complaint having expired, and no answer or other plea to said complaint being interposed by defendants, plaintiff demanded of said justice that he enter a default judgment against said defendants; that said justice, conceding that plaintiff was entitled thereto, nevertheless refused to enter the same, except upon payment made by plaintiff of a fee of $2 in addition to that theretofore paid upon the filing of the complaint, which petitioner refused to pay.

The contention of petitioner is that this additional fee demanded by the justice for the rendition and entry of judgment by default, is without warrant of law. Both parties base their contentions upon section 4300e of the Political Code, as amended in 1913 (St. 1913, p. 1442), which is as follows:

"For all services to be performed by him before trial, in a civil action, two dollars; and for the trial of either a question of law or fact, and all proceedings subsequent thereto, including all affidavits, swearing witnesses and jury, and the entry of judgment and issuance of execution thereon, three dollars, to be paid when such trial is calendared for hearing; and for the rendition and entry of judgment by default or confession, and services subsequent thereto, including execution and satisfaction of judgment, two dollars."

Prior to the amendment, the third clause of the statute above quoted read as follows:

"And in all cases where judgment is rendered by default or confession, for all services, including execution and satisfaction of judgment, two dollars."

We must assume that the Legislature had some purpose in thus amending the law under which petitioner concedes that justices made no such charge as that here made. Moreover, it is a cardinal rule of interpretation of statutes that effect, if possible, must be given to every clause and part thereof. If we accept petitioner's construction, that the fee of $2, provided as compensation for all services to be performed before trial, covers the cost for rendition and entry of judgment by default, then the third clause of the statute is given no effect whatever, and its adoption was an idle act.

As we construe the statute, the Legislature has, for the purpose of fixing the fees of a justice, classified the services which may be rendered into three groups, as to each of which a specific fee is fixed for services performed. Thus, $2 is required to be paid for all services performed by him before trial. If there be a trial, an additional $3 shall be paid; if there be no trial, and the justice be called upon to render and enter judgment by default, an additional fee of $2 shall be paid, covering such services. The services are itemized under three heads and a separate fee fixed for each class of items.

We are clearly of the opinion that it was the duty of respondent, as a prerequisite to the rendition and entry of judgment of default demanded by plaintiff in said action, to exact the payment of a fee of $2, which, as provided, covered the cost, not only of the rendition and entry of such judgment, but for all services subsequent thereto, including the issuance of an execution and satisfaction of judgment.

The petition for a peremptory writ of mandate as prayed for is denied, and the proceeding dismissed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 31

PEOPLE v. PHILLIPS. (Cr. 455.)

(District Court of Appeal, Second District, California. March 1, 1916. Rehearing Denied by Supreme Court April 29, 1916.)

1. CRIMINAL LAW ⟸1159(2) — EVIDENCE—CONCLUSIVENESS OF VERDICT.

Where relevant and competent evidence in a prosecution for larceny supports all the material allegations of the information, the verdict of the jury will not be disturbed for insufficiency of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. ⟸1159(2).]

2. JUDGES ⟸49(2)—DISQUALIFICATION—BIAS AND PREJUDICE.

Proof of improper bias and prejudice, *held* insufficient to disqualify a judge who had presided at a prior trial of the accused on a similar offense and in refusing to approve an order of probation, had expressed the opinion that accused should be placed in the penitentiary.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 188; Dec. Dig. ⟸49(2).]

3. CHATTEL MORTGAGES ⟸230 — SALE OF MORTGAGED CHATTELS—GRAND LARCENY.

Under Pen. Code, § 538, providing that the sale of mortgaged chattels without notice to the buyer and the mortgagee is larceny, and under section 487, declaring the larceny of a cow, calf, etc., to be grand larceny, the sale of a mortgaged heifer or cow without the prescribed notice is grand larceny.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 489–493; Dec. Dig. ⟸230.]

4. LARCENY ⟸23 — GRAND LARCENY — KIND OF PROPERTY—"COW."

Within the meaning of Pen. Code, § 487, declaring that grand larceny is committed where the property stolen is a "* * * cow * * * bull, calf," etc., the word "heifer" is synonymous with the word "cow."

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 50–52; Dec. Dig. ⟸23.

For other definitions, see Words and Phrases, First and Second Series, Cow.]

5. CHATTEL MORTGAGES ⟸230 — SALE OF MORTGAGED PROPERTY—INTENT.

Intent is not an element of the offense of selling mortgaged chattels without notice to buyer and mortgagee, as prescribed by Pen. Code, § 538, and need not be alleged or proved.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 489–493; Dec. Dig. ⟸230.]

6. CRIMINAL LAW ⟸822(4) — REVIEW — INSTRUCTIONS.

Where the instructions as a whole correctly present the law, the accused cannot complain of a single instruction which, if standing alone, might be erroneous as assuming that the acts charged had been proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1994, 1995, 3158; Dec. Dig. ⟸822(4).]

7. CRIMINAL LAW ⟸815(3)—SALE OF MORTGAGED CHATTELS—INSTRUCTIONS.

Where the information charging sale of mortgaged chattels contains the twofold allegation of failure to give notice to the mortgagee and failure to give notice to the buyer in violation of Pen. Code, § 538, an instruction that the sale of one of the animals would warrant a conviction was not error, notwithstanding testimony that accused had the mortgagee's permission to sell two of the animals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1986; Dec. Dig. ⟸815(3).]

8. Criminal Law ⟸1215—Sale of Mortgaged Chattels—Punishment.

Under Pen. Code, § 672, providing that upon conviction of any crime punishable by imprisonment in jail or prison, a fine may also be imposed, such fine in addition to imprisonment may be imposed upon conviction of selling mortgaged property with notice to buyer and mortgagee prescribed by section 538.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3288; Dec. Dig. ⟸1215.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

E. J. Phillips was convicted of grand larceny, and appeals. Affirmed.

Rehearing denied in Supreme Court, 157 Pac. 1005. See, also, 27 Cal. App. 409, 150 Pac. 75.

O. V. Willson, of El Centro, and W. F. Frazier, of Calexico, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Appeal from a judgment of imprisonment and from an order denying defendant's motion for a new trial.

Defendant was prosecuted agreeable to the provisions of section 538 of the Penal Code, which makes the mortgagor of personal property, who sells or transfers the same to another, guilty of larceny, where he fails to inform the person to whom the sale is made of the existence of the mortgage and also fails to give written notice to the mortgagee of such intended sale. The property in question, which was subject to the lien of a chattel mortgage and which it is alleged the defendant sold without giving the requisite notice to either the mortgagee or the purchaser, consisted of three heifers and two cows. The judgment of the court, as entered upon the verdict, was that the defendant be imprisoned in the state prison for a period of three years, and that he pay a fine in the sum of $200.

[1] Referring to the evidence, the sufficiency of which is challenged by appellant, it will be sufficient to say that there was testimony relevant and competent to support the allegations of the information as to all material matters charged therein. Under such a state of the case, it is not for this court to revise the finding of the jury on the questions of fact.

[2] Appellant contends that the showing made by him of alleged disqualification of the trial judge as to bias and prejudice should have been sustained. It appears that the appellant had been a defendant in another case under a similar charge, and that, after conviction and when probation was there being applied for, the judge, being the same judge who sat at this trial, refused to approve an order for probation and gave it as his opinion in that connection that the defendant should, for the offense there considered, be placed in the penitentiary. Affidavits of the deputy district attorney and of the trial judge were filed, which contradicted the assertion of appellant as to any improper bias or prejudice.

[3, 4] It is urged that defendant should not have been convicted of the crime of grand larceny, because the section of the Code under which he was prosecuted makes the commission of the acts charged amount only to "larceny." In section 538 of the Penal Code it is provided that any person who shall commit any of the acts therein described shall be "guilty of larceny and * * * punishable accordingly." The property which was the subject of the chattel mortgage, as alleged in the information, consisted entirely of cows and heifers. By section 487 of the Penal Code, when the property stolen is a cow, calf, etc., the crime is declared to be grand larceny. We think that within the meaning of this section, "heifer" is synonymous with "cow," and it follows, therefore, that if, as section 538 of the Penal Code declares, the selling of mortgaged property without the prescribed notice makes the person guilty of larceny and makes him "punishable according," the crime is either grand or petty larceny, dependent upon the kind or value of property taken.

[5] The court charged the jury that the intent with which the act alleged was done was not an element of the offense, and then proceeded to state that:

"When the intent is not made an affirmative element of a crime the law interprets that the act knowingly done was of criminal intent and it need not be alleged or proven."

That instruction was in accordance with the law as laid down by this court in People v. Phillips, 27 Cal. App. 409, 150 Pac. 75.

[6] It is complained that in the same instruction the court by its language assumed that the acts charged against the defendant had been proved. If the instruction pointed to stood alone, it might be susceptible of such interpretation, but in the body of the instructions given by the court the jury was advised that it must find beyond a reasonable doubt all of the allegations set forth in the information to be true. Instructions are to be read in their entirety and not by segregated and separate portions.

[7] It is complained again that where the court instructed the jury that if they should find that the appellant sold either or all of the five animals described in the information they should convict him, error was committed, because there was testimony given on the part of the mortgagee to the effect that he had authorized the mortgagor to sell two of the cows. The information contains a two-fold charge, to wit: Not only that there was a failure to give notice to the mortgagee, but also a failure to give notice to the purchaser of the animals sold. Furthermore, the giving of mere permission to sell does not work a waiver of the right to have notice of the sale furnished, for, as is properly stated by the

Attorney General, the mortgagor has a full right to sell without permission, provided he gives the notice prescribed by the statute. We have examined each of the instructions offered by the appellant and which were not given. These instructions mainly went to the question of intent, and in view of what has been said herein upon that proposition, the refusal of the court to so declare the law did not amount to error of which the appellant has a right to complain. As before stated, the questions of fact proposed by the allegations of the information were submitted to the jury, and the jury made its finding thereon. There being material evidence to support the allegations, that finding forecloses any further inquiry into that matter.

[8] Appellant made the point that the law did not permit of the imposition of a fine in addition to a sentence of imprisonment and has referred to the section of the Penal Code fixing the punishment for grand larceny. Upon our first examination of the case, no answer being made on behalf of the Attorney General to this point, it seemed that the objection to that portion of the judgment which imposed the fine of $200 was well taken. However, our attention has now been called to section 672 of the Penal Code, which is a section general in its nature and which provides as follows:

"Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding two hundred dollars, in addition to the imprisonment prescribed."

Under the terms of this section it would seem that the court had the discretion to add the fine in the sum mentioned in the judgment to the sentence of imprisonment.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(30 Cal. App. 31)

PEOPLE v. PHILLIPS. (Cr. 2016.)

(Supreme Court of California. April 29, 1916.)

In Bank. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

On application for rehearing after decision in District Court of Appeal, 157 Pac. 1003. Rehearing denied.

See, also, 27 Cal. App. 409, 150 Pac. 75.

O. V. Willson, of El Centro, and W. F. Frazier, of Calexico, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Second District is denied.

In denying the application we do not wish to be understood as holding that if permission to sell was given by the mortgagee it would not operate as a complete waiver of the requirement of the statute that notice of the sale shall be given to the mortgagee. We express no opinion upon that question. The complaint that error was committed in the giving of an instruction bearing on this question was sufficiently answered by what is said in the opinion of the District Court of Appeal that:

"The information contained a twofold charge, to wit, not only that there was a failure to give notice to the mortgagee, but also a failure to give notice to the purchaser of the animals sold."

(29 Cal. App. 760)

MEINBERG v. JORDAN et al. (Civ. 1688.)

(District Court of Appeal, First District, California. Feb. 25, 1916. Rehearing Denied by Supreme Court April 24, 1916.)

1. APPEAL AND ERROR ⇐977(3) — SCOPE OF REVIEW — DISCRETIONARY ORDERS — NEW TRIAL.

An order granting new trial will not be disturbed, in the absence of a showing of abuse of discretion by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3862; Dec. Dig. ⇐977(3).]

2. APPEAL AND ERROR ⇐854(6) — SCOPE OF REVIEW — DISCRETIONARY ORDERS — NEW TRIAL.

An order granting new trial must be affirmed without regard to the ground on which it is specifically based, if it could rightfully be granted on any ground alleged in the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3423, 3424; Dec. Dig. ⇐854(6).]

3. APPEAL AND ERROR ⇐856(5) — SCOPE OF REVIEW — DISCRETIONARY ORDERS — NEW TRIAL.

On appeal from an order granting new trial, the court cannot consider the sufficiency of the evidence when the lower court, by direct language, expressly excludes that ground as a basis for its order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3410, 3423, 3424; Dec. Dig. ⇐856(5).]

4. APPEAL AND ERROR ⇐856(5)—SCOPE OF REVIEW — DISCRETIONARY ORDERS — NEW TRIAL.

An order for new trial upon the sole ground that the damages awarded to the plaintiff are excessive is susceptible of the interpretation that the trial court considered the evidence insufficient to sustain the award, so that the court on appeal may consider the sufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3410, 3423, 3424; Dec. Dig. ⇐856(5).]

5. APPEAL AND ERROR ⇐1015(1)—WEIGHT OF EVIDENCE—UNCONTROVERTED TESTIMONY.

Though the testimony offered is uncontroverted, it is for the trial court ultimately on the motion for new trial, to determine its legal sufficiency and weight.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3866; Dec. Dig. ⇐1015(1).]

6. NEW TRIAL ⇐104(1)--GROUNDS—NEWLY DISCOVERED EVIDENCE — CUMULATIVE EVIDENCE.

Notwithstanding newly discovered evidence relied on to secure new trial is cumulative only,

it will be sufficient to warrant new trial if its introduction would probably lead to a different result.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218, 228; Dec. Dig. ⟸104(1).]

7. New Trial ⟸104(3)—Grounds—Newly Discovered Evidence—Sufficiency.

Where plaintiff, suing for an assault, testified that defendant was the aggressor, and she denied it, there being no other testimony, an order for new trial on newly discovered evidence was warranted by a showing that another witness would corroborate defendant, in spite of the cumulative character of the new testimony.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 220; Dec. Dig. ⟸104(3).]

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Henry Meinberg against Catherine E. Jordan and husband. Judgment for plaintiff, and from an order granting a new trial, plaintiff appeals. Affirmed.

Perry & Dailey, of San Francisco, for appellant. Jordan & Brann, of San Francisco, for respondents.

LENNON, P. J. In this action the plaintiff recovered a judgment upon the verdict of a jury against the defendants in the sum of $750 as damages for personal injuries alleged to have been inflicted upon the plaintiff as the result of an assault and battery committed upon him by the defendant Catherine E. Jordan, wife of the defendant F. J. Jordan. The appeal is from an order granting the defendants' motion for a new trial upon "the sole ground that the damages awarded to the plaintiff * * * are excessive."

[1, 2] It is the well-settled rule that an order granting a new trial will not be disturbed upon appeal save upon a showing of an abuse of the discretion vested in the trial court. The defendants' motion for a new trial in the present case was based upon all of the statutory grounds; and it is equally well settled that an order granting a new trial must be affirmed without regard to the ground upon which it is specifically based if it could be rightfully granted upon any of the grounds upon which the motion was made.

[3] The latter rule is subject to the exception that in passing upon the correctness of the order granting a new trial the appellate court may not consider the insufficiency of the evidence when the lower court "by direct language" expressly excludes that ground as a basis for its order. Newman v. Overland, etc., Ry. Co., 132 Cal. 74, 64 Pac. 110; Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 Pac. 332; Gordon v. Roberts, 162 Cal. 506, 123 Pac. 288; Cahill v. E. B. & A. L. Stone, 167 Cal. 127, 138 Pac. 712.

[4] The order appealed from in the present case does not fall within the exception stated. It neither expressly nor impliedly excludes the insufficiency of the evidence as one of the grounds for its making. To the contrary, the reason assigned for its making implies that it was granted upon a consideration of the insufficiency of the evidence to warrant and support the finding of the jury that the plaintiff had been damaged in the sum of $750.

The declaration of the court that such sum was "excessive" does not necessarily mean that the trial court was of the opinion that the verdict was the result of passion or prejudice. It is susceptible of the interpretation that the trial court was not satisfied that the finding of the jury as to the extent of the damage suffered by the plaintiff was supported by the evidence adduced upon that phase of the case.

[5] Conceding, as plaintiff's counsel contends, that there is no conflict in the evidence as to the nature and extent of the injuries and the damages resulting therefrom, nevertheless the probative force and effect of the evidence upon that phase of the case was ultimately for the determination of the trial court upon the hearing of the motion for a new trial; and, in the absence of a showing of an abuse of discretion, its order granting a new trial will not be disturbed by this court. The rule in this behalf is stated in the case of Otten v. Spreckels, 24 Cal. App. 251, 257, 141 Pac. 224, 226, where it is said that:

"Even in cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to the one or the other of the parties litigant, the question as to the probative force or evidentiary value of the testimony, in a proceeding on a motion for new trial, based upon the ground that the evidence is insufficient to justify the verdict, is one whose determination is with the trial court. The rule (elementary and commonly familiar in our system of jurisprudence) is that the plaintiff in a civil action must establish his cause by a preponderance of proof, but, although many witnesses may testify directly in favor of his position, and no adversary testimony directly adduced, it is still with the jury, in the first instance, and finally with the court, where a new trial is asked on the ground stated, to say whether such testimony, when subjected to the legal tests whereby the probative value of evidence is to be judged, measures up to the requirement of the law as to the degree of proof essential to the support of an issue of fact. Of course, as has frequently been asserted, neither the jury nor the judge, in such a case, can arbitrarily reject testimony received in proof of the ultimate fact, or thus declare it to be unworthy of credence, but it is the duty of both, when exercising their respective functions with reference thereto, to consider and dispose of it by the light of the surrounding circumstances of the transaction constituting the subject-matter of the litigation, and their action in that regard will not be disturbed on appeal where there appears to flow from the general surrounding circumstances of the case probable justification for discrediting or giving no weight to testimony which, on its face, may bear all the earmarks of probability."

[6] A consideration of the evidence concerning the damage done to the plaintiff by the assault and battery alleged to have been perpetrated upon him at the hands of the defendant Catherine E. Jordan, has not con-

vinced us that the order granting a new trial upon the ground stated therein was an abuse of discretion. Moreover, one of the grounds of the motion for a new trial was alleged newly discovered evidence, which, under the rule previously stated, may be considered upon appeal in support of the order, notwithstanding the order specified that it was granted solely upon another ground; and we are not prepared to say that the showing made by the defendant in that behalf was not in itself sufficient to warrant and support the order granting a new trial.

Upon the trial of the cause it was the contention of the plaintiff that the defendant Catherine E. Jordan was the aggressor in the altercation which resulted in the alleged injuries and damage to the person of the plaintiff. The defendants, on the other hand, insisted that it was the plaintiff who precipitated the encounter, and that whatever the defendant Catherine E. Jordan did in the way of assaulting the plaintiff was done in necessary self-defense. The evidence upon this phase of the case was limited solely to the testimony of the plaintiff and the defendant Catherine E. Jordan. Needless to say, it was in sharp and substantial conflict. The alleged newly discovered evidence, as shown by affidavits filed and considered in support of the motion for a new trial, consisted of the proposed testimony of a witness to the affray, to the effect that the plaintiff, and not the defendant Catherine E. Jordan, was the aggressor therein. No objection is made that the defendants did not make a sufficient showing of reasonable diligence in an effort to discover and produce the newly discovered evidence upon the trial of the case; but it is insisted that such evidence is merely cumulative, and therefore was not sufficient to warrant the granting of a new trial. While it is true generally that newly discovered evidence which is merely cumulative in effect will not suffice to support a motion for a new trial, nevertheless if such evidence, notwithstanding its cumulative character, possesses sufficient probative force to render probable a different result upon a retrial of the case, it will then warrant and require an order granting a new trial. Cahill v. E. B. and A. L. Stone, etc., Co., supra.

[7] Manifestly the alleged newly discovered evidence relied upon for a new trial by the defendants in the present case, if it had been produced at the original trial, would have been material to the defense of the defendants; and, although it was but corroborative of the testimony of the defendant Catherine E. Jordan, and therefore cumulative in character, still, in view of the sharp and substantial conflict in the testimony of the plaintiff and defendant Catherine E. Jordan as to who was the aggressor in the affray, we are not prepared to say that if the newly discovered evidence had been presented to the jury in the first instance, the result of the trial would not have been different.

The order appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(29 Cal. App. 760)

MEINBERG v. JORDAN et al. (S. F. 7808.)

(Supreme Court of California. April 24, 1916.)

In Bank. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Henry Meinberg against Catherine E. Jordan and husband. On application for hearing in the Supreme Court after decision in the District Court of Appeal (157 Pac. 1005), affirming an order granting new trial after judgment for plaintiff. Application denied.

Perry & Dailey, of San Francisco, for appellant. Jordan & Brann, of San Francisco, for respondents.

PER CURIAM. The application for hearing in this court after decision of the District Court of Appeal of the First District is denied upon the first ground stated in the opinion of the District Court of Appeal, namely, that it cannot be held that there was error in the action of the trial court in granting defendants' motion for a new trial upon the "ground that the damages awarded to the plaintiff * * * are excessive."

(172 Cal. 546)

YOUNG v. KAUFMAN. (S. F. 6890.)

(Supreme Court of California. May 15, 1916.)

1. JUDGMENT ⇐719—RES ADJUDICATA.

The judgment in a suit to quiet title brought by the purchaser in which it was a pertinent issue whether the vendor or purchaser was entitled to insurance money on real estate sold subject to a deed of trust, and whether the purchaser had assumed the vendor's indebtedness on the secured notes, was res adjudicata in a subsequent action brought by the vendor to recover balance alleged to be due on the purchase price, since, although the relief sought in the former action was somewhat different, it was substantially the same cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1249, 1250; Dec. Dig. ⇐719.]

2. LIMITATION OF ACTIONS ⇐56(1)—ACCRUAL OF CAUSE OF ACTION—REMEDIES OF VENDOR.

Where a vendor sold land subject to a deed of trust which was assumed by the purchaser, and after the destruction of the improvements by fire voluntarily paid a balance due on the secured notes, the statute of limitations on his right to recover from the purchaser began to run on the date of such payment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 307, 310; Dec. Dig. ⇐56(1).]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by John Crosby Young against Elizabeth Kaufman. From a judgment for defendant, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

Albert B. Harris and Alfred B. Weiler, both of San Francisco, for appellant. David L. Levy, J. C. Campbell, and Weaver, Shelton & Levy, all of San Francisco, for respondent.

MELVIN, J. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. The suit was for an alleged balance due from Mrs. Kaufman to Mr. Young on the purchase price of a certain parcel of real property in the city and county of San Francisco.

Plaintiff alleged that he had sold and conveyed the property to defendant for an agreed price of $6,000, that the sum of $2,740.47 had been paid thereon, and that $3,259.53 remained unpaid. For a further and separate cause of action plaintiff alleged that he and his wife, Josephine M. Young, on the 1st day of February, 1904, executed and delivered their note for the sum of $4,000 to the Savings & Loan Society; that said note was due and payable on February 1, 1906; that thereafter plaintiff and defendant entered into an agreement whereby the latter purchased from plaintiff the property which is described in detail in the complaint; that the price was $6,000; that by the terms of the agreement defendant promised to pay $3,523.48 to the Savings & Loan Society, together with interest at the rate of 6 per cent. per annum; that the Savings & Loan Society knew of the agreement and accepted the defendant as principal debtor for the sum of $3,523.48 to be paid in accordance with the terms of the said note; that said Savings & Loan Society did not release plaintiff or his wife from their obligation on the note, but retained said note and obligations as security for the payment of said sum by defendant; that defendant paid the Savings & Loan Society $263.95 and no more; and that thereafter and subsequent to the 1st day of February, 1906, plaintiff paid the Savings & Loan Society $3,259.53 and interest in discharge of his obligation on his note. The last-named sum was demanded as due to plaintiff from defendant as the remainder of the purchase price. Defendant answered fully, setting up three separate defenses: (1) That upon the merits plaintiff had not established a cause of action; (2) that plaintiff's claim was concluded by a former judgment; and (3) that plaintiff's alleged cause of action was barred by the statute of limitations. The cause was tried and judgment was given on the merits in favor of defendant. The court found that another action between the same parties had been tried, and while there was no direct finding that the same issues were involved in both actions, an elaborate review of the course of the other litigation was set forth including much of the opinion of the district court of appeal in the case of Kaufman v. All Persons, etc., 16 Cal. App. 388, 117 Pac. 586. On the defense of the statute of limitations the court found certain probative facts. The record contains an elaborate stipulation of facts. Upon these facts Mrs. Kaufman founded the defenses of payment and the bar of the statute of limitations. The undisputed facts thus established by stipulation and again set forth by the findings actually signed by the court are in brief as follows:

On February 1, 1904, plaintiff owned the real property described in the pleadings. On that day he and his wife executed and delivered a promissory note for $4,000 at 6 per cent. interest per annum payable to the Savings & Loan Society and secured by a deed of trust executed at the same time. By the terms of the note it was payable in monthly installments of $20, with interest until February 1, 1906, when the unpaid balance should become due. Prior to January 16, 1906, plaintiff paid all of the interest due to said date and $476.52 of the principal. On the day last specified a written agreement was executed whereby Mr. Young gave Mrs. Kaufman, for $1,000, then paid, an option for the period extending to and including the 1st day of January, 1908, to purchase the premises for $6,000. The contract provided for a credit of the $1,000 on the purchase price in case Mrs. Kaufman should elect to purchase within the optional period. The balance of $5,000 was to be paid as follows: $1,476.52 to be paid in installments before January 1, 1908, to the Crocker-Woolworth National Bank of San Francisco for Mr. Young's benefit and the remainder $3,523.48 "to be paid to the Savings & Loan Society of San Francisco, by the party of the second part, at the rate of twenty dollars ($20.00) per month and interest, according to the terms of a certain deed of trust from John Crosby Young and Josephine M. Young to said Savings & Loan Society, dated February 1, 1904." The vendor was to place in escrow with the Crocker-Woolworth National Bank a deed to be delivered to the vendee "upon full payment of said fourteen hundred and seventy-six and fifty-two hundredths dollars ($1,476.52), and interest thereon as aforesaid." The deed was executed and placed in escrow according to the provisions of the agreement. Mrs. Kaufman was in possession of the property, and, following the terms of the aforesaid agreement, made monthly payments to the Savings & Loan Society. After three such payments had been made the improvements on the land were destroyed by fire. The vendor had previously insured these improvements in favor of the Savings & Loan Society as provided by the deed of trust. On September 1, 1906, the insurance company paid to said society $2,250 in full of its obligations arising upon the policy of insurance. This amount was credited upon the indebtedness secured by the deed of trust. Mrs. Kaufman paid her usual installments to the Savings & Loan Society early in September, 1906. On the 29th of that month Mr. Young, without her knowledge or consent and without any demand by the society or its agents for such action paid the entire balance of the indebtedness amounting to $1,100 to the said society, taking its reconveyance of the land. Thereafter Mrs. Kaufman made monthly tenders for the balance of the year 1906 to the Savings &

Loan Society. Each of these was for $20 and interest computed upon an existing balance of $1,100. These tenders were rejected by the Savings & Loan Society. Mr. Young at that time claimed that Mrs. Kaufman was under obligation to pay to him $20 per month, together with interest upon a balance of $3,360, which included the amount paid by him upon the indebtedness secured by the deed of trust as well as the sum paid by the insurance company. On November 30, 1906, Mrs. Kaufman paid the Crocker-Woolworth National Bank the entire amount covered by the escrow instructions, received the deed and placed it of record. Subsequently she received a quitclaim deed to the property from the Savings & Loan Society.

On February 17, 1908, Mrs. Kaufman commenced an action under the "McEnerney Act" to quiet her title to the property. Mr. Young appeared as a defendant, set up the transactions between himself, the plaintiff and the banks and alleged that there was a balance due him of $3,259.53 and interest, the amount for which he seeks judgment here. He asked that the amounts demanded be declared liens upon the land in his favor. In that action Mrs. Kaufman prevailed.

Appellant here contends that respondent never assumed his debt to the bank, but merely paid upon his account the installments provided by the contract of option and sale; that the insurance money was properly his and should not have been applied on account of Mrs. Kaufman's indebtedness; and that his payment of the residue evidenced by the note and secured by the deed of trust was not a voluntary payment of another's debt. We are satisfied that all of these contentions, save one, are fully answered adversely to appellant's contentions by the decision in the action to quiet title, and that his demand for repayment of the money paid voluntarily by him in extinguishment of the debt assumed by his vendee is barred by the statute of limitations.

In the case of Kaufman v. All Persons, etc., 16 Cal. App. 388, 117 Pac. 586, after setting forth fully a statement of the facts which we have endeavored in some degree to epitomize above, the learned District Court of Appeal held that the money paid by the insurance company was properly applied to the extinguishment of the debt which had been assumed by Mrs. Kaufman. In discussing this part of the case Mr. Justice Hart, who delivered the opinion of the court, said among other things:

"The habendum clause of the deed in escrow, it will be remembered, reads: 'To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns forever, subject to a certain deed of trust from John Crosby Young and Josephine M. Young to Arthur A. Smith and Wm. B. Dunning, trustees Savings & Loan Society, dated Feb'y 1, 1904.'

"Said clause in said deed and the agreement of option must be construed together, and, so construing them, it is idle to argue that the intention and understanding of the parties was not that plaintiff was to assume and that she did not, by virtue of such understanding, assume the extinguishment of the obligation of the defendants to the Savings & Loan Society. The agreement of option specifically points out all the payments, by installments, including the payment of the note held by the savings society, that were required to be made by plaintiff until the full purchase price should have been paid. The clause quoted from the deed in escrow, viewed by the light of said option, simply and plainly means that the plaintiff bought the property from the defendants subject to the right of the Savings & Loan Society to enforce the collection of its note executed to it by the defendants by the sale of the property, if necessary, and, if the insured portion of the property was destroyed by fire before the payment of the note, by the application of the money derived from the insurance company on said policy to the indebtedness. There must be, of course, some competent evidence clearly showing that plaintiff assumed the indebtedness of defendants to the savings society, and it may be that, had the contract of sale been evidenced only by the deed in escrow, no other writing as to the terms of the sale having been made by the parties, the mere language of the clause of said deed 'subject to a certain deed of trust,' etc., might be held to be insufficient to bind the plaintiff to the payment of the debt secured by the deed of trust. But such is not the case here. As seen, the writings constituting the transaction by which the sale of the property was consummated very clearly and unequivocally show that the plaintiff, as a part of the consideration or purchase price, assumed the indebtedness of defendants to the savings society." The opinion also contains this language: "The policy here, as has been seen, was by its own terms, and under the agreement between said society and the defendants, made payable, in case of the destruction of the building by fire, to the savings society, for the sole purpose of extinguishing or reducing a debt which the plaintiff, under her agreement with defendants and with the knowledge and consent of the creditor, had assumed and agreed to pay. She was, as declared, the equitable owner of the property and in possession thereof. * * * In brief, it was her property until her equitable title was defeated by the nonperformance of the conditions upon which she purchased it."

[1] It is argued that the doctrine of res adjudicata may not be applied here because in the suit to quiet title Mr. Young was not seeking to establish the indebtedness of Mrs. Kaufman to him, but merely a lien on the property for money owed to him. But the prayer of his complaint was in part that he should be adjudged the owner of and entitled to all sums of money paid upon, under, or in pursuance of the contract between him and Mrs. Kaufman. It was pertinent there as it is here to determine whether Mr. Young or Mrs. Kaufman was entitled to the insurance money. It makes no difference that the relief sought in the former case was in some measure different from that demanded in this action. If the former litigation was substantially the same cause of action, the judgment therein is a bar to recovery in this suit. Krzepicki v. Krzepicki, 167 Cal. 449–452, 140 Pac. 13; Suisun Lumber Co. v. Fairfield School District, 19 Cal. App. 587–594, 127 Pac. 349. We are of the opinion, therefore, that the judgment in the action to quiet title

is res adjudicata against plaintiff as to $2,500 of the amount to which he asserts he is entitled; and also as to the status of Mrs. Kaufman who had assumed the indebtedness of Mr. Young and stood in his place with reference to the Savings & Loan Society.

[2] The matter of the payment of the $1,100 to the Savings & Loan Society presents a different aspect. The district court of appeal held that such payment was purely voluntary, as we are bound to hold under the findings in this case, but Mr. Young and his wife were denied a lien because they had refused a tender of the full amount. The court, however, expressly refrained from deciding whether or not the vendee might be compelled to respond in another action, using this language:

"If it may transpire, although we have no occasion to so declare here, that the defendants have lost any legal remedy to which they might have resorted for the recovery of any just claim they may have against plaintiff, by reason of the payment by them of the balance remaining unpaid on the note which she promised to pay, the fault lies with defendants themselves. They forfeited their chance or opportunity to be reimbursed for said payment by their refusal to accept reimbursement tendered to them by plaintiff before this action was instituted. Neither law nor equity can have much, if any, patience with a litigant, appealing for the assistance of either, who has deliberately refused an amicable tender of the right to which he subsequently asks the courts to restore him; and particularly should this view prevail where the refusal was, as was evidently the fact in the case at bar, prompted by no other motive than to secure more, manifestly, than was justly, equitably and in good conscience such litigant's due."

Appellant reminds us that his contract called for payment by the vendee of $20 a month with interest. This action was commenced December 29, 1911, and he concedes that all installments due before December 29, 1907, are barred. There were 23 such installments, but 8 were paid. He insists therefore that the statute of limitations applies to 15 installments, but that the rest should be enforced. He is in error. As we have seen he is estopped by the former judgment from asserting that the purchase price of the property was payable to him independently of his agreement with the Savings & Loan Society. Mrs. Kaufman was substituted for him as debtor in that transaction. The indebtedness of plaintiff, which Mrs. Kaufman promised to pay, fell due on February 1, 1906. The payment of the proceeds of the policy and plaintiff's voluntary liquidation of the remaining indebtedness both occurred in September, 1906. The only theory upon which plaintiff may assert a cause of action for the $1,100 is that he paid a debt which she owed or was equitably bound to pay. From the date of that payment the statute of limitations began to run, and more than five years elapsed between the payment of the residue of the debt to the Savings & Loan Society and the commencement of this action. In her answer defendant set up the bar of subdivision 1 of section 337, Code of Civil Procedure, and of subdivision 1 of section 339 of the same Code. It is immaterial whether the period of two years or of four years is applicable. The bar of the statute is complete.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

172 Cal. 583

FRESNO ESTATE CO. v. FISKE et al.

FISKE v. FRESNO ESTATE CO. et al.

(S. F. 6582, 6581.)

(Supreme Court of California. May 23, 1916. Rehearing Denied June 22, 1916.)

1. JUDGMENT ⊂⊃444 — EQUITABLE RELIEF—EXTRINSIC FRAUD—FALSE TESTIMONY—MATERIALITY.

Even granting that there was false testimony which, if its falsity had been disclosed, would have led the court to disregard the testimony of the same witness on which he based his judgment, the judgment, having become final, cannot therefore be set aside in equity after 20 years, for the fraud, which was not extrinsic, there having been no extrinsic fraud in preventing fair submission by the unsuccessful litigants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 839; Dec. Dig. ⊂⊃444.]

2. JUDGMENT ⊂⊃444 — EQUITABLE RELIEF—FALSE TESTIMONY—METHOD OF ATTACK.

Where trial of the issues is had, the parties must be ready then and there to meet and expose perjury, and, if they fail, the remedy is by motion for new trial and by appeal, and not by suit to set aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 839; Dec. Dig. ⊂⊃444.]

3. EVIDENCE ⊂⊃588—CREDIBILITY OF WITNESS.

On appeal in a suit to set aside a judgment, the court will not declare the testimony of a witness in the first case to have been unworthy of belief because of perjury proved against her as to other testimony; the appeal not being from the original judgment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. ⊂⊃588; Witnesses, Cent. Dig. § 1164.]

4. JUDGMENT ⊂⊃461(5)—EQUITABLE RELIEF—EVIDENCE—SUFFICIENCY.

Evidence *held* insufficient to warrant reversal of the court's finding that a prior judgment was not secured by collusion between the plaintiff therein and the guardian of the instant plaintiff who was then a minor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 895; Dec. Dig. ⊂⊃461(5).]

5. JUDGMENT ⊂⊃461(1)—EQUITABLE RELIEF—EXTRINSIC FRAUD—BURDEN OF PROOF.

One who attacks a judgment entered after trial by the chancellor who had full power and was under the duty to protect the interests of the minor defendants has the burden of proving extrinsic fraud sufficient to vitiate the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 892; Dec. Dig. ⊂⊃461(1).]

6. GUARDIAN AND WARD ⊂⊃129—ACTIONS BY GUARDIAN—WHO MUST BE SUMMONED.

Where the mother of minor defendants, who had been their guardian, brought a suit in her individual right involving their interests, it was not necessary that she be served with summons in her capacity as guardian in their behalf.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 439; Dec. Dig. ⊂⊃129.]

7. GUARDIAN AND WARD ⊂⊃23—DISCHARGE OF GUARDIAN—TIME.

Where a new guardian is appointed for minors, the resignation of the former guardian is accepted, and he is discharged from office, although liability to account and on the bond continues, as discharge from office may antedate settlement of account.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 77; Dec. Dig. ⊂⊃23.]

8. JUDGMENT ⊂⊃470—CONCLUSIVENESS—COLLATERAL ATTACK.

A judgment of a court of general jurisdiction cannot be collaterally attacked.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. ⊂⊃470.]

9. GUARDIAN AND WARD ⊂⊃23—DISCHARGE AND ACCOUNT—PRESUMPTIONS.

Even if a guardian must deliver up property of his wards and have his resignation accepted before a new guardian can be appointed, it must be presumed that such delivery was made, though the order of appointment was made one day prior to entry of the order of discharge.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 77; Dec. Dig. ⊂⊃23.]

10. GUARDIAN AND WARD ⊂⊃23 — APPOINTMENT AND DISCHARGE—TIME.

An order discharging a guardian is effective from pronouncement, and not from date of entry, so that delay or failure to enter it does not affect its validity.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 77; Dec. Dig. ⊂⊃23.]

11. GUARDIAN AND WARD ⊂⊃23—DISCHARGE AND ACCOUNT—PRESUMPTIONS.

Under Code Civ. Proc. § 1427, requiring that an executor or administrator shall first turn over the property before being discharged, the presumption of such delivery arising from appointment of a new guardian, which operated as a discharge of the old, was sufficient.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 77; Dec. Dig. ⊂⊃23.]

12. GUARDIAN AND WARD ⊂⊃23 — APPOINTMENT AND DISCHARGE—TIME.

Code Civ. Proc. § 1427, governs resignation or discharge of an executor or administrator after settlement of accounts. Section 1808 makes the sections as to executors and administrators apply so far as possible to guardianship. Section 1801 gives the court complete discretion to accept a guardian's resignation and appoint a successor. *Held*, that section 1808 does not limit the discretion conferred by section 1801, but that previous accounting and delivery of property need not be required of a guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 77; Dec. Dig. ⊂⊃23.]

13. TRIAL ⊂⊃5—TIME FOR TRIAL.

Since a general guardian has power to appear for his wards, independently of service of summons upon them, where such guardian filed his answer, the trial was not premature merely because it occurred before expiration of 10 days following service of summons on the ward.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 11, 12; Dec. Dig. ⊂⊃5.]

14. New Trial ⊂⊃102(9)—Grounds—Newly Discovered Evidence.

Where a witness whose affidavit is offered in support of motion for new trial, on the ground of newly discovered evidence, was present at the trial and was not used because he did not then remember the facts, and where it did not appear that his memory could not have been stimulated during the trial, and his connection with the facts was known at all times, new trial was properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 214; Dec. Dig. ⊂⊃102(9).]

15. New Trial ⊂⊃102(9)—Grounds—Newly Discovered Evidence.

Where a witness whose affidavit is offered in support of motion for new trial on the ground of newly discovered evidence was present at the trial and was not used because she was thought to be unfavorable, and the whole effort of the party was devoted to showing that she was a perjurer, the court cannot say that it was an abuse of discretion to deny new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 214; Dec. Dig. ⊂⊃102(9).]

16. Appeal and Error ⊂⊃981—Discretion—New Trial—Newly Discovered Evidence.

Motions for new trial for newly discovered evidence are not favorably regarded and appellate tribunals do not disturb the action of the trial court in denying them unless it clearly appears that there was an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. ⊂⊃981.]

In Bank. Appeal from the Superior Court of Fresno County; S. E. Crow, Judge.

Two actions, by the Fresno Estate Company, against Jay Allen Fiske and others, and by Jay Allen Fiske against the Fresno Estate Company and others, consolidated and tried together. From orders denying new trial in each case, Fiske appeals. Affirmed.

Gavin McNab, of San Francisco, Everts & Ewing, of Fresno, and R. P. Henshall and Luther Elkins, both of San Francisco, for appellant. N. C. Coldwell, of San Francisco, F. H. Short and F. E. Cook, both of Fresno, and W. S. Goodfellow and Goodfellow, Eells, Moore & Orrick, all of San Francisco, for respondents.

MELVIN, J. These two actions were consolidated and tried together. The appeals are from the orders denying the motion by Jay Allen Fiske in each case for a new trial.

The Fresno Estate Company sued to quiet title to certain real property in Fresno county. Jay Allen Fiske answered and filed a cross-complaint, which is substantially the same as the bill in equity, by the filing of which the second suit was commenced. The corporation answered both the cross-complaint and the bill in equity. By his pleadings Jay Allen Fiske sought to set aside and to avoid for extrinsic fraud the final decree of distribution in the estate of John D. Fiske, deceased, or that part of it which purported to distribute the real property of said estate as the community property of John D. Fiske and Amanda J. Fiske, his wife; and to vacate, set aside, and avoid for extrinsic fraud the final decree in a suit to quiet title to said property; and to declare the Fresno Estate Company a trustee of a third interest in said property for said Jay Allen Fiske.

It appears without question that Jay Allen Fiske is the son of the late John D. Fiske and Amanda J. Fiske, his wife; that subsequent to John D. Fiske's death his widow married Theodore Marceau, was divorced from him and married a Mr. Fennell. From the findings the following facts, among others, appear:

John D. Fiske died in Fresno county, July 26, 1890, leaving as heirs his widow, Amanda J. Fiske and two minor children, Jay Allen Fiske and Mercie Jean Fiske. The last-named child died during minority. On July 25, 1889, John D. Fiske executed to his wife, Amanda, a deed conveying the property here in dispute to her. In the deed was contained a recital of the consideration as $10 and the further sum of $28,000 advanced to him by his wife in July, 1885, out of her separate property. In the deed of conveyance the premises were described as the separate property of Amanda J. Fiske. On October 14, 1889, John D. Fiske executed another deed with similar recitals regarding the consideration and the separate character of the property, and this deed contained the statement that it was made to correct the former one. Each deed was acknowledged before a notary public, and was duly recorded shortly after its execution. The purpose of John D. Fiske in executing these instruments was to hinder, delay, and defraud a creditor, one A. H. Cummings. The court also found that by these deeds Amanda became the owner and seized in fee, as of her separate estate, of all of the real property referred to in the pleadings, and so remained continuously until 1897 when she conveyed title to the Fresno Estate Company. There were further findings that John D. Fiske never after the execution of the said deeds owned any interest in the land, and that Jay Allen Fiske had acquired no interest therein either as heir or otherwise.

The court also made findings that on February 24, 1890, Amanda J. Fiske, in anticipation of her possible death, prepared a deed of conveyance of the property to her husband, and deposited it in his safe in a compartment to which she had exclusive right of access; and that in June, 1890, domestic difficulties having arisen between the husband and wife, the former broke open this compartment, abstructed the deed therefrom, and caused it to be recorded. Mrs. Fiske subsequently instituted a suit for divorce. In her complaint she alleged, among other things, the nondelivery of the deed and prayed for its annulment. John D. Fiske died during the pendency of the action for divorce. Thereafter Mrs. Fiske was appointed administratrix of the estate of John D. Fiske, deceased, and, as the court finds, she did not conceal the existence of the property,

although she did not include it in the inventory filed in the course of the probate proceedings. The petition for letters of administration contained the following language:

"Your petitioner is informed and believes that certain real estate in Fresno county, Cal., stands of record in the name of said deceased, and that the rents, issues, and profits of the same amount to $1,500 per month, but that, as your petitioner is informed and believes, said real estate was not at the time of the death of the said deceased the property of the said deceased, and that the value of the said property is not known to your petitioner."

On April, 6, 1892, the final account of Mrs. Fiske as administratrix was settled and allowed and a decree of final distribution of the estate was given and made whereby all of the property of the estate was declared and adjudged to be community property and was distributed, one-half to her and one-quarter to each of the two minor children. Mrs. Fiske was thereupon discharged as administratrix. In August, 1890, as the court finds, Mrs. Fiske was appointed guardian of the persons and estates of her two minor children, and she duly qualified and acted as such guardian until April 6, 1892. On that day she resigned, and her resignation was accepted and she ceased to be such guardian. On that same day (so the court finds), upon petition of one W. L. Fisher, and upon request of Mrs. Fiske and of her mother, who was the wife of said Fisher, he was duly appointed guardian of the persons and estates of the minors, duly qualified as such, and served in that office until some time in November, 1892. On April 7, 1892, the mother of the minors, who had by marriage become Amanda J. Marceau, commenced an action against the said minors and W. L. Fisher as their guardian, alleging in her complaint that she was the owner of the real estate, the title to which is here in dispute, and praying for a decree quieting her title thereto. There is a finding that summons in this action was duly and personally served upon each of the minors and upon the guardian, Mr. Fisher, and that through their said guardian the minors answered denying the allegations in their mother's complaint, and averring that title to said property was in them. This action was tried in the superior court on April 12, 1892, the guardian and his wards being duly represented by counsel. As a result of the trial the court adjudged that the instrument, in form a deed of conveyance from Amanda J. Fiske to John D. Fiske, her husband, had never been delivered, but that he had abstracted it from his wife's private compartment in his safe. Mrs. Marceau's title to the land in dispute was quieted. In the case now at bar the court found that the judgment in that action quieting title has, ever since its entry, remained in full force; that the action was tried on its merits; that the decision and judgment were based upon competent testimony; that the action was fully and fairly tried; that all available defenses were presented to the court by counsel for the defendants; and that the judgment given in the year 1892 estops Jay Allen Fiske to claim or assert any interest in the premises adverse to that of his mother or of the Fresno Estate Company.

In response to certain allegations contained in the pleadings of Jay Allen Fiske the court found that at all times following the death of John D. Fiske, his widow in good faith believed, as the fact was, that the property now in controversy was her own separate estate; that she made no false statements in the matter of the estate of John D. Fiske, nor concealed from the court any facts affecting the interests of her children, nor committed any fraud upon the court; that throughout the probate proceedings the minor children were represented by Mr. R. A. King under appointment of the court, and they were not deprived of any rights in said probate proceedings; that the decree of the probate court was free from all fraudulent influence; that she commenced and prosecuted in good faith the action of April, 1892, to quiet title; that at the trial of said action she proved that there had been no lawful delivery of the purported deed, supposedly granting the title to her husband; that upon the trial of that case Amanda J. Fiske introduced letters written by John D. Fiske and testimony regarding statements made by him to the effect that the property had been purchased with Mrs. Fiske's separate moneys, and that he claimed no interest therein; that Mrs. Fiske also testified at that trial that the said property had been purchased by money which was her separate property derived from gifts made to her by her mother and various other persons, but it is found, upon testimony adduced at the trial of this case, that the statements regarding the gifts were absolutely false, and that similar false testimony was given in that action by Mrs. Fisher. The court in the trial of this action found that the funds used in the purchase of the land here involved were in fact furnished by John D. Fiske. It was found, however, that the false testimony was immaterial and did not affect the judgment in the former action in favor of Mrs. Fiske and against her children.

There was a finding that Mrs. Fiske induced her stepfather, Mr. Fisher, to come from New York to act as guardian of the minor children, but that there was no fraud or fraudulent intent upon her part or that of Fisher. The court further found that Fisher as guardian, and not Mrs. Fiske, paid the attorneys who had represented the minors in the probate and guardianship proceedings, and also in an action theretofore prosecuted by her against her minor children and herself as administratrix of the estate of John D. Fiske, deceased.

It was found that W. L. Fisher, as guardian, acted in good faith, and not as a passive instrument in Mrs. Fiske's hands. There were elaborate findings against the theory

of appellant that Mrs. Fiske and Mr. Fisher had conspired to defraud the minor children and that the suit against the said minors was not a genuine contest, it being found, on the contrary, that all of the proceedings and statements were in good faith except the said false statements regarding the source of the money by which the property was originally purchased by Mr. Fiske.

There were findings that the corporation, Fresno Estate Company, was formed in the course of a transaction by which Mrs. Fiske sought a loan from C. F. MacDermott. He organized said corporation, and she transferred all of the property here in suit to it, taking as consideration for said transfer substantially all of the shares of the capital stock, which she then pledged to MacDermott as security for a loan. It was found that MacDermott and the original stockholders had no knowledge of the claims of Jay Allen Fiske, and that they dealt with the said Amanda J. Fiske in good faith; that subsequently she sold all of the shares to the present stockholders, who were innocent purchasers and were persons who bought their stock in reliance upon the judgment entered in April, 1892; and that to grant the demanded relief to Jay Allen Fiske would be inequitable to the corporation and to its stockholders. There were full and adverse findings responsive to Jay Allen Fiske's allegations with reference to alleged frauds and concealments perpetrated by his mother in the probate proceedings and to his contentions that W. L. Fisher had not been duly appointed his guardian; and that Jay Allen Fiske had not been represented by guardian, by attorney or otherwise in the suit brought against him to quiet title to the land in which he now claims an interest. According to further findings Jay Allen Fiske could not present proof of extrinsic fraud in the suit to quiet title, or that he was prevented from presenting his defense thereto, but he could establish the fact that Mrs. Fiske falsely swore that the property was bought with money derived by her from her relations, and that it was always equitably hers. The findings contained the further concession that Jay Allen Fiske could prove that the purpose of the conveyance of the property from his father to his mother was to defeat A. H. Cummings from realizing upon a possible judgment which he might obtain against John D. Fiske. There was a repitition in substance of the earlier finding that there was no delivery of the deed of February 24, 1910, in which Mrs. Fiske was apparently the grantor and her husband the grantee.

We have found it necessary thus to reproduce rather fully the findings of the superior court because of the many angles of attack upon them and the many lines of defense.

[1] Appellant's first contention is that the real property in question was the separate property of John D. Fiske, and at his death a one-third interest therein descended to his son. This is conceded to be the crucial point in the litigation because, say counsel for appellant:

"If the property did not belong, as separate property, to John D. Fiske at the time of his death, we are ready to concede that Jay Allen Fiske is without any case."

The lower court found that the property was acquired by John D. Fiske after his marriage, and that it was community property until it was conveyed to his wife, when it became and continued to be her separate property until a time subsequent to her husband's death. This finding is attacked upon the ground that it is contrary to the solemn stipulation of the parties that on March 31, 1887, John D. Fiske was "the owner in fee simple and in the possession of the land." This admission, say counsel, establishes beyond question that the findings in the case of Marceau v. Fiske, to the effect that the property in question was Mrs. Marceau's separate property, bought by John D. Fiske in her name with his moneys, are untrue; that this is the very basis of the judgment cutting off the interests of the minors, and because of its falsity it must be disregarded. But it must be remembered that the judgment in Marceau v. Fiske was based upon the finding that Mr. Fiske had taken the deed from his wife's compartment in the safe without her knowledge or consent, and that there had been no delivery of that instrument which purported to evidence his title. That was the one essential matter before the court. Was there a delivery or not? His reason for the original conveyance to his wife was immaterial, and it was equally immaterial whether the property was separate or community property prior to such transfer. John D. Fiske, in December, 1889, had written to the German Savings & Loan Society of San Francisco a letter containing the declaration that this property had been purchased by him with money given to his wife by her mother. In the two deeds executed by John D. Fiske in his wife's favor, dated respectively July 25, 1889, and October 14, 1889, he had declared that part of the consideration of each deed was $28,000 advanced to him by Amanda J. Fiske out of her separate property. Respondent asserts that the finding in the suit to quiet title could be supported by the evidence of these recitals, eliminating all of the false testimony given and procured by Mrs. Fiske. But whether this position be correct or not, we think the testimony of Mrs. Fiske as to her loan to her husband was not of controlling weight. She sued to quiet title, not pleading her source of ownership, nor the advancement of any money by her for the original purchase. The answer averred that John D. Fiske held legal title to the property at the time of his death, and that as his sole heirs at law the minors, defendants in the suit, succeeded to the title. It sets up the infancy of the heirs,

and prays strict proof of the matters alleged in the complaint. The source from which John D. Fiske originally received the purchase money was not a determination necessary to the decision of that case, and the finding based upon the false testimony was clearly not material.

But appellant's counsel say that the fact of nondelivery, found in Marceau v. Fiske, was based upon Mrs. Marceau's testimony, and that evidence concerning the source of the original purchase money was material as indicating the probability or improbability of her statement that she had never delivered the deed to her husband, Mr. Fiske. It is the theory of appellant's counsel that the court would never have depended upon her statements regarding nondelivery had it been apprised of her perjury regarding the supposed gifts from her kinsfolk of the purchase price of the property. To support such a contention would authorize the reversal of a judgment which has long since become final, upon considerations of fraud not extrinsic. Even granting that the decree in Marceau v. Fiske was based upon Mrs. Marceau's false testimony, it may not be set aside in this action for that reason. There was no extrinsic fraud by which the unsuccessful litigants in that case were prevented from having a fair submission of the controversy.

[2] True the plaintiff swore falsely, but where a trial of issues in any case is had, the parties must be prepared to meet and to expose perjury then and there. If one fails so to do and the perjury accomplishes its malign purpose, the means of correction of the wrong are to be found in a motion for a new trial and in an appeal from the judgment. This in its practical operation is often a harsh rule, but, if it were not rigidly enforced, the mischiefs which would arise from the disturbing of apparently final judgments after years of dependence upon property rights established by them would be much worse than the enforcement of the judgments based upon the false swearing. In any view of the matter we cannot see that the false stories told by Mrs. Marceau and her mother amounted to extrinsic fraud. Therefore we must hold that we may not, upon the ground of such fraud nullify the effect of that judgment. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Fealey v. Fealey, 104 Cal. 354–359, 38 Pac. 49, 43 Am. St. Rep. 111; Hanley v. Hanley, 114 Cal. 690–693, 46 Pac. 736; Steen v. March, 132 Cal. 616, 617, 64 Pac. 994; United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; French v. Phelps, 20 Cal. App. 101–111, 128 Pac. 772.

[3] Counsel devote many pages of their briefs to an attack upon the testimony of Mrs. Marceau by which was established the nondelivery of her alleged deed to her husband. They argue that, her statements regarding the original purchase of the property having been false, this court should now declare that her account of the nondelivery was worthy of no belief. The conclusive answer to this contention is that this is not an appeal from the judgment in the case of Marceau v. Fiske.

We do not see that the omission by Mrs. Fiske (Marceau) to include the property here in dispute in the final account of her administration of the estate of John D. Fiske has any proper place in this controversy. If the property was her own it was not entitled to be so included. In her petition for letters she had called the court's attention to property standing in the name of the decedent, but not belonging to him. Her final account was in harmony with her expressed views upon the subject of the ownership of the realty.

[4] Appellant insists that the case of Marceau v. Fiske was sham because the defense was dominated by the plaintiff in the action; that it was a collusive and simulated controversy; and that it was brought upon allegations known by the plaintiff to be false. It is true that Mr. Fisher, who succeeded Mrs. Marceau as guardian, came to California at her request, but it is also true that the judge of the superior court who made the appointment knew of this fact and of their relationship. If Mrs. Marceau was in truth the owner of the property, or believed that she was (and the court below found upon competent evidence that she so believed), there was nothing sinister nor fundamentally fraudulent in her seeking to have some one appointed to represent the minors, to the end that a fact which she believed to exist might be judicially determined. Messrs. Thompson and King were chosen as attorneys for the guardian and the minors, and concededly the selection was made by Col. Marceau at his wife's request, but it does not appear from the record that they, or Mr. Thompson, who gave his personal attention to the litigation, failed in any duty which they or he owed their clients. Mr. King had been guardian ad litem for the children by virtue of the court's appointment, and afterwards by similar selection had been employed to represent them in the probate proceedings, and had objected in their behalf to many items in their mother's account as administratrix. Naturally Mr. Fisher, who was not familiar, it appears, with forms of law, acted upon the advice of his counsel. He testified that in the conduct of the litigation he did what he thought was proper and right as guardian.

Mr. W. P. Thompson, who actually conducted the trial on behalf of the guardian and the minors, said, as a witness in the present case:

"I cross-examined the witnesses, and became convinced that the facts were as testified to. There was no understanding between me and Mrs. Marceau or Fisher that the matter was not to be appealed, or that I should not act further in the case. After the trial that evening Mrs. Marceau seemed piqued because I cross-examined her so severely. She made some re-

mark about my being mean to her; something of that kind, when I left the room after the court adjourned."

Later the following questions were asked and the appended answers were made by Mr. Thompson:

"Q. Now in examining the case, did you consider if she succeeded in proving that deed wasn't delivered she would establish her case anyway? A. She certainly seemed to establish it that night by the testimony of her mother and the recorder. Q. You knew of those matters yourself before the trial? A. Yes, sir; because I had been more or less familiar with the troubles of Mrs. Fiske and her husband. Q. Did you know whether or not any person could testify on that subject except Mr. Fiske and Mrs. Fiske? A. I did not—didn't know of any one that could testify. Q. Therefore it was no use looking for evidence on a subject of that kind when none could be found? A. Didn't seem to be. We made a serious defense in that case. Q. Whether or not there was any collusion between the parties, you defended the case to the best of your ability, and you think that the woman succeeded, and that the judge was justified in finding in her favor? A. That was my opinion at that time."

But independently of Mr. Thompson's recollection, which naturally was dimmed by the passage of many years, the record of the cross-examination of Mrs. Marceau at the trial of the suit to quiet title shows that he went quite fully into the matters adduced upon direct examination, and questioned her minutely with reference to her life with Mr. Fiske, regarding the sources of the money invested by them in Fresno and elsewhere, and upon other pertinent subjects. We cannot say that the court was not justified in finding in this case that the guardian and his counsel acted in good faith in the conduct of that litigation.

It is to be remembered, too, that Mrs. Marceau was supported in some of the matters to which she testified. Mr. Fiske's former secretary, Mr. Donohue, corroborated her in the statement that she was accustomed to keep her papers in a separate compartment in Mr. Fiske's safe. Mr. Henry, another employé of Mr. Fiske, testified to the same fact, and related under oath how on one occasion he assisted his employer in breaking open this compartment. The incident, he said, occurred shortly before Mr. Fiske's death, and at a time when Mrs. Fiske was absent from Fresno, where they resided. On that occasion, witness said, Mr. Fiske took certain papers and some bracelets from the strong box. The recorder of the county, Mr. Beall, speaking of the last deed recorded by Mr. Fiske a few weeks before his death, said that he had been requested by Mr. Fiske to hold it and put it of record at any time any papers should come into his office from Mrs. Fiske. This he declined to do, but agreed to hold the deed and to place it of record at any time on request of Mr. Fiske. Shortly after Mrs. Fiske's return Mr. Fiske met the recorder and told him to record the instrument immediately. He telephoned to a deputy, and the deed was recorded a few minutes before the filing of the lis pendens in the divorce suit. It appeared in evidence at the trial of Marceau v. Fiske that Mrs. Fiske had earlier made another deed in favor of her husband, but had not delivered it. Her husband obtained it, and, upon discovering its absence from her papers, she searched among his documents, found the purported deed, and cut her signature from it. Later, upon her husband's demand, she executed the second instrument.

[5] It is also to be remembered that in the case at bar the burden was upon Jay Allen Fiske to show extrinsic fraud vitiating a decree solemnly entered more than two decades before the hearing. That decree was entered after a trial before a chancellor having full power and bounden duty to protect the interests of the minors. We cannot say that he acted despite evidence conclusively establishing collusion, nor that the proof in the case now before us was such as should have compelled the conclusion that the suit to quiet title was false and fraudulent.

We need examine only one other contention made in behalf of appellant, and that is the assertion by his counsel that for technical reasons the judgment in Marceau v. Fiske was and is void on its face. It is argued that at the time of service of summons upon Jay Allen Fiske there was no service upon his living parent; that the order appointing W. L. Fisher, his guardian, was void; and that therefore the service amounted to nothing because it was not made in accordance with the provisions of section 411 of the Code of Civil Procedure. On April 5, 1892, Amanda J. Fiske filed her resignation as guardian of her minor children. On the same day W. L. Fisher filed a petition, praying that he be appointed their guardian. On April 5th Mrs. Fiske's account was also filed and approved. On April 6th the court made an order appointing Mr. Fisher, and letters of guardianship issued to him. On April 6, 1892, the court signed an order, accepting the resignation of Mrs. Fiske, approving her accounts, and discharging her as guardian. The "order discharging guardian" was dated April 6th, but was not filed until the 7th. Jay Allen Fiske was served with summons on the 7th of April.

[6, 7] It is insisted that a ward may not have two general guardians at one time, and that the appointment of Fisher prior to the filing of the order discharging Mrs. Fiske was therefore void; that the statute permitting the appointment of a guardian ad litem when there is a general guardian is an exception which proves the general rule that there may not be two general guardians at one and the same time; and, finally, that Jay Allen Fiske was not given time to answer because the trial occurred before the expiration of the 10 days allowed by law for an appearance and answer after service of summons. The mother being the plaintiff in the litigation, it was not necessary that she should be served with summons. Brown

v. Lawson, 51 Cal. 615–617. But she was not her son's guardian on April 7th. The acceptance of her resignation occurred when Mr. Fisher was appointed on the 6th. Jennings v. Le Breton, 80 Cal. 8–17, 21 Pac. 1127; In re Allen, 78 Cal. 581, 21 Pac. 426. Upon her resignation being accepted she was discharged from office, but not from liability to account or liability on her bond. Discharge from office may antedate the settlement of account. Graff v. Mesmer, 52 Cal. 636; Estate of Clary, 112 Cal. 292, 44 Pac. 569; Title Guaranty & Surety Co. v. Slinker, 35 Okl. 128, 128 Pac. 696.

[8-10] Moreover, when Mr. Fisher was served with summons he was possessed of letters issued under a judgment of a court of general jurisdiction. Such judgments may not be collaterally attacked. Even if we say that there is complete analogy between probate and guardianship matters, and that a guardian, like an administrator, must deliver up the property of his wards and have his resignation accepted before a new guardian may be appointed, it must be presumed that such delivery was made (Barboza v. Pacific Portland Cement Co., 162 Cal. 36–41, 120 Pac. 767), and this in spite of the entry of the order of the 6th of April on the 7th. But that order was effective on the 6th when it was signed. The validity of such an order does not depend upon the day of its entry. An order or decree of court takes effect from the time it is pronounced, and the failure of the clerk to file the papers or enter the judgment does not delay or defeat the operation of the court's pronouncement. In re Cook, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267; Id., 83 Cal. 415, 23 Pac. 392; In re Newman, 75 Cal. 213–221, 16 Pac. 887, 7 Am. St. Rep. 146; Niles v. Edwards, 95 Cal. 41, 30 Pac. 134; In re Clarke, 125 Cal. 388–395, 58 Pac. 22; Estate of Wood, 137 Cal. 129–133, 69 Pac. 900; Crim v. Kessing, 89 Cal. 478–488, 26 Pac. 1074, 23 Am. St. Rep. 491. There is nothing in Brownell v. Superior Court, 157 Cal. 703, 109 Pac. 91, in conflict with this conclusion. The court was there concerned with the question:

"When is an order of partial distribution 'taken' within the meaning of section 473, Code of Civil Procedure"?

It was held that it was only "taken" when duly entered. This court carefully limited the effect of the decision in that case, for Mr. Justice Shaw, who delivered the opinion, said:

"Nor are we concerned with the effect of an announcement of a decision or order against one who was then present."

It will be presumed, in support of the order appointing Mr. Fisher as guardian, that the oral order directing Mrs. Fiske to deliver the property of the wards was made before said appointment. It will be presumed that the oral order, discharging Mrs. Fiske, was made on the day of its date, April 6th. The order recites that:

"She has delivered up the property of said estate in her hands to W. L. Fisher, her successor in said guardianship, in accordance with a former order * * * appointing Fisher as guardian."

[11] Respondent's counsel contend, and we think correctly, that:

"Thus it appears that the oral order appointing Fisher and the oral order that Mrs. Fiske deliver the ward's property to him were made at the same time; they were synchronous; they were in fact parts of the same order. As the order appointing Fisher operated as an acceptance of Mrs. Fiske's resignation it will be presumed that the property was delivered at the time that order was made. This accomplished every purpose of the requirement of section 1427 that she should 'first' turn over the property."

[12] The basis of appellant's argument against the validity of the appointment of Mr. Fisher as guardian is that Mrs. Fiske's resignation and the installation of a successor to the resigning guardian are governed by the provisions of section 1427 of the Code of Civil Procedure relating to the resignation of an administrator or executor after having settled his account and delivered up the property of the estate to a person appointed by the court to receive it. It is true that by section 1808, Code of Civil Procedure, the provisions of the title relative to the estates of decedents are made applicable, as far as possible, to proceedings under the chapter on guardians; but by section 1801 of the same Code the court is given complete discretion to accept a guardian's resignation and appoint his successor. Clearly the terms of this special provision regarding guardians are not to be construed as being limited by the general language of section 1808. It has been held that the removal of one guardian and the selection of another may be accomplished without notice to the ward. In re Tilton, 15 Cal. App. 244–251, 114 Pac. 594, a case in which a petition to have the cause heard in the Supreme Court was denied. Upon like reasoning it may be said that the requirements of previous accounting and delivery of property to a third person may not be attached to the court's power to accept a resignation of a guardian and to confer full powers of guardianship upon another. We are convinced, therefore, that Mr. Fisher was the duly appointed and qualified guardian of the minors, with full authority to represent them in the case of Marceau v. Fiske.

[13] As Fisher was guardian and filed an answer, the trial was not premature merely because it occurred before the expiration of 10 days following the service of summons on Jay Allen Fiske. The general guardian had the power to appear for the infants, even independently of the service of summons upon them. Redmond v. Peterson, 102 Cal. 595–599, 36 Pac. 923, 41 Am. St. Rep. 204.

Our conclusions upon the matters discussed above obviate the necessity of discussing the court's findings that the Fresno Estate Company and its stockholders are innocent holders of the title to the land without notice of the asserted equities of the appellant.

[14] Appellant's motion for a new trial based upon the ground of newly discovered evidence was properly denied. The affidavit of S. L. Hogue, the notary public, who acknowledged the first deed in which Amanda J. Fiske was the grantor and her husband the grantee (the one from which she cut her signature) is to the effect that there was a solemn and formal delivery of that instrument by Mrs. Fiske to her husband in the presence of affiant. But witness Hogue was examined in the action to quiet title, and was in attendance upon the trial of this case, although not put upon the stand. It is true that no questions were asked of him when he was on the stand in the earlier case, tending to disclose his knowledge of the alleged delivery, but it does appear from the affidavit of Jay Allen Fiske that the notary was examined by him or, on his behalf, before and during the trial, and Hogue then said he remembered no facts concerning delivery of either of the deeds in which Mrs. Fiske's name appeared as that of the grantor. After the trial, and after appellant had urged him to try to recall the facts, Hogue said that they had come to his memory, and that he then recollected the delivery described in his affidavit subsequently filed in support of the motion for a new trial. It does not appear that with proper urging Hogue's memory might not have been stimulated to recall the fact of delivery when he was interviewed during the progress of the trial. Nor did his statement, made during the trial, that he forgot the incidents surrounding the making of the deeds, excuse the appellant for failure to put him upon the stand. Appellant knew as well then as at any subsequent time that Hogue was present when the deed was made, and that he had some knowledge of the surrounding circumstances. This court, many years ago, took an emphatic stand against the granting of a new trial upon the tardy production of evidence not available at the trial because of the "absolute forgetfulness" of a witness. Moran v. Abbey, 63 Cal. 56. If appellant chose to accept Hogue's unsworn statement that he did not remember the actions of appellant's parents at the time of the execution of the deed, and depending upon it elected to refrain from calling the notary as a witness, he cannot, with very good grace, question the discretion of the court exercised in refusing to grant a new trial upon the showing of the belated recollection of the witness.

[15, 16] Without going into the details of Mrs. Fennell's affidavit (Fennell being the present name of the former Mrs. Fiske) it is sufficient to say that by it she admits the making of many false statements at the trial of the case of Marceau v. Fisher. Appellant's excuse for his failure to produce his mother as a witness at the trial is that he and she were unfriendly to each other, and he had been told by her that she intended to be a witness for his adversaries. But at all times he knew that she, of all living persons, had the most direct knowledge regarding the transactions about which he was seeking information. He might have taken her deposition very easily, but he did not do so. The principal effort of appellant and his counsel, throughout the trial, was to prove that his mother was a perjuror and the spoliator of himself and his sister. He cannot well complain if the court, in the exercise of a discretion, wisely conferred by law, refused to accept her affidavit as of sufficient importance to justify the granting of the motion for a new trial. We cannot say that the newly discovered evidence was not such as might have been produced at the trial by the exercise of due diligence. It requires no citation of authority to support the rule, which indeed is conceded by counsel for appellant, that motions of this kind, based upon the ground of newly discovered evidence, are not favorably regarded by courts, and that appellate tribunals do not disturb the action of a trial court in refusing to grant such a motion except where it clearly appears that there has been an abuse of discretion. We find no such abuse in the present case.

The orders are affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

(30 Cal. App. 267)

PEOPLE v. TERRAMORSE. (Cr. 618.)

(District Court of Appeal, First District, California. April 13, 1916.)

1. CRIMINAL LAW ⟸1166½(12) — APPEAL — HARMLESS ERROR—REMARK OF COURT.

In a prosecution for larceny, based upon defendant's having eloped with a married woman and appropriated some of her husband's separate property, where the court, in response to counsel's contention that they had a right to show adulterous relations existing between defendant and the wife, inadvertently stated, "You have established that in some other way," but immediately corrected himself upon objection and instructed the jury to disregard any remarks he addressed to counsel, such remark was harmless error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125; Dec. Dig. ⟸1166½(12).]

2. CRIMINAL LAW ⟸1169(5)—HARMLESS ERROR—EVIDENCE.

Where the court admitted evidence, but became satisfied it was too remote, and granted defendant's motion to strike the entire testimony of a witness, which motion was concurred in by the prosecution, and the court instructed the jury to disregard and dismiss from their minds the objectionable testimony, any error in the admission was cured.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. ⟸1169(5).]

3. WITNESSES ⟸277(2) — CROSS-EXAMINATION.

In a prosecution for larceny, the defendant having eloped with a married woman and appropriated certain of her husband's property,

where defendant was called in his own behalf and gave evidence as to the presence of certain articles of clothing in his trunk after his return from the elopement, the prosecution, on cross-examination, could pursue the examination of the defendant as to the entire contents of his trunk, a portion of which had been identified by him, though the articles concerning which the inquiry was made were such as reflected no credit upon him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 980; Dec. Dig. ⟸277(2).]

4. CRIMINAL LAW ⟸706 — TRIAL — MISCONDUCT OF PROSECUTING ATTORNEY.

In a prosecution for larceny, the conduct of the prosecuting attorney, while cross-examining a witness for the defense relative to the trial and expulsion of defendant from a lodge of which the witness was a member, in asking, after the court had held such evidence inadmissible, "This defendant at that trial [the lodge trial] was dishonorably expelled from the order, wasn't he?" and in persisting in the same line of inquiry, was improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. ⟸706.]

5. WITNESSES ⟸62 — PRIVILEGE — WIFE OF ACCUSED.

A defendant charged with crime has the legal right to decline to consent that his wife be a witness against him, and his declination to permit her to testify should in no manner prejudice him or be used against him at the trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 177; Dec. Dig. ⟸62; Trial, Cent. Dig. § 106.]

6. CRIMINAL LAW ⟸721½(2)—TRIAL—CONDUCT OF PROSECUTING ATTORNEY.

In a prosecution for larceny through defendant's having eloped with a married woman and appropriated her husband's property, where defendant's wife was hostile to him, the action of the prosecuting attorney in commenting in argument upon defendant's failure to consent to her testifying was improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. ⟸721½(2).]

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Frank Terramorse, Jr., was convicted of petty larceny, and, from the judgment and an order denying new trial, he appeals. Judgment and order reversed.

A. S. Newburgh, of San Francisco, and Geo. J. McDonough, of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment of conviction of the defendant of petty larceny, and from an order denying a new trial.

The defendant was charged with the crime of grand larceny, consisting in the alleged larceny of a diamond scarf pin, cuff links, a silver portrait frame, a suit case, a revolver, and certain articles of wearing apparel, the property of one J. B. Molera. The evidence offered in support of the charge tended to show that the defendant had entered into certain meretricious relations with the wife of said Molera during the absence of the latter from his home on a trip to Alaska, which culminated in the defendant and Molera's wife going off to New York together, and that it was while these relations existed and this trip was taken by the pair that the above-mentioned articles, the separate property of the husband, were appropriated by the defendant with the connivance and consent of the wife.

The nature of the case as thus outlined required the presentation of proof as to the adulterous relations between the defendant and the wife of Molera, involving not only a large volume of evidence in support of the theory of the case held by the prosecution, but also involving almost constant clashes between opposing counsel as to the relevancy and admissibility of particular portions of such evidence, with the result that upon this appeal the main issues presented arise out of the alleged misconduct of the court and of the prosecuting officer occurring during the trial and argument of the cause.

[1] The alleged misconduct of the court upon which the appellant relies occurred during the course of a dispute between counsel as to the admissibility of certain evidence, which it was claimed by the prosecution tended to show adulterous relations between the defendant and the wife of Molera. The court was inclined not to admit the particular piece of evidence sought to be elicited, and did not in fact permit its introduction, but in the course of the discussion the following occurred:

"Mr. Smith: I want to show that he made a gift of it, but we will prove that he stole the property and she got possession of it, and we will show how she got possession of it.

"The Court: That would not tend to prove any of the issues in this case. He is not charged with having stolen any of these particular pieces of jewelry.

"Mr. Smith: We have a right to show intimacy; we have a right to show adulterous relations existing between this defendant and Mrs. Molera.

"The Court: You have established that in some other way.

"Mr. Newburgh: You mean he tried to establish it in some other way.

"The Court: Yes; but not in this particular manner. I don't think that would be proper testimony.

"Mr. Newburgh: That is right.

"Mr. Smith: I will show you what purports to be a promissory note dated December—

"Mr. McDonough (interrupting): Just one second. In order to keep the record straight, and with all due respect, we assign the remark of your honor to a reply made by Mr. Smith—a reply made by your honor, as being prejudicial to the rights of the defendant, and specify it—

"The Court (interrupting): I will instruct the jury that any statements addressed by the court to counsel—

"Mr. McDonough: We concede, if your honor please, that you inadvertently made that statement.

"Mr. Newburgh: Inadvertently, yes.

"Mr. Smith: The court corrected himself immediately afterwards.

"The Court (to the jury): Any remarks I address to counsel should not be considered by you in your deliberations. If I made a statement which has gone beyond the evidence or a ration-

al discussion of the evidence, it is your duty to disregard it. My remarks were addressed to counsel, and not to the jury."

It is quite evident, and in fact it is conceded, that the remark of the court, while an improper reference to the state and effect of the evidence, was inadvertent, and was addressed to counsel in the course of a legal argument, and that the court immediately, upon its attention being called to its unguarded remark, instructed the jury expressly and emphatically to disregard it. This prompt and decided action on the part of the court was sufficient, in our opinion and under the circumstances of the particular case, to correct its inadvertent act and to remove from the minds of the jury any effect prejudicial to the defendant which might have been caused thereby.

[2] The appellant also assigns certain rulings of the court during the course of the trial as error, and calls particular attention to two specific instances of such alleged error. The first of these occurred during the examination of a witness named Anna Pufahl with relation to certain interviews between herself and the defendant, which the prosecution claimed tended in some degree to show the existence of adulterous relations between the defendant and Molera's wife. The court at first admitted the evidence, but finally became satisfied that it was too remote, and granted the defendant's motion to strike out the entire testimony of this witness. This motion was concurred in by the prosecution, and the court in striking out the evidence expressly instructed the jury to disregard and dismiss from their minds the objectionable testimony. It is to be assumed, in the absence of some showing to the contrary, that the jury regarded this instruction, and that the error of the court, if any, in its admission was thereby cured.

[3] It is also contended by the appellant that the court erred in regard to the admission of evidence as to certain contents of the defendant's trunk after his return from New York. The defendant had been called in his own behalf and had given evidence as to the presence of certain articles of clothing in his trunk. On cross-examination by the prosecution he was asked as to whether certain other articles were not also in the trunk. We think the prosecution was entitled to pursue the examination of the defendant as to the entire contents of his trunk, a portion of which had been identified by him; and the mere fact that the articles concerning which the inquiry was made were such as reflected no credit upon him, would not of itself justify a restriction of the examination.

[4] The chief contention of the defendant upon this appeal relates to a number of instances of alleged misconduct on the part of the prosecuting officer during the trial and argument of the case. The first of these occurred during the cross-examination of one Bozie, a character witness for the defendant, of whom six questions were asked, all relating to the trial and expulsion of the defendant from a lodge of which the witness was a member. To the first five of these questions the defendant's objection was sustained upon the ground that it had reference to events occurring after the defendant had been charged with this crime; no assignment of misconduct was made to the asking of these five questions, but when the prosecuting officer, knowing, as the record affirmatively shows he did know, that the whole matter being inquired into related to a time after the defendant's reputation had been brought into question by the charge of this crime, asked this question, "This defendant at that trial was dishonorably expelled from the order, wasn't he?" he committed a gross breach of misconduct which counsel for the defendant tempestuously assigned as such, and asked the court for an instruction to that effect to the jury. The prosecuting officer, unchastened by the assignment, proceeded to excoriate defendant's counsel for losing their temper, and asked the court to instruct the jury to disregard the latter's remarks in making the assignment. The court thereupon instructed the jury to disregard the remarks of both counsel, having evident reference to the interchange of discourtesies which had just transpired, but which neither amounted to a rebuke of the prosecuting officer for persisting in an improper inquiry, nor to an admonition not to pursue such inquiry further; for almost immediately the cross-examiner returned to the subject by asking the same witness whether the defendant now belonged to the order from which his previously unanswered question conveyed the suggestion to the jury that he had been ignominiously expelled. This question was also assigned as misconduct and a repetition of the former offense, which the admonition of the court to the jury to disregard the personal views or opinions of counsel would neither reach nor cure. The purpose of the prosecuting officer in persisting in this inquiry was all too plainly to get before the jury the fact, or at least the suggestion, that the defendant had been expelled from a fraternal order upon charges involving moral turpitude, and thus to further discredit him before the jury. It would be a dangerous precedent to permit such a purpose to go unreproved. People v. Wells, 100 Cal. 459, 34 Pac. 1078; People v. Pang Sui Lin, 15 Cal. App. 262, 114 Pac. 582, and cases cited.

Several other instances of alleged misconduct on the part of the prosecuting officer in the course of the examination of witnesses are called to the court's attention, but no assignment of misconduct was made.

Upon the argument of the cause the prosecuting officer undertook to comment to the jury upon the fact that the defendant had refused to permit his wife to be a witness

in the case. The record shows that the defendant's wife was called to the witness stand by the prosecution, and stated that she was willing to testify, but that when the defendant was asked to consent that she might become a witness he stood mute. During the argument of the case defendant's counsel had made some reference to the defendant's wife, whereupon in his reply the prosecuting officer spoke as follows:

"Mr. Smith: Gentlemen of the jury: Mr. McDonough in his argument spoke of the defendant's wife in this case; he spoke about her and the clothes she had been wearing; he commented about the different hats that she had, but, gentlemen of the jury, she was on the witness stand. Why didn't they ask her where she got the hats and where she got the coats? No. He stood upon his constitutional rights. We were willing to put her on the stand, and she was willing to testify, but without the consent of the defendant of course we could not examine her, so she left the stand."

[5, 6] The record discloses that the attitude of the defendant's wife towards him was antagonistic. In declining to consent that she should be a witness against him the defendant was standing as strictly upon his legal rights as he would have been had he declined to be a witness himself, and he was equally entitled to the application of the rule that his declination to permit his wife to be a witness should not in any manner prejudice him or be used against him on the trial. People v. Heacock, 10 Cal. App. 456, 102 Pac. 543. In making the foregoing comment the prosecuting officer was guilty of prejudicial misconduct, which counsel for the defendant immediately called to the attention of the court, and requested that the jury be instructed to disregard it. The court did not give such an instruction as the defendant asked and was entitled to have given.

Had the trial of this cause proceeded with that degree of decorum and courtesy which should regulate the conduct and attitude of respective counsel in the trial of causes in courts of justice, the two instances of misconduct on the part of the prosecuting officer to which we have referred might not have been sufficient in themselves to warrant a reversal and justify the retrial of this cause, particularly in view of the fact that the defendant was only found guilty of petty larceny; but a reading of the entire—and much too voluminous—record disloses a degree of persistence on the part of the prosecuting officer in the repetition of questions clearly objectionable, and evidently intended to discredit and degrade the defendant and his witnesses in the eyes of the jury, which should not have the approval which would attend the affirmance of a verdict in some measure doubtless influenced by them. Nor should the fact that counsel for the defendant was also seriously at fault in repeated and exasperating objections to the admission of evidence which was clearly competent as supporting the prosecution's theory of the case, much as such conduct is to be deprecated, suffice to furnish an excuse for the misconduct of the prosecuting officer. The only method which this court knows for preventing the spread of such abuses is that of compelling the retrial of causes in which they occur.

Judgment and order reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

30 Cal. App. 251

PALMER et al. v. WOODRUFF. (Civ. 1533.)

(District Court of Appeal, Third District, California. April 4, 1916.)

APPEAL AND ERROR ⚖627(2)—FAILURE TO FILE TRANSCRIPT—DISMISSAL.

Appeal will be dismissed on motion of respondents where more than 40 days have elapsed since it was perfected, and no transcript has been filed or extension of time given within which to file the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744–2747, 2749, 3126; Dec. Dig. ⚖627(2).]

Appeal from Superior Court, Sacramento County.

Action by George T. Palmer and Eugene G. Palmer against S. A. Woodruff. From a judgment for plaintiffs, defendant appeals. Appeal dismissed.

Welsh & Henry, of Sacramento, for appellant. White, Miller, Needham & Harber, of Sacramento, for respondents.

PER CURIAM. Notice of appeal from the judgment in the above-entitled cause was served and filed by defendant on July 20, 1915. On July 23, 1915, undertaking on appeal was filed. September 16, 1915, bill of exceptions was duly settled, and on December 13, 1915, motion for new trial was denied. Appellant has made no request of the clerk of the superior court to certify to a correct or any transcript of the record, and no further proceedings have been had towards prosecuting the appeal.

More than 40 days having elapsed since the appeal was perfected, and no transcript having been filed or extension of time given within which to file such transcript, on motion of respondents the appeal from the judgment is dismissed.

30 Cal. App. 277

ROSENTHAL et al. v. BAUER et al. (Civ. 1595.)

(District Court of Appeal, First District, California. April 14, 1916.)

1. GUARANTY ⚖36(8) — LEASES — CONSTRUCTION.

Civ. Code, § 1652, requires repugnancies in a contract to be reconciled, if possible, by giving them such interpretation as will make them effective and at the same time subordinate to the general purpose of the contract considered and construed in its entirety. Section 1654 declares that particular words and phrases may be rejected only when inconsistent with the general

purpose of the contract; while sections 1638, 1650, require effect to be given to the entire contract, if possible. Plaintiff leased premises for a term of ten years, the rental for the first five years to be $600 per month, and for the last five years $700 per month. Defendant corporation through its secretary gave an instrument guaranteeing performance by the lessees to the sum of $3,600. The lessors requested that the guaranty bear evidence of action by the directors of the corporation, and, pursuant to this request, a special meeting was held, the minutes of which showed the directors authorized a guaranty of rent to the amount of $3,600; that being six months' rent. *Held* that, in view of the fact that the rent reserved for the first five years was $600 per month, the guaranty must be taken as applying only to that term to the amount of $3,600, and not as covering the rent for the last half of the term, when the rent was greater.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 44; Dec. Dig. ⟸36(8).]

2. Appeal and Error ⟸1058(2)—Review—Harmless Error.

Error in sustaining an objection to a question is harmless, where subsequently all the evidence concerning that matter is admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. ⟸1058(2).]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Hannah Rosenthal and others against L. Bauer and another and the National Brewing Company. From a judgment for the last-named defendant, plaintiffs appeal. Affirmed.

Chas. A. Shurtleff and J. G. De Forest, both of San Francisco, for appellants. Marcus Rosenthal, of San Francisco, for respondent.

LENNON, P. J. On July 12, 1906, the plaintiffs, as lessors, and the defendants Bauer and Sachau, as lessees, entered into a lease of certain real property for a period of ten years from the date of the acceptance of a building to be erected upon the real property, at a monthly rental of $600 for the first five years, and $700 for the remaining five years. The lessors insisted upon a guaranty for the payment of the rent reserved, and accordingly the lessees, Bauer and Sachau, procured a written guaranty, expressed upon a separate paper, purporting to be signed by the National Brewing Company, which was attached to the lease, and which was in the following words and figures:

"Know all men by these presents that for and in consideration of the execution of the within lease by the parties of the first part, and in consideration of one dollar to it paid, the undersigned, the National Brewing Company, a corporation duly incorporated under and by virtue of the laws of the state of California, does hereby guarantee to said lessors, parties of the first part, the payment of the rent reserved in said lease and the performance of the covenants and conditions to be performed by the parties of the second part, in the sum of thirty-six hundred ($3,600) dollars; and hereby agrees that it will indemnify said lessors, parties of the first part, in said sum against any loss or damage which they or either of them might incur by reason of the breach of any of the covenants of said lease by said parties of the second part.

"Dated July ——, 1906.

"National Brewing Co.,
"By George F. Volz, Secretary."

The lessors expressed dissatisfaction with the guaranty thus drawn and delivered in so far as it failed to reveal the corporate authority for its execution, and returned it to the secretary of the corporation defendant with the request that the authority for its execution be evidenced by a resolution of the board of directors of said corporation. Thereupon the board of directors of said defendant adopted and expressed upon a separate paper, which was attached to the lease and guaranty as originally drafted, the following resolution:

"San Francisco, Cal. July 12, 1906.

"At a special meeting of the board of directors of this association, held at this office 7262 Fulton street, at 9 o'clock a. m. July 12, 1906, it was resolved that the secretary of this corporation be authorized to sign that certain guaranty on lease of L. Bauer and John Sachau with Hannah Rosenthal, Amelia Waterland, Fannie Bernard, and Rose Oser for the sum of $3,600, being for six months' rent at $600 per month.

"There being no further business, it was resolved to adjourn.

"George F. Folz, Secretary. [Seal.]"

After the execution and delivery of the lease in question, with the guaranty as originally drafted and the resolution attached thereto, the tenants, Bauer and Sachau, on the 19th day of January, 1907, when the building referred to in the lease was completed and accepted, entered into the possession of the demised premises, and paid rent under the terms of the lease to July 13, 1913, after which date they refused to pay further rent. Plaintiffs brought this action against Bauer and Sachau, as lessees, and the National Brewing Company, as guarantor, to recover $700, the rent from July 19th to August 19th, under the terms of the lease, which provided that during the second five years the rent reserved should be in that amount. The defendants Bauer and Sachau defaulted, and judgment was rendered and entered against them in favor of the plaintiffs, but, upon the issue of the guaranty judgment was rendered in favor of the corporation defendant, and the appeal is by plaintiffs from that judgment and from an order denying a new trial.

The appeal comes here on the judgment roll and a statement of the case. The statement, however, does not purport to present all of the evidence adduced upon the trial of the case, and apparently is limited to a recital of "the evidence concerning the relative time of the execution of the guaranty and the certificate of resolution."

In addition to alleging the execution of the lease and the breach by the defendants Bauer and Sachau of the covenant to pay the rent reserved therein for the month above mentioned, the plaintiff's complaint

for cause of action against the corporation defendant pleaded and relied upon the alleged execution and delivery of the guaranty in the sum of $3,600 as originally drafted, and made no reference to the resolution of the corporation defendant authorizing and embodying a guaranty for the payment of six months' rent at $600 per month. The answer of the defendant denied the execution and delivery of the guaranty as originally drafted and pleaded in the plaintiff's complaint, and then averred that, although it had authorized a guaranty to the plaintiffs for the payment of the first six months' rent reserved under the lease in the sum of $3,600, yet such guaranty had never been executed and was never delivered to the plaintiffs.

The trial court in its findings of fact, after finding the execution of the lease and the breach of the covenant to pay the rent reserved in the sum of $700 for the month commencing July 19, 1913, and ending August 19, 1913, in effect found that the original guaranty and the resolution were attached to the lease when it was finally delivered to plaintiffs; that the original guaranty and the resolution were executed by and between the same parties; that the subject-matter of the lease was the same; and that they and the lease were parts of substantially one transaction. It is conceded that these findings necessarily involve the implied finding that the original guaranty and the resolution constituted but a single contract of guaranty. Civ. Code, § 1642.

These are the fundamental findings in the case; and whether or not they support the judgment is the primary question presented upon the appeal. The determination of that question depends upon the construction to be given to the contract of guaranty. Evidently the trial court construed it to mean that the corporation defendant had thereby obligated itself to guarantee only the payment of the rent reserved for six months during the first five years of the lease not to exceed the sum of $3,600, at $600 per month; that is to say, the trial court in effect found that the corporation defendant, by its contract of guaranty, only obligated itself to indemnify the plaintiffs against such default in the lessees' payment of the rent reserved as might occur during the first five years of the lease, when the rent reserved was fixed at $600 per month.

[1] This, we think, is the correct construction to be given to the guaranty. We cannot bring ourselves to agree with the construction contended for by counsel for the plaintiffs, to the effect that the guaranty contemplated and covered any default of the lessees in the payment of the rent reserved without regard to whether such default occurred during the first five years, when the rent was fixed at $600 per month, or during the second five years, when the rent was fixed at $700 per month. This construction of the guaranty cannot be sustained without doing violence to the general rule of construction which requires that the repugnances of a contract must be reconciled, if possible, by giving to them such an interpretation as will make them effective, and at the same time subordinate to the general intent and purpose of the contract considered and construed in its entirety. Civ. Code, § 1652. Particular words and phrases in a contract may, for the sake of interpretation, be rightly rejected only when they are inconsistent with its apparent purpose and the obvious intent of the parties. Civ. Code, § 1654. That clause of the resolution which limits the liability of the corporation defendant for the lessees' default in the payment of the rent reserved to "six months at $600 per month" is not, in our opinion, inconsistent with the general purpose of the contract, nor antagonistic to the intent of the parties as gathered from the contract of guaranty in its entirety. To provide security for the payment of the rent reserved to the extent of $3,600 was the obvious purpose of the contract of guaranty and the apparent intent of the parties. The clause of the contract referred to, and which counsel for plaintiffs would have us reject, is in general accord with the purpose of the contract, and is not necessarily opposed to the main intent of the parties as gathered from the contract of guaranty considered as a whole. The original guaranty contracts to idemnify the plaintiffs for a breach of the covenant of the lease to pay the rent reserved "in the sum of thirty-six hundred dollars ($3,600)," and that sum is the aggregate of six months' rent at $600 per month.

There is therefore no good reason for rejecting that clause of the contract which purports to limit the liability of the corporation defendant to defaults in the payment of rent which might occur during the first five years of the life of the lease. Retaining this clause, the trial court's construction of the contract does not involve an absurdity. It reconciles, in subordination to the main intent of the parties, the repugnancy, if any, existing between the terms of the original guaranty and the resolution. It is reasonably practicable and gives effect to every part of the contract. Such construction therefore must be sustained. Civ. Code, §§ 1638, 1650, 1652.

Whatever the uncertainty existing between the original guaranty and the resolution, it is readily removed by a resort to the statutory rules of construction, and therefore the rule that any uncertainty existing in the language of a contract must be "interpreted against the party who caused the uncertainty to exist" cannot be invoked in aid of plaintiffs' construction of the contract of guaranty. Civ. Code, § 1654.

[2] The error, if any, in the ruling of the

trial court sustaining an objection to a question propounded to a witness by plaintiffs' counsel, calling for the circumstances attending the execution of the guaranty, was harmless, for the reason that subsequently all of the circumstances preceding and attending the execution and delivery of the lease, the original guaranty, and the resolution were admitted in evidence without objection.

The judgment and the order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

30 Cal. App. 274

BLOOD v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 1921.)

(District Court of Appeal, Second District, California. April 13, 1916.)

MASTER AND SERVANT ⊂⊃362—WORKMEN'S COMPENSATION ACT—"EMPLOYÉ"—"CASUAL."

Under Workmen's Compensation, Insurance and Safety Act (St. 1913, p. 284) § 14, excluding from the meaning of the word "employé" as used in the act any person whose employment is "both casual and not in the usual course of the trade, business, profession or occupation of his employer," where petitioner employed a house painter to paint his house at a rate per day, petitioner to furnish materials, the employment not being for a definite period, but the work could be reasonably finished in two weeks, the contract of employment was "casual," and, not being in the usual course of any business of petitioner, the employment was of a nature which did not entitle the employé to compensation under the act for an injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊂⊃362.

For other definitions, see Words and Phrases, First and Second Series, Casual; Employé.]

Petition for certiorari by Frank Blood against the Industrial Accident Commission of the State of California and A. J. Pillsbury and others, composing said Commission, to review an award made by the Industrial Accident Commission. Award annulled.

James R. Choate and W. C. Shelton, both of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

CONREY, P. J. This is a proceeding in certiorari to review an award made by the Industrial Accident Commission. The petitioner, Frank Blood, owned a two-story frame building at Huntington Park, in Los Angeles county, consisting of a storeroom below and two flats above; one of the flats being occupied by the owner. Blood employed one W. F. Heck, a house painter by trade, to apply two coats of paint to the house. Blood was to furnish the painting materials and pay Heck at the rate of $3.50 per day. The employment was not for any definite period of time, but the evidence shows that the work would reasonably have been done within two weeks. During the first day of his employment Heck was accidentally injured and suffered a temporary total disability, on account of which an award in his favor was made by the commission.

On behalf of petitioner it is contended that in making any allowance whatever the commission acted in excess of its jurisdiction, because the employment of the applicant for compensation was "both casual and not in the usual course of the trade, business, profession, or occupation of his employer." Workmen's Compensation, Insurance, and Safety Act, § 14. We think it must be conceded that the employment was not in the usual course of any business of the employer. There is absolutely no evidence that Blood was engaged in any business which in its usual course, if at all, called for the employment of house painters.

Under the British Workmen's Compensation Act of 1906 the word "workman" "does not include a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business." As to both clauses within the quotation, it will be observed that there is a material difference between the language used in the British act and that of the California statute. Commenting upon a very similar difference between the Massachusetts and the British acts, the Supreme Court of Massachusetts has said that this difference in phraseology must be regarded as deliberately designed, and that its effect is to narrow the scope of the Massachusetts act as compared with the English act.

"No one whose employment is 'casual' can recover here, while there one whose employment is 'of a casual nature' comes within the act, provided it is also for the purpose of the employer's trade or business. It is possible that a distinction as to the character of the employment may be founded upon the difference between the modifying word 'casual' used in our act and the words 'of a casual nature' in the English act. The phrase of our act tends to indicate that the contract for service is the thing to be analyzed, in order to determine whether it be casual, while in the English act the nature of the service rendered is the decisive test. This distinction appears to have been made the basis of decision in Knight v. Bucknill, 6 B. W. C. C. 160 (1913), W. C. & Ins. Rep. 175, 57 Sol. Jo. 245." Gaynor v. Standard Accident Ins. Co., 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363.

In the same Massachusetts decision it is noted that the ordinary signification of the word "casual," as shown by the lexicographers, is something which comes without regularity and is occasional and incidental; that its meaning may be more clearly understood by referring to its antonyms, which are "regular," "systematic," "periodic," and "certain." Tested by this distinction, the contract of employment of Heck by the petitioner to paint his house was casual. It was a mere occasional and incidental contract, not con-

stituting or connected with any regular, systematic, periodic or certain business.

The Supreme Court of Massachusetts afterward referred to the Gaynor Case as follows:

"In addition to what was said there, it may be of importance (in determining whether in a particular case the 'employment is but casual') to have in mind the reason for this limitation upon the class of persons who are entitled to the benefits of the Workmen's Compensation Act [St. 1911, c. 751, as amended by St. 1912, c. 571]. The scheme created by the Workmen's Compensation Act is a scheme of insurance in which the premiums to be paid by the employer are based upon the wages paid by him to his employés. It may have been thought impracticable to work out a scheme of insurance if persons who are only occasionally employed are to be included among those insured." In re Cheevers, 219 Mass. 244, 106 N. E. 861.

It appears to us that the Massachusetts decisions we have referred to are based upon sound reasoning, and may well be applied in the interpretation of our own statute. We therefore have reached the conclusion that the employment of the applicant, Heck, named in the proceedings here under review, was of a nature which did not entitle him to compensation for his injury.

In view of the preceding decision, it is not necessary for us to consider petitioner's other propositions, which were: (1) That the amount of the award was determined under a section of the statute which is not applicable to the case; and (2) that the award was procured by fraud.

The award under review is annulled.

We concur: JAMES, J.; SHAW, J.

(30 Cal. App. 261)

GAMBETTA v. GAMBETTA. (Civ. 1635.)

(District Court of Appeal, First District, California. April 12, 1916. Rehearing Denied by Supreme Court June 8, 1916.)

1. BASTARDS ⊜33—ACTION FOR SUPPORT—PARTIES PLAINTIFF.

Under Civ. Code, § 196a, providing that the father, as well as the mother of an illegitimate child, must furnish him support suitable to his circumstances, and that a civil suit to enforce such obligation may be maintained in behalf of the minor illegitimate child by his mother or guardian, it is not necessary that the mother, being alive and sane, should bring the action in her own name, but it might be brought by the child through his guardian, either general or ad litem, as provided by Code Civ. Proc. § 372, requiring a child to appear by guardian, etc.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 69–79; Dec. Dig. ⊜33.]

2. BASTARDS ⊜78—ACTION FOR SUPPORT—JUDGMENT.

In an action under Civ. Code, § 196a, by a minor illegitimate child by his guardian ad litem to compel defendant, his father, to support him, where it appeared that the mother, when employed, earned $35 per month, of which $20 per month was required for the child's board and lodging; that defendant owned property valued between $3,000 and $4,000, and had an income from $150 to $200 per month—the determination that he should contribute $25 per month to the child's support was proper.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 194–200; Dec. Dig. ⊜78.]

3. BASTARDS ⊜49—ACTION FOR SUPPORT—COMPLAINT.

In an action, under Civ. Code, § 196a, by an illegitimate child by his guardian ad litem to compel support by his father, a complaint, alleging that his parents were not married at the time of his birth, and had not since been married, was not insufficient, because not showing that they may not have been married when the child was conceived, and that, therefore he was not illegitimate.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 66–68, 138–141; Dec. Dig. ⊜49.]

4. BASTARDS ⊜49—DEFECT IN COMPLAINT—CURE BY EVIDENCE.

Such complaint, if insufficient because not showing that the parents may not have been married when the child was conceived, was cured by the evidence, introduced upon the hearing, showing the defendant to be the father of the plaintiff, and that the plaintiff's mother had never been married, especially in view of the constitutional amendment relating to procedure in respect to technical errors.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 66–68, 138–141; Dec. Dig. ⊜49.]

5. APPEAL AND ERROR ⊜544(1)—FAILURE TO ANSWER—APPEAL ON JUDGMENT ROLL.

Defendant, in a civil action, having failed to answer, could take his appeal upon the judgment roll alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412; Dec. Dig. ⊜544(1).]

6. APPEAL AND ERROR ⊜522(1)—RECORD—EVIDENCE.

Under Code Civ. Proc. § 950, providing that on appeal from a final judgment, the appellant must furnish the court a copy of the notice of appeal, the judgment roll, and of any bill of exceptions upon which he relies, appellant may include the evidence in the record upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2367, 2368, 2370, 2371; Dec. Dig. ⊜522(1).]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by Louis Gambetta, Jr., a minor, by Clara A. Clivio, his guardian ad litem, against Louis Gambetta, Sr. Demurrer to complaint overruled, judgment for plaintiff, and defendant appeals. Affirmed.

J. A. Gendotti and C. J. Houston, both of San Francisco, for appellant. Jewel Alexander, of San Francisco, for respondent.

KERRIGAN, J. This is an action brought by the plaintiff through his guardian ad litem to compel his father, the defendant, to support him, he being a minor child. The action is founded on section 196a of the Civil Code, which reads:

"The father, as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to * * * enforce performance thereof, the same as under sections

138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

In the trial court a demurrer to the complaint was overruled, whereupon, the defendant having refused to answer, his default was entered; and, after hearing testimony introduced on behalf of the plaintiff, the court rendered judgment against the defendant, who now prosecutes this appeal therefrom.

[1] The evidence showed that the plaintiff was born in San Francisco in the year 1913; that he is the illegitimate child of the defendant and a young woman who is employed as a domestic; that when employed she earns $35 per month; that the child is boarded out; and that the sum of $20 per month is required for his board and lodging, which sum does not cover, as we understand the record, other expenses, such as for clothing and medical attendance. The evidence also shows that the defendant is a hotel keeper, owning property of the value of between $3,000 and $4,000, and having an income of $150 to $200 per month, and that he has contributed nothing towards the support of his child. Upon the conclusion of the case the court determined that $25 per month should be contributed by the defendant for the support, maintenance, and rearing of the child, and the judgment provided for this payment.

There is no merit in the point that the mother of the child, being alive and sane, should have brought the action in her own name. The section reads in the alternative, "by his mother or guardian"; and, the mother not having chosen to bring the suit herself, it might be brought and maintained by the child through his guardian, either general or ad litem. Code Civ. Proc. § 372; Lewis v. Lewis, 158 Pac. 368, decided by this court, Third Appellate district, March 16, 1916; In re Cahill, 74 Cal. 52, 15 Pac. 364; 15 Am. & Eng. Ency. of Law, 6; 21 Cyc. 19; 22 Cyc. 634.

[2] Equally without merit is the point urged that the court imposed the whole duty of the child's support upon his father, the defendant. With the pleadings and facts as to the financial ability of the respective parents before it, the court made such a decree as under all the circumstances of the case seemed to it meet and proper; and we are not in a position, nor are we disposed, to interfere with the conclusion of the trial court upon that subject.

The appellant makes in all 17 points for the reversal of the decree, but those discussed by us are the ones that seem to possess the most merit. Chief of these is the contention that the complaint fails to state facts sufficient to constitute a cause of action.

[3] The allegations of the complaint thus assailed show that the parents of the child were not married at the time of his birth, and that they have not, since that time, been married; and defendant argues that for aught that appears in the complaint the defendant and the mother of the child may have been married at the time the child was conceived, and that therefore he is not illegitimate. While, perhaps, the complaint, measured by the strictest rules of pleading, might be regarded as ambiguous and uncertain in the respect pointed out, still we think it can hardly be said to wholly fail to state sufficient facts. It is certain that it sets forth facts enough to enable the defendant to sufficiently understand the issues tendered by the pleading and to meet it by proper and full denials. Under the allegations of the complaint the defendant is the father of the plaintiff, and whether legitimate or illegitimate, defendant is liable for his support. We would leave the discussion here were it not a fact that the remedies provided by section 196a, and those sections of the Code permitting legitimate children to maintain actions against parents for support, are different, the difference being that in proceeding under section 196a to compel the support of an illegitimate child, the mother as such in her own name may maintain the action, and that it is in the power of the court to impound the property of the parent as security for the payment required by its decree. Civ. Code, § 196a.

[4-6] But conceding for the sake of argument that the point is meritorious, still we think the defect in the complaint is cured by the evidence introduced upon the hearing. The defendant having failed to answer, he could have taken his appeal upon the judgment roll alone, but he has included the evidence in the record upon appeal (as he had a right to do—Code Civ. Proc. § 950), and, it being before us, we doubtless may consider it. According to the evidence, the defendant is the father of the plaintiff, and the latter's mother has never been married. In addition to this, counsel for the defendant admitted and asserted at the oral argument that "the plaintiff is a bastard." Under these circumstances, to reverse the decree because of the alleged defect in the complaint would be to accord more consideration to a technical error of pleading than is warranted in view of the recent amendment to the Constitution relating to judicial procedure.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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